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Residential  
Property  
TRIBUNAL SERVICE

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL  
ON AN APPLICATION UNDER SECTIONS S.20ZA AND S.20C  
OF THE LANDLORD & TENANT ACT 1985**

Ref: LON/00BK/LDC/2010/00 27

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**Property:** Wesley Court  
51-55 Weymouth Street  
London W1G 8NN

**Applicant/Freeholder:** Rolyn Investments Limited

**Respondents / Leaseholders:** The Lessees of Wesley Court

**Date of Application:** 3<sup>rd</sup> March 2010

**Date of Hearing:** 24<sup>th</sup> May 2010

**Appearances for the Applicant:** Mr J Summers, Counsel  
Instructed by Bolt Burdon Solicitors

**Appearances for the Respondent:** Dr D Watters – Leaseholder Flat 2  
Ms H Nyman – Leaseholder Flat 6  
Mr T Stern – Leaseholder Flat 9  
Mrs F Verdis – Leaseholder Flat 7  
Mr G McHardy – Leaseholder Flat 10  
Mr K Fine – Leaseholder Flat 5

**Also in Attendance:** Mr French – Director Rolyn Investments  
Mr Holme – Director Rolyn Investments  
Mr J Byers – Director Langle Byers Bennett  
Mr S Langle – Director Langle Byers Bennett

**Leasehold Valuation Tribunal:** Ms F Dickie, Barrister  
Mr Cartwright FRICS  
Mr D Wills

**Date of Decision:** 1<sup>st</sup> July 2010

### **Summary of Determination**

- 1) The application is granted, though this Tribunal considers that no dispensation from the consultation procedure is in fact required. The application under s.20C is granted in part.

### **Preliminary**

- 2) The Applicant landlord seeks dispensation from some or all of the consultation requirements imposed by Section 20 of the Landlord and Tenant Act 1985. The application was made on 3<sup>rd</sup> March 2010 and Directions were issued on 9<sup>th</sup> March 2010 for an oral hearing of the application which took place on 24<sup>th</sup> May 2010. The Respondents applied for an order under s.20C of the Act preventing the landlord from recovering the costs of these proceedings as service charges.
- 3) The subject premises are a block of 11 residential flats with commercial ground floor premises. The Tribunal did not conduct an inspection. A proposed programme of works (hereinafter described as the "Main Works") was the subject of Leasehold Valuation Tribunal application LON/00BK/LSC/2008/0313. The Tribunal in its decision on that application, dated 12<sup>th</sup> January 2009, found the Main Work to be reasonably necessary and of reasonable cost. Management fees in respect of the annual service charge were reduced. The present application is for dispensation from the statutory consultation requirements in respect of certain further works (the "Additional Works") which were apparently urgently required during the course of the Main Works and carried out in August and September 2009.
- 4) At the hearing Dr Watters, leaseholder of Flat 2 and himself an architect, represented the Respondents. He clarified however that the leaseholders of Flats 1 and 3 had not participated in the proceedings. A further leaseholder, Mr Valentine, had confirmed in writing to the Tribunal that he did not oppose the application. Mr Summers of counsel represented the Applicant.

### **The Hearing**

- 5) The landlord's managing agent is Langle Byers Bennett Chartered Surveyors (LBB). The Applicant relied on witness evidence of Mr John Howard Byers, Chartered Building Surveyor and Director of LBB. The Main Works to the exterior of the building were the subject of statutory consultation (and were described in a Notice of Intention dated 27<sup>th</sup> November 2006 as "cyclical repair and redecoration works to external and internal parts of the building").
- 6) Mr Byers gave evidence that the Main Work was contracted to SJS Maintenance Ltd. in the sum of £114,339 plus VAT and commenced on 20<sup>th</sup> July 2009 when scaffolding was erected to the main roof level. Shortly after the commencement of the Main Works certain Additional Works were identified, namely defects to the property at high level which could not previously have been seen. Mr Byers said that some of the timber frames around the dormer windows in the mansard roof had decayed and required renewal as they could not be repaired. This work necessitated the renewal of the asphalt coverings to the dormers (work which had been included in the original specification for the Main Works but omitted in the course of agreement with the lessees' expert prior to the LVT hearing in case LON/00BK/LSC/2008/0313). Repairs to a chimney stack were said to be required (renewal of flaunchings, replacement of pots and re-pointing). The Specification for the Main Works had included a contingency of £3000 (reduced from £6000 on negotiations with the tenants and in order to reach an agreement as to the Main Works).
- 7) Mr Byers considered that certain additional items of repairs necessary to the roof were less urgent and decided not to carry these out. On 24<sup>th</sup> August 2009 LBB wrote to Mr Conway, the expert who had acted for the lessees in the previous Tribunal proceedings, to notify him of the requirement for the Additional Works. However Mr Conway did not reply and, Mr Byers said, the Applicant had not been informed that he had ceased to act for the lessees.
- 8) The Additional Works commenced on 16<sup>th</sup> September 2009, and during their execution decay was found to the timber structural framework of one of the dormers. Mr Byers was of the opinion that there was no alternative but to

