

5156

REF LON 00AZ/LSC/2009/0527

IN THE LEASEHOLD VALUATION TRIBUNAL

IN THE-MATTER OF THE LANDLORD AND TENANT ACT 1985 SECTION  
27A and S20C  
AND IN THE MATTER OF 20ZA OF THE LANDLORD AND TENANT ACT  
1985

Address

3 Cherry Tree House Shardeloes Road  
New Cross London SE14 6RR

Applicant in the first  
Application, Respondents  
in the second

Ms M Ivanova  
Mr Stoyan Kolev

Represented by

Mr L Lourdes of counsel instructed by  
Baftas Solicitors

Respondent in the first  
Application Applicant in the  
Second

Mayor and Burgesses of the London  
Borough of Lewisham

Represented by

Mr C Heather of counsel instructed by  
Greenwoods Solicitors

The Tribunal

Mr P Leighton LLB (Hons)  
Mr K M Cartwright FRICS  
Mrs J Clark JP

Date of Hearing

26<sup>th</sup> 27<sup>th</sup> January 1<sup>st</sup> March and 7<sup>th</sup> June  
2010

Date of Inspection

26<sup>th</sup> January 2010

Date of Decision

5<sup>th</sup> July 2010

## **Introduction**

- 1 By an application dated 14<sup>th</sup> August 2009 the Applicants applied to the Tribunal for a determination of their liability to pay service charges arising from major works to the property known as 3 Cherry Tree House Shardeloes Road New Cross London SE14 6RR("the property") in accordance with Section 27A of the Landlord and Tenant Act 1985 ("the Act") and a restriction on liability to pay costs under section 20C of the Act
- 2 By a cross application dated 14<sup>th</sup> January 2010 the Respondent applied to the Tribunal for dispensation from all or any of the provisions of Section 20 of the Act and the Service Charges (Consultation Requirements) Regulations 2003 in accordance with the provisions of Section 20ZA of the Act.
- 3 Directions were given for the conduct of the first application at a pre trial review held on 22<sup>nd</sup> September 2009 and the matter came before the Tribunal for hearing on 26<sup>th</sup> and 27<sup>th</sup> January 2010. The hearing was not completed on 27<sup>th</sup> January and was resumed on 1<sup>st</sup> March 2010. At the conclusion of the hearing on 1<sup>st</sup> March the Tribunal gave further directions for the case to be concluded at an adjourned hearing on 24<sup>th</sup> March 2010. However, owing to the indisposition of counsel the hearing could not proceed on that date and was finally concluded on 7<sup>th</sup> June 2010

## **Inspection**

- 4 The Tribunal carried out an inspection of the property and the block in which it was situated on the morning of 26<sup>th</sup> January in the company of the Applicants, representatives of the Respondent and counsel acting for both the parties.
- 5 The property is situated in a purpose built block of flats consisting of six flats and comprising a larger series of blocks of 24 flats situated in a residential street in New Cross London SE14. The exterior of the block appeared to be in fair condition and there were a number of upvc

windows fitted to the flats. Internally the common parts were fairly basic with concrete floors and a staircase leading to the first and second floors. There was no lift or carpeting

- 6 The Tribunal inspected the exterior and the interior common parts of the block and took particular note of the following features
- 7 It was noted that the entrance door was made of standard timber and it incorporated a door entrance control system of a type commonly used in a local authority block. At the time of the inspection the control system was not working and the door opened and closed without being secure in any way.
- 8 There were marks on the building where scaffolding had been erected and holes left in sections of the wall. Both the Applicants and the Respondents pointed out areas of the wall where pointing work had been carried out to brickwork
- 9 The Tribunal noted that some painting had been carried out to the walls, but only to areas where other remedial work had been carried out and for the purpose of making good. This left variable shades of paintwork throughout the block.
- 10 The Tribunal did not inspect the flat roof. It was impossible to see whether work had been done from the ground but the tribunal accepted that both parties agreed that works had been done and the issue between them related to the necessity for such work
- 11 The Tribunal also noted that there were areas of concrete pillars and soffits which had been repaired and also noted the galvanised electrical trunking in the staircase area.
- 12 The Tribunal noted that it was alleged that minor mechanical works had been carried out to the cold water tanks but this was not visible and not inspected.
- 13 It was alleged that CCTV work had been carried out to the drains but the drains were not inspected as it would not have been possible to ascertain whether such works had been carried out.

