5162

Residential
Property
TRIBUNAL SERVICE

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL
LANDLORD AND TENANT ACT 1985

LON/00AN/LSC/2010/0262

Premises:	Flat 2, 68 Hurlingham Road Fulham London SW6 3RQ
Applicant:	Mrs M Cameron
Respondent:	Miss A Laird
Tribunal:	Mr NK Nicol Mr WJ Reed FRICS Mrs J Clark JP
Date of Hearing:	24/06/10
Date of Decision:	07/07/10

REASONS FOR DETERMINATION

1. The Respondent is the freeholder of 68 Hurlingham Road, Fulham, London SW6 3RQ, a three-storey mid-terrace house converted into three flats. The Applicant is the lessee and occupant of Flat 2 on the first floor. The Applicant has applied for a determination under s.27A of the Landlord and Tenant Act 1985 ("the Act") as to the payability of service charges arising from a programme of major works to the exterior of the property. It is not clear what the precise sum in dispute is. In her application to the Tribunal, the Applicant referred to the figure of £2,882.96 based on one-third of the final cost of the external building works and renovations of £3,132.96 less a payment of £250.00 made in May 2009 but an earlier invoice, dated 13th October 2008, demanded £4,269.15 inclusive of some interior works which have not actually gone ahead yet. In any event, the Applicant has paid only the aforementioned £250.

2. In summary, the Tribunal has decided, for the reasons set out further below:-

   (a) The consultation requirements under s.20 of the Act should not be dispensed with.

   (b) The Applicant's liability for the exterior works programme is limited to £250.

   (c) An order is made under s.20C of the Landlord and Tenant Act 1985 that the Respondent may not add any costs of these proceedings to the Applicant's service charge.

   (d) The Respondent shall reimburse the Applicant her Tribunal fees totalling £250.

3. Although the Applicant had a number of points of dispute which were set out in her statement of case, a preliminary issue arose as to whether the Respondent had complied with the statutory consultation requirements which are as follows:-

   Landlord and Tenant Act 1985

   S20 Limitation of service charges: consultation requirements

   (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
   (a) complied with in relation to the works or agreement, or
   (b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

S20ZA Consultation requirements: supplementary

(1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—
"qualifying works" means works on a building or any other premises, ...

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

Service Charges (Consultation Requirements) (England) Regulations 2003

Interpretation

Reg. 2

(1) In these Regulations-

"relevant period", in relation to a notice, means the period of 30 days beginning with the date of the notice;

Reg. 6

For the purposes of subsection (3) of section 20 the appropriate amount is an amount which results in the relevant contribution of any tenant being more than £250.

SCHEDULE 4

PART 2

CONSULTATION REQUIREMENTS FOR QUALIFYING WORKS FOR WHICH PUBLIC NOTICE IS NOT REQUIRED

Notice of intention

Para 8

(1) The landlord shall give notice in writing of his intention to carry out qualifying works-
(a) to each tenant; ...

(2) The notice shall-
(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
(b) state the landlord's reasons for considering it necessary to carry out the proposed works;
(c) invite the making, in writing, of observations in relation to the proposed works; and
(d) specify-
(i) the address to which such observations may be sent;
(ii) that they must be delivered within the relevant period; and
(iii) the date on which the relevant period ends.

(3) The notice shall also invite each tenant ... to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

Duty to have regard to observations in relation to proposed works

Para 10

Where, within the relevant period, observations are made, in relation to the proposed works by any tenant ..., the landlord shall have regard to those observations.

Estimates and response to observations

Para 11

(2) Where, within the relevant period, a nomination is made by only one of the tenants ..., the landlord shall try to obtain an estimate from the nominated person.

(4) Where, within the relevant period, more than one nomination is made by any tenant ..., the landlord shall try to obtain an estimate-
(a) from at least one person nominated by a tenant; ...

(5) The landlord shall, ...-
(a) obtain estimates for the carrying out of the proposed works;
(b) supply, free of charge, a statement ("the paragraph (b) statement") setting out-
(i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and
(ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and
(c) make all of the estimates available for inspection.

(10) The landlord shall, by notice in writing to each tenant ...-
(a) specify the place and hours at which the estimates may be inspected;
(b) invite the making, in writing, of observations in relation to those estimates;
(c) specify-
(i) the address to which such observations may be sent;
(ii) that they must be delivered within the relevant period; and
(iii) the date on which the relevant period ends.

Duty to have regard to observations in relation to estimates

Para 12

Where, within the relevant period, observations are made in relation to the estimates by a recognised tenants' association or, as the case may be, any tenant, the landlord shall have regard to those observations.

Duty on entering into contract

Para 13

(1) Subject to sub-paragraph (2), where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, by notice in writing to each tenant and the recognised tenants' association (if any)-
  (a) state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and
  (b) there he received observations to which (in accordance with paragraph 5) he was required to have regard, summarise the observations and set out his response to them.