rebuild that dormer and this was done. The total cost of the Additional Works (including rebuilding the dormer) was £7395 plus VAT.

- 9) Mr Summers observed that there was no requirement for the landlord to consult the lessees before making an application for dispensation under s.20ZA. He argued that the Additional Works did not require separate statutory consultation in any event. The contingency was to cover any additional unforeseen works and such finessing on a major works contract does not require fresh statutory consultation. In the alternative Mr Summers argued that dispensation from the s.20 consultation procedures ought to be granted, in summary because:
- a) The Additional Works were carried out during the Major Works to save costs. If the windows were allowed to continue to decay, the structural integrity of the dormers could be affected and repairs required at greater cost to the lessees. A discrete programme for the Additional Works would have added to the overall disruption suffered by them.
  - b) Full statutory consultation in respect of the Additional Works would have been more costly for the lessees, in particular for extended hire or replacement of scaffolding.
  - c) The Applicant, though only a small a two director firm, had constantly tried to do everything "by the book". Statutory consultation was not designed to turn leaseholders into supervisors of the work once it had started.
  - d) The Additional Works were urgent as the chimney stack was open to the elements and its condition could allow rainwater to penetrate the building. The timber to the dormers was severely decayed allowing water to penetrate the structure of the building.
  - e) The cost of the Additional Works was consistent with their being a minor variation to the Main Works.
- 10) Dr Watter's Response to the application acknowledged that sometimes further works are necessary. The position of the Respondents, in essence, was that if notified of the need for Additional Work they would have been willing quickly

and constructively to engage in deciding the appropriate way forward. They considered they had been prejudiced by the failure to follow the statutory consultation procedure in that they had not had the opportunity to inspect and verify the condition of the elements of the building in question before the Additional Works were carried out. At £7,395 the cost of the Additional Works (specified with considerable complexity) amounted to approximately a 70% increase on the sums estimated for roof and mansard repairs. Dr Watters argued that re-erected localised scaffolding would have been sufficient for carrying out the Additional Works, at modest cost, and that the landlord had had more than sufficient time to conduct statutory consultation.

- 11) It was only through the current Tribunal proceedings that the leaseholders were first notified about the requirements for the Additional Works. Dr Watters considered that the Applicants could easily have made contact with the lessees directly, and were not justified in attempting to contact Mr Conway (whom the tenants had ceased to instruct some time ago) and as they received no response from him and did not chase for a reply, they were not warranted in proceeding with the Additional Works. Dr Watters considered this was another example of poor management as observed by the previous LVT decision in case LON/00BK/LSC/2008/0313 in criticising "a significant number of unacceptable errors" in the management services rendered by LBB and reducing the management charges payable for previous years.
- 12) In his response to the application Dr Watters also argued that the commercial premises ought to bear liability to contribute to some of the works. Mr Summers for the Applicant observed that the dispute over apportionment was raised by the tenants in the previous proceedings, and that Tribunal had found that any issue of apportionment had to be raised on an application for variation of the leases.
- 13) The landlord receives income from various commercial occupiers under leases for the use of areas at basement level around the premises for car parking. The Respondents raised a dispute as to the apportionment and recoverability of service charges applied in respect of the landlord's lost car parking revenue owing to those areas being used for the erection of scaffolding. The "Miller

lease” is a lease solely for car parking and the landlord had added to the service charge account lost rental income of £1564.93. In respect of the “Harris Latner” lease and “Clapham and Baker lease” the former sought recovery of £1720 from the landlord and the latter had not yet specified a figure. The Applicant considered that these were costs which the landlord has had to bear as a result of complying with its repairing obligations under the leases, but that in any event they were not qualifying work which would be subject to statutory consultation.