### The Lease

- 14 On 15<sup>th</sup> September 2007 the Applicants took an assignment of the lease of 3 Cherry Tree House for a sum of £192,000 from Ms Minett and Ms Douglas the original lessees. The lease is for a term of 123 years from February 2001 at a rent of £10 per annum and was originally granted under the Right to Buy provisions of the Housing Act 1985
- 15 The lease contains the following provisions  
By clause 2 "Any notice to be given under this lease shall be in writing and any notice to the lessee shall be deemed to be sufficiently served if left at the demised premises or sent by pre-paid post to the demised premises ... and any notice sent by post shall be deemed to be served 48 hours following the date of posting."
- 16 By clause 4 of the lease the lessee covenanted to observe and perform the covenants set out and contained in the seventh schedule and by clause 5 (1) the lessee covenanted subject to the provisions of schedule 8 to the Housing Act 1985 years in so far as the same are capable of applying to the demised premises to pay to the lessor all such sum or sums in respect of the matter is described in part 1 and 2 of the 10th schedule and assessed in accordance with the terms thereof
- 17 By clause 6 of the lease the lessor covenanted to observe and perform subject to the provisions of clause 5 (2) the covenants and obligations set out in the 10th schedule of the lease. .

### The Law

- 18 Under Section 20 of the Landlord and Tenant Act 1985 it is provided that where the amount which is chargeable to major works would exceed a contribution prescribed by the regulations from each of the leaseholders who are under an obligation to contribute under the lease the landlord must comply with the provisions of the Service Charges

(Consultation Requirements) (England) Regulations 2003 ("the 2003 Regulations)

- 19 Where the landlord fails to comply with the regulations he is only entitled to recover up to a maximum figure of £100 per leaseholder in respect of qualifying long term agreements and £250 per leaseholder in respect of qualifying works.
- 20 Where the works require notice to be given in the Official Journal of the European Community because they exceed a specified sum. Schedule 4 Part 1 of the Regulations applies. In cases below this level where such a notice is not required Schedule 4 Part 2 of the Regulations applies. It is clear that the contract in this case exceeded £72 million and required a public notice.
- 21 Where a notice is given before 31<sup>st</sup> October 2003 the consultation procedure is governed by Schedule 3 of the Regulations instead of Schedule 4 by virtue of Paragraph 7(3) (b) of the Regulations

### **The Issues**

- 22 The Applicants challenge the validity of the consultation procedures carried out by the Respondent and assert that they have failed to comply with the provisions of the 2003 Regulations. The Respondent denies that there has been a failure to comply with the Regulations but asserts that if any breach is found by the Tribunal, it should dispense with the requirements of that part of the regulations under section 20ZA of the Act.
- 23 The Applicants also challenge the need for the major works to be carried out to the estate, the cost of the works and the standard of the works provided.