(2) The requirements of sub-paragraph (1) do not apply where the person with whom the contract is made is a nominated person or submitted the lowest estimate.

4. Although those who are supposed to comply with the consultation requirements are overwhelmingly likely not to be lawyers, the statutory provisions are drafted in a confusingly complicated way. Fortunately, there is a number of sources of information from various organisations summarising their provisions for the non-lawyer, for example by ARMA, the organisation for managing agents, and LEASE, the Leasehold Advisory Service. Therefore, there is no reason why those responsible for ensuring compliance should not be able to do so.

5. In summary, the obligations of a landlord such as the Respondent, when contemplating carrying out works which may result in a service charge to a tenant, such as the Applicant, of more than £250, are to:-

   (a) Serve an initial notice including the matters specified in reg.8(2) and (3) – note that this is before any of the following steps, including obtaining estimates;

   (b) Have regard to any observations made by a tenant in response to the notice within 30 days (a good landlord would, insofar as it is practicable, still take into account observations received after this period, although failure to do so would not be a breach of these Regulations);

   (c) Obtain an estimate from at least one of the contractors (if any) provided by the tenant;

   (d) Obtain estimates from contractors, at least one of whom has no connection to the landlord;

(e) Provide a summary statement of at least two of the estimates, any observations received as a result of the initial notice and the landlord's responses;

(f) Make all estimates available for inspection;

(g) Serve another notice, this time setting out the matters specified in reg.11(10) and including the aforementioned summary statement;

(h) Have regard to any observations made by a tenant in response to this second notice within 30 days; and

(i) Within 21 days of entering into a contract, serve a third notice setting out the matters specified in reg.13(1)(a) and (b), unless the chosen contractor was one nominated by the tenant or provided the lowest estimate.

6. Unless the landlord complies with these requirements or a Tribunal dispenses with them, each tenant's contribution to the service charge is limited to £250. This means that, if the Respondent failed to comply with the requirements and the Tribunal does not dispense with them, the Applicant's liability would be limited to the £250 she has already paid rather than the full £3,132.96. The Applicant concedes that, subject to this issue, her liability would be more than £250 which means that, if the Tribunal does limit her liability to that sum, there would be no point in considering any other issues she has raised because they would make no difference to the outcome.

7. Therefore, the first question for the Tribunal is whether the Respondent complied with the consultation requirements. The process started in 2007 when she appointed managing agents for the first time. Previously, she had sought to manage the building in an informal manner which she thought was befitting for a property of this size. However, her relationship with the Applicant did not run smoothly and she thought that managing agents might be able to help by providing a more professional service. She appointed Brice Snasdell Property Management, a partnership run by Mr David Snasdell and his wife, Mrs Alexandra Snasdell. Mr Snasdell gave evidence to the Tribunal alongside the Respondent herself.

8. Following his appointment, Mr Snasdell recommended carrying out a comprehensive survey of the property to identify what repair and maintenance

works were required. A quote was obtained for the survey which turned out to be expensive. The lessee of the top floor flat, Sir Thomas Dunne, baulked at it and possibly the Applicant too. The Applicant suggested using instead Mr David Toogood of local surveyors, Hardings. He inspected in October 2007 and produced a brief report and a Repair and Maintenance Schedule, listing the works he thought were required. Following this, in December 2007 the Applicant and Respondent met and thought they had reached agreement as to what works should be carried out and when. The Applicant also understood that estimates would be obtained with an intended start date of April 2008.

9. Unfortunately, Mr Toogood had not provided a specification of works and Mr Snasdell did not seek one. Instead, Mr Snasdell sent Mr Toogood's Repair & Maintenance Schedule to eight contractors. Three provided estimates in March and April 2008. Due to the lack of a specification, the estimates were not precisely comparable. Mr Snasdell produced his own handwritten analysis of the three estimates in tabular form to make it easier to compare them.

10. The Respondent sent copies of the three estimates and Mr Snasdell's analysis to the Applicant on 3rd June 2008. In a handwritten covering note, she indicated her preference to use one of the contractors, Mansel Land Construction Ltd. This was principally because, although theirs was not the lowest estimate, she had received a recommendation from a source she trusted, Sir Alan Ridley, who also had property nearby on which Mansel Land had done work.

11. The Applicant immediately wrote back by e-mail expressing concern that certain chimney works were not included in Mansel Land's estimate. This was the start of correspondence stretching over the next five months in which the Applicant, the Respondent and Mr Snasdell debated the merits of Mansel Land's estimate.