### **The Hearing**

- 24 The hearing took place on 26<sup>th</sup> and 27<sup>th</sup> January 2010 when the Applicants both gave evidence and the Tribunal heard evidence from Mr Holmes Ms Jones and Mr Kelly witnesses for the Respondent and it

was thought by the Tribunal that the evidence was concluded on that date. The hearing was then adjourned to enable the parties to make submissions and for the Tribunal to consider the evidence on 1<sup>st</sup> March 2010

- 25 At the adjourned hearing Mr Heather applied to the Tribunal to admit a further statement on behalf of the Respondent from Mr Allan Ronald a surveyor employed by Messrs Higgins to give evidence about the condition of the roof prior to the service of the Section 20 notice in May 2007 and afterwards in November 2007. He did not have an entirely satisfactory reason for the delay in providing the evidence the relevance of which had not been foreseen by this solicitors.
- 26 Mr Lourdes objected to the admission of this evidence on the ground that it was very late and clearly in breach of the directions which required witness statements to be exchanged by 18<sup>th</sup> December 2009. He did not have any evidence to rebut the evidence which Mr Ronald was likely to give and if it were admitted would need time to prepare cross examination.
- 27 Mr Heather submitted that if there was relevant and apparently cogent evidence, albeit late evidence, it should be admitted in the interests of justice. It was not merely a technical exercise but a genuine attempt to ascertain the true state of affairs and the Tribunal would be acting perversely if it took an overly technical view and excluded the evidence. He agreed that further time should be granted for cross examination.
- 28 The Tribunal having considered the submissions ruled that the evidence should be admitted in the interests of justice. The evidence was important, relevant and apparently cogent. In the view of the Tribunal the evidence should have been obtained earlier and could have been obtained with reasonable diligence, but that would normally be reflected in costs rather than by way of exclusion. The admission of the evidence would only require a short adjournment of about half an

hour to enable Mr Lourdes to mount his cross examination of the witness. .

- 29 The evidence was accordingly admitted and a short adjournment granted to enable Mr Lourdes to take instructions on cross examination. The witness was then called and cross examined by Mr Lourdes and questioned by the Tribunal and the evidence was then concluded.
- 30 Thereafter Mr Heather made his submissions on behalf of the landlord. He indicated that his submissions on the alleged breaches of the Service Charge Regulations were provisional as he did not really understand the full extent of the case against him as it had not been set out in the papers. The Tribunal accepted that he should have a right of reply on the law after Mr Lourdes had made his submissions clear on the alleged breaches of the regulations.
- 31 When Mr Lourdes came to make his final submissions the Tribunal pressed him to clarify which regulations he alleged had been breached and the prejudice to the Applicants arising thereby. He appeared to have some difficulty in formulating his submissions in relation to the specific breaches relied upon and after a full hour the Tribunal was still left in doubt as to the exact nature of his case in relation to the regulations.
- 32 Owing to the lateness of the hour it was not possible for the submissions to be completed and for Mr Heather to reply. Accordingly the Tribunal reluctantly adjourned the hearing once again and gave further directions to enable Mr Lourdes to set out fully in writing the nature of his case in relation to the alleged breaches of the regulations and the prejudice caused thereby which would enable the Tribunal to deal with the question of dispensation under section 20ZA in the event of any breaches being found by the Tribunal. The hearing was then adjourned to complete submission to 24<sup>th</sup> March 2010. but owing to the indisposition of counsel the matter did not resume until 7<sup>th</sup> June 2010.

## The Evidence

- 33 Mr Kolev in his statement informed the Tribunal that the lease had been transferred to both Applicants on 13<sup>th</sup> September 2007. He stated that at no time had they received any notices from Lewisham Council informing them of the intention to carry out major works.
- 34 Some time after they moved into the property they noticed that scaffolding was being erected and as a result Mr: Kolev went to the offices of Regenter B at Mantel Road London SE4 to enquire about the work. He was informed that a further notice would be sent to them but no such notice was received. The Applicants then contacted their solicitor Mr Gary McAuley at Beaumont Legal who informed them that he would look into the matter.
- 35 The works continued at the property and were completed in early 2008. Details of the completed work including the estimates were sent to the Applicants in March 2009.
- 36 Mr Kolev runs his own building company and has had many years experience in the building trade. He maintains that the costs of the work in this case were excessive and that had he been consulted he would have been able to either quote for the works or provide another contractor to provide estimates for the work which would have been considerably lower than the sum charged by Regenter B. Accordingly he maintained that as a result of the failure to consult the applicants had been prejudiced and that the liability in respect of the works should be capped in the sum of £250..Miss Ivanova was a joint signatory to the original witness statement and gave evidence along similar lines to that of Mr Kolev
- 37 He also made numerous complaints either that works had not been carried out at all or that they had been carried out to a poor standard. Concerning the pointing work, the external decorations, mechanical and electrical works and the level of professional fees charged which he alleged amounted to 26% of the works and were excessive. .



- 38 On behalf of the Respondent Ms Carol Jones the contract manager of Pinnacle Housing gave evidence relating to the background to the works contract. In about the summer of 2000 the Respondent started a process of consultation with all Council tenants and leaseholders in Brockley on the future of housing management in the area.
- 39 This arose following an independent housing condition report which t indicated that it was necessary to make improvements to housing conditions and services in the Brockley area. The Council put forward a bid for government funding which was successful, and following a process of public advertisement and tendering Regenter B were awarded the contract in June 2007 for the refurbishment management and maintenance services for council housing in the Private Finance Initiative area of Brockley. The portfolio of properties within the area comprised 1340 tenanted properties and 500 leasehold dwelling is made up of a combination of terraced properties, detached properties semidetached properties and blocks of flats within the Brockley area.
- 40 Regenter B3 comprises Regenter B3 Limited the main contractor, Messrs Higgins plc the refurbishment subcontractor Pinnacle Housing Limited, for housing management and Equipe Regeneration Limited was the facility management subcontractor.
- 41 In 2004 the Respondent commenced they section 20 conclusion in relation to the qualifying long term agreement with Regenter B3 following the grant of the contract to Regenter they undertook a further consultation in respect of the works undertaken to the properties under a Qualifying Long Term Agreement.. The consultation was undertaken pursuant to Schedule 3 Regulation 7 (3) of the 2003 Regulations.
- 42 Lewisham Homes the Arms Length Management Organisation for Lewisham received notice of the assignment of the lease to the Applicants in November 2007 and passed it on to Pinnacle Housing in December 2007..Ms Jones states that they were aware of the notice,

however in October 2007, having been informed of the transfer by the Applicant's legal adviser.

- 43 Lewisham Homes were approached by the Applicants' predecessors in title in April 2007 who informed them that they were proposing to sell the property. Their solicitors were sent a pre-assignment pack in May 2007 setting out details of the ground maintenance charges and details of major works plus a copy of the original notice of intention dated 10 June 2004 in relation to the PFI.
- 44 On 6 August 2007 a section 20 notice was served on the property setting out the works to be carried out and indicating that the likely cost would result in a charge to the property of £20,986... This figure was however reduced following further investigation to a sum of £15,516.83 and leaseholders were informed by a second notice sent on 17 September 2007. After the Applicants attended the offices of Pinnacle on 29th October 2007 Ms Jones states that they have co operated fully in providing the solicitors with full details of the section 20 notice and she asserts that at no time have they failed to provide the Applicants with any information which has been requested.
- 45 She further states that in the pre-assignment pack which was sent to the solicitors for the previous leaseholders in May 2007 it was made clear that the property was within a proposed PFI area and there was a likelihood of major works being carried out under the PFI management within the first five years. She stated that the work commenced on 29 October 2007 and was completed on 26 February 2008.
- 46 She further points out that under the terms of the PFI agreement it would not have been possible for the Applicants to nominate a different contractor since the identity of the contractor had been confirmed following previous consultations and was confirmed in the QLTA..
- 47 She further confirmed that the final cost of the contract to the leaseholders amounted to £13,659.99 but that the final demand had been capped in the sum of £10,000.