12. By letter dated 20th August 2008 Mr Snasdell reiterated his and the Respondent's view that Mansel Land were offering the best deal and informed the Applicant that the total works to be done by them, including interior works, would be £11,334.03, inclusive of VAT and 10% for BSPM's administration of the contract, of which her contribution would be £3,778.01. It also included a new item of £600 plus VAT to paint downpipes but not the chimney works for which

a separate price was quoted. The Applicant replied on 29th August 2008 that she agreed to use Mansel Land in principle but raised various queries.

13. The Applicant and Mr Snasdell exchanged several letters in September 2008, with the Applicant continuing to be concerned that Mansel Land's estimate did not cover all the required works. The Respondent concluded that the process was taking too long and took advice from Solicitors First LLP. They drafted for her a notice which purported to comply with the consultation requirements under s.20 of the Act. It was served on 2nd October 2008. It noted that estimates had already been provided but they were not attached to the notice. The Applicant was invited to make observations and nominate her own contractor by 1st November 2008.

14. A meeting was then held on 9th October 2008, minuted by the Respondent and attended also by the Applicant, Mr Gould (an adviser to the Applicant), Mrs Garner (a next-door neighbour), Mr Taylor of Mansel Land and Mr Snasdell. It was agreed that some of the drainage costs would be shared with the neighbouring property. On 14th October 2008 Mr Snasdell sent the Applicant a copy of the minutes and an invoice listing various additional works, taking her contribution up to £4,269.15, even after credits from the sinking fund and the neighbour's contribution. In yet further correspondence, the Applicant objected to the fact that the increase was not supported by revised or, indeed, any estimates. She agreed with Mr Snasdell that she would obtain further estimates.

15. The Applicant obtained three estimates and forwarded them to Mr Snasdell. He telephoned one of the contractors, Mr Stephen Waller, ostensibly to query why his quote was significantly less. Mr Waller telephoned the Applicant later to convey to her his understanding that his providing an estimate had been a waste of time because Mr Snasdell had, as he perceived it, already made his mind up. Naturally, being told this also upset the Applicant.

16. By letter dated 20th October 2008 Mr Snasdell told the Applicant what he thought was wrong with Mr Waller's estimate. In response, the Applicant telephoned Mr Snasdell. Mr Snasdell claimed in a letter dated 21st October 2008 that the Applicant had been aggressive, abusive and threatening. He gave no details, in

the letter or to the Tribunal. The Applicant refuted the allegation and was yet further upset by it.

17. There were further letters in October but, by letter dated 6th November 2008, Mr Snasdell informed the Applicant that, following the expiry of the time limit set out in the notice served on 2nd October 2008, the Respondent had decided, with the agreement of the other lessee, Sir Thomas, and the neighbours, Mr and Mrs Garner, to award the contract to Mansel Land. No reasons were given for this decision. He asked for payment of two invoices, namely £3,344.36 for the exterior works and £994.44 for the interior works, totalling £4,338.80.

18. The only further relevant event before the works went ahead in April 2009 was that the Applicant sought assistance from the Fulham Legal Advice Centre. They wrote to the Respondent on 10th November 2008 making various points. In his reply of 20th November 2008, Mr Snasdell asserted that he and the Respondent had done everything to meet the Applicant's queries and demands. The implication of some of the things he said was that he understood the consultation requirements under s.20 to have been complied with.

19. In fact, it is clear from a straightforward comparison of the statutory provisions set out above and the statement of facts also set out above that the Respondent and her managing agents completely failed to comply with the consultation requirements. The notice of 2nd October 2008 complied on its face with the requirements under para 8 of Sch.4 of the Regulations for an initial notice of intention but it was served long after estimates had been obtained and the Respondent had selected her preferred contractor. The two notices required under paras 11(10) and 13 were never even contemplated. The Tribunal has no choice but to conclude that there were substantial breaches of the consultation requirements.

20. The Respondent had not made an application to dispense with the consultation requirements. The Tribunal invited her to do so at the hearing and she did so. Therefore, the question is whether, in accordance with s.20ZA(1) of the Act, the Tribunal is satisfied that it is reasonable to dispense with the requirements.

21. The Lands Tribunal has recently given guidance on the application of s.20ZA(1) in *Daejan Investments Ltd v Benson* [2010] 2 P&CR 8. This case was not

specifically mentioned at the hearing, but the Tribunal asked the parties to point to their evidence and make submissions which accorded with the Lands Tribunal's guidance. That guidance included the following:-

> 40 ... The power given to the LVT is to dispense with the consultation requirements, not with the statutory consequences of non-compliance. The principal focus, therefore, must, be on the scheme and purpose of the regulations themselves. If Parliament had intended to give a power to remove or mitigate the financial consequences, it could easily have done so, but we would have expected it to have been done in a way which avoided an " all or nothing" result. ... The potential effects— draconian on one side and a windfall on the other— are an intrinsic part of the legislative scheme. It is not open to the tribunal to rewrite it. ...
>
> 41 ... the potential consequences for the parties are relevant as part of the context in which the matter is to be considered. Although we do not think it helpful or accurate to describe the provisions as " penal" ..., the tribunal should keep in mind that their purpose is to encourage practical co-operation between the parties on matters of substance, not to create an obstacle race. If the non-compliance has not detracted significantly from the purpose of the regulations and has caused no significant prejudice, there will normally be no reason to refuse dispensation.