- 48 . Her statement explains the working of the PFI contract whereby Lewisham agreed a lump sum with the contractor and on completion of the work and independent certifier inspects the building to confirm that the works have achieved the standard required by the landlord. The contractor then receives payment for the work and the landlord then recovers the service charge items and other costs under the terms of the lease. The sums recoverable from the leaseholders do not equate with the sums which Lewisham pays to the contractor.
- 49 She concluded that the work carried out amounted to less than that which was originally stated in the consultation notices, that it was carried out to a reasonable standard and that there was no prejudice suffered by the Applicants if they failed to receive any notice.
- 50 She stated in cross examination that she had personally supervised the sending out of the notices to each of the properties and was sure that they had been sent as none were returned through the dead letter service. ...She stated that following the consultations and the completion of the works they had not received any other complaints from any of the leaseholders in the block
- 51 Mr Holmes the independent certifier from Mott Macdonald Limited produced a report of his inspection of the premises in February 2008 on completion of the works when he issued a snagging schedule. He returned in May 2008 to check whether the items in the snagging schedule had been remedied and concluded that they had. All the items raised by the Applicants including the door, the electrical works, the decorations , the brickwork and the concrete work were examined and found to be of reasonable standard as provided in the Availability Standards required under the contract.
- 52 He did not inspect the roof and did not comment on the structure of the building or the levels of professional fees.

- 53 Mr Adrian Kelly MRICS the member of the survey team from Higgins gave detailed evidence in relation to the work carried out in accordance with the section 20 notices
- 54 He pointed out that it was necessary to replace the door entry system with a high standard replacement because of complaints of vandalism and intruders. He also explained why it was considered necessary to erect scaffolding for the roof works and that it could not be safely carried out using other methods. of access.
- 55 He also explained the structure of the professional fees under the terms of the PFI agreement and how they were broken down between the management charges and the professional fees. He acknowledged that these might be higher under a PFI agreement .
- 56 .Mr Ronald who was called at the later hearing dealt with the condition of the roof and explained that they were not aware of the need for replacement of the covering to the roof until the works had started. His first inspection of the roof was from the ground and it was only when the scaffolding was erected that he was able to go on to the roof and ascertain the full extent of the works required. . When he inspected the roof he concluded that it was necessary for the roof covering to be replaced because of it s condition and it was considered desirable to carry out this work while the scaffolding was still erected He considered this was the most economical way of carrying out the work and that the costs wren reasonable as did Mr Kelly.

### **The Tribunal's Decision**

- 57 Mr Lourdes having originally submitted in his closing speech that Schedule 4 of the Regulations applied and that the Respondent was in breach of those, conceded in his final submission that Schedule 4 of the Regulations did not apply and that the case was governed by the more limited provisions of Schedule 3 which applied to public notices given before 31<sup>st</sup> October 2003

- 58 The Tribunal accepts the evidence of Ms Jones that on the balance of probabilities the two notices were served on the property by first class post and were not returned through the dead letter service. The Tribunal would have preferred to see written evidence of posting but this was not available and the evidence of Ms Jones together with the fact that there was no evidence that anyone else in the block complained of having failed to receive the notice the Tribunal finds on the balance of probabilities that it was sent.
- 59 In the circumstances the Tribunal considers that there was adequate compliance with Paragraph 1 of Schedule 3 of the Regulations although the Tribunal accepts the evidence of the Applicants that they personally did not see the notice at or shortly after the date when it was posted. The Tribunal finds it difficult to see why they did not see it shortly after the visit to the offices in October 2009 because it accepts the evidence of Ms Jones that the details were sent to the Applicant's solicitor shortly after that date.
- 60 The Section 20 notice served on 6<sup>th</sup> August ought to have been passed on by the previous vendors if they received it but that does not appear to have happened. That, however, is not an issue for the Tribunal to consider further in these proceedings although it may be relevant in another context
- 61 .The second letter ought to have been received by the Applicants themselves but the Tribunal accepts that they did not receive it although on the basis of Mr Jones's evidence it was sent to the property
- 62 By virtue of the deeming provision in Clause 2 of the lease the notice was deemed to have been received by the Applicants within 48 hours of posting.
- 63 Accordingly the Tribunal finds that there was no breach of section 20 of the Act or of the 2003 Regulations. Had there been a breach the Tribunal would have granted dispensation on the basis that the

prejudice suffered by the Applicants was minimal and even when they received the necessary information they did not make any representations at a time when it would still have been possible for them to do so. Even though the work had started the Respondent states that it may well have been possible to make changes if representations had been received from a leaseholder in October or November 2007

64 With regard to the failure to make specific mention of the roof works Mr Heather asserts that the description of the work in both cases includes the roof as "structural repairs" in the first notice and "structural works" in the second

65 The Tribunal considers that the works which were in fact undertaken involved replacement to the surface of the roof covering and is not "structural works" or "structural repairs" within the meaning of the notices

66 No measurements were taken and no photographs adduced and the evidence before the Tribunal is limited to the inspection carried out by Mr Ronald which gives a detailed description

67 The works were sufficiently significant in the view of the Tribunal to justify a separate heading in the final account and the Tribunal is of the opinion that a separate section 20 notice should have been served in respect of these works.

68 A Reason put forward to justify non service of an additional notice would be a small saving of costs but in view of the Tribunal this would not be sufficient to warrant dispensation. In respect of that failure, The Tribunal considers that the Applicants did suffer prejudice and it could have been rectified very simply by the service of an additional notice. Accordingly the liability of the Applicants for the roof works should be limited to £250

- 69 Complaints about the quality of works made by Mr Kolev related to the non functioning of the external door, a failure to undertake brickwork and re pointing to the building although it was charged for
- 70 The Tribunal accepted that there was isolated repointing and brickwork which justified the costs charged to the service charge account. The door had a non functioning tradesman's button but the Respondent says this was fixed in March 2010 and no further problems since that date. Although this evidence was given at the end of the hearing, it was not challenged by the Applicants before the Tribunal.
- 71 The complaints relating to external decorations, concrete repairs, brickwork repairs, electrical work , mechanical work to tanks in the roof and the Applicants also challenged the professional fees charged on the contract
- 72 The Tribunal does not consider that any deduction should be made form the service charges on account of works allegedly not carried out or carried out to a poor standard. . The complaints made by the Applicants were either not established or were of a trivial nature which did not justify any reduction in the overall costs.
- 73 The Tribunal analysed a breakdown of the professional fees from which it appeared that the management fee charged by the Respondent was 10%. Other professional fees were 3.47% and refurbishments, contractors overheads and profits amounted to 12% so that the description of all these items as professional fees is not technically correct, is somewhat misleading and should be broken down in accordance with the schedule produced. The Tribunal does not consider that 10% management fees and 3.47% professional fees to be excessive.
- 74 The amounts chargeable for the roof works amounted to £2562.17 plus a proportion (approximately 26%) of professional and other fees of £668.98 and after adding a proportion of management fee (10% of £323.12) making a total of £3554.29 a net figure of £3304.29 should

be deducted from the total figure for the works of £13,659.99 which would leave a liability to the Applicants of £10,255 70 but in fact the liability of the Applicants is capped under the scheme at £10,000

75 Accordingly notwithstanding the above deduction the Tribunal determines that the Applicants are liable to pay the sum of £10,000. Respondents concede that the lease does not permit recovery of costs so there is no requirement on the Tribunal to make any order under section 20C of the 1985 Act.

76 With regard to the fees paid on the application the Tribunal considers that in the light of the findings above it would be just and equitable to credit the Applicants with one half of the fees paid namely £175 on the basis that they were partially successful in the proceedings in relation to the consultation regarding the roof and raised issues which the Tribunal considered had some merit . save for that figure no order is made in relation to the fees of either party

Chairman Peter Leighton

Date 5th July 2010