22. The Respondent asserted that she had done everything she could possibly think of to consult fully and, there being nothing further she could have done, her submission effectively was that there could not possibly be any prejudice to the Applicant from any lack of compliance with the consultation requirements. In particular, the Applicant had agreed on more than one occasion to what was proposed, including the appointment of Mansel Land.

23. However, the problem here is that the failure to comply with the consultation requirements was so comprehensive that it is extremely difficult to quantify any prejudice. The purpose of the requirements is not only to protect the interests of the tenant but, in doing so, to help ensure that the decision-making process is rational and efficient, with both parties having an opportunity to address relevant issues and to produce an effective outcome. The lack of compliance here resulted in a confused and overly-lengthy process in which all steps taken after 3rd June

2008 effectively constituted efforts to correct the misguided procedure used up to that point. The Respondent jumped straight from an initial consultation to her preferred contractor, with nothing in between. An increasingly frustrated Applicant then spent several months trying to point out matters which, if the correct procedure had been followed, would already have been addressed. The response of the Respondent and her managing agents was to try, up to a limit, to fit the Applicant's objections into a framework they had already decided on. This culminated in a telephone conversation in which Mr Snasdell felt he had been harassed and abused. Even if the Applicant's behaviour did not merit that description, she had certainly become upset and frustrated in a way which would have been much less likely if the correct procedure had been used.

24. While the Respondent is not a local authority or commercial landlord, she had professional advice throughout. Mr Snasdell does not hold any professional qualifications but had many years of experience with Hamptons International and claimed to have been involved in a significant number of major works programmes. His apparent ignorance of the consultation requirements would suggest that his experience is significantly more limited than that, but that does not alter the Respondent's ostensible position. The Respondent also had the benefit of specialist legal advice. She asserted that Solicitors First LLP had told her that the service of the notice of 2nd October 2008 constituted compliance with s.20 – if that is so, the advice was clearly wrong. It is possible, on the facts presented to the Tribunal, that a significant contributory problem in this case was negligent professional advice. In those circumstances, the Respondent may have a remedy against her advisers but that is a matter for her. It is the Respondent's responsibility to take proper advice and incorrect advice cannot constitute an excuse for failure to comply with the consultation requirements to the detriment of the Applicant.

25. The consultation requirements are not targets or a preferred ideal. Parliament set them out in great detail, in place of previously lesser requirements. It is not for a landlord to come to a Tribunal saying that they did everything they could think of in ignorance of the requirements and, now that they are aware of them, that they somehow came near enough. That does not accord sufficient respect to Parliament's clearly expressed intentions. The Respondent's best efforts in fact

produced an ineffective and inefficient process which meant that the Applicant was not able to give her input at the right time, while views were not yet formed and proposals had not yet been crystallised.

26. The Respondent had no excuse for not complying with the consultation requirements in full. This was not a case of a minor or technical breach but a complete failure of compliance. The consultation process used instead was certainly better than nothing but fell short of what could be considered adequate. In the circumstances, the Tribunal concluded that it would not be reasonable to dispense with the consultation requirements.

27. Consequently, the Applicant's liability for the service charge arising from the exterior works carried out in 2009 is limited to £250, a sum she has already paid. As already described above, there is no need to consider further the Applicant's other objections to the reasonableness of the service charge.

28. The Applicant applied for an order under s.20C of the Landlord and Tenant Act 1985 which reads:-

S20C Limitation of service charges: costs of proceedings.

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a ... leasehold valuation tribunal ... are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant ...

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

29. The Respondent said at the hearing that there were no such costs which means it is unlikely that any such order is strictly necessary. However, it is possible that the Respondent could change her view. In the light of the fact that the Applicant has succeeded in her application, and in the absence of any other factors, the Tribunal is satisfied that it would be just and equitable to make the order. Therefore, the Tribunal orders that any costs incurred by the Respondent in connection with the current proceedings are not to be regarded as relevant costs to

be taken into account in determining the amount of any service charge payable by the Applicant.

30. The Applicant paid a fee of £100 to make her application to the Tribunal and £150 for the hearing. She applied for reimbursement of the total of £250 in accordance with reg.9(1) of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003. Again, in the light of the fact that the Applicant has succeeded in her application, and in the absence of any other factors, the Tribunal is satisfied that it would be appropriate to order the Respondent to reimburse the Applicant the sum of £250.

Chairman N.K. Nicol

Date 7th July 2010