- 14) The Respondents’ principal argument was that the landlord had improperly leased what were in fact pavements, access routes and emergency exits for parking, none of the spaces so used having been designed for the purpose. Having created this additional commercial use of the premises, and in the absence of express provision in the Respondents’ leases for the recovery of this lost income as a service charge, the tenants disputed their liability to make good the landlord’s loss.

#### **Tribunal’s Determination**

- 15) Section 20ZA of the Landlord and Tenant Act 1985 provides.

*(1) Where an application is made to the 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.*

- 16) The s.20 consultation procedure on the Main Works and its compliance were not challenged. Indeed, the decision of the previous Tribunal effectively settles that matter. There had certainly been comprised within that process consultation about renewal of the asphalt coverings. That specification having been changed to repair of roof coverings in negotiations does not alter the fact of that consultation had taken place on the item of work in the event completed.
- 17) The Tribunal agrees with the Applicant’s argument that there was a close nexus between the contemplated scheme and location of works as consulted

upon and those ultimately completed. The Additional Works were not wholly new, but closely associated with the Main Works. The landlord had consulted about repairs to the roof and to the dormer windows. The extent of that repair changed once those parts of the structure were closely inspected. When looking at the price of the overall contract the Additional Works were a small percentage. Tribunal considers that the only item on which the landlord had not consulted was the chimney stack. The contract had a contingency for such unforeseen works. It would not be a sensible interpretation of the Act to require additional consultation for works carried out in the nature of those that could be met by a contingency (notwithstanding that in this case the contingency was reduced as a result of the tenants' request). The Tribunal finds that statutory consultation procedure carried out did incorporate the additional works in the event completed, and that dispensation is not therefore required.

18) Owing to the above conclusions the application under s.20ZA is considered by this Tribunal to be unnecessary. However it should be noted that since no application under s.27A is made this conclusion is reached without the jurisdiction to make a determination as to the payability of the associated service charges. There appears a theoretical possibility that, subject to an argument as to abuse of process, a different Tribunal might reach a contrary view upon an application under s.27A as to the payability of the costs of the Additional Works. The Tribunal considers it appropriate, therefore, to determine this application on the assumption that statutory consultation procedures were not complied with, and having done so the Tribunal considers it reasonable to grant the dispensation sought.

19) The Lands Tribunal in **Daejan Investments Ltd v Benson and others** LRX 148 2008 approved of the approach taken in **London Borough of Camden v Leaseholders at 30 to 40 Grafton Way** LRX/185/2006 that:

"The principal consideration for the purpose of any decision on retrospective dispensation must, in our judgment, be whether any significant prejudice has been suffered by a tenant as a consequence of the landlord's failure to comply with the requirement or requirements in question. An omission may not

prejudice a tenant if it is small, or if, through material made available in another context and the opportunity to comment on it, it is rendered insignificant. Whether an omission does cause significant prejudice needs to be considered in all the circumstances. If significant prejudice has been caused we cannot see that it could ever be appropriate to grant dispensation.”

20) In all the circumstances, the Tribunal considers it reasonable to dispense with the consultation requirements based on the following factors:

- a) The approach taken by the Landlord in carrying out the Additional Works at the same time as the Main Works resulted in an overall saving in cost and time to the tenants. The statutory consultation procedure would have lasted 3 months and would be likely to have led to substantial additional scaffolding hire costs to be added to the service charge account. The disruption to the tenants was also minimised.
- b) The Additional Works were urgent owing to the cost implications to the tenants of delay, and the need to ensure the building was weather-tight.
- c) In spite of the modest size of the Applicant firm, the tenants had been engaged in consultation over the Main Works far in excess of that required by statute. Only by virtue of that had the specification been modified to remove some of the works the landlord now found to be required.
- d) The Tribunal has considered carefully the arguments well put on behalf of the Respondents, but is not persuaded that they have suffered significant prejudice in the circumstances.

### **Prejudice**

The Respondents did not have an opportunity to inspect and verify the condition of the roof, and approve the specification, prior to the execution of the Additional Works. The question for the Tribunal is whether they have suffered significant prejudice. It has balanced this loss of opportunity against the consequences to the tenants of the delay occasioned by a statutory consultation. The prejudice alleged is that the tenants did not have the opportunity to inspect the state of the elements of the building



concerned to verify their condition. The Tribunal considers therefore that the prejudice alleged is more appropriately understood to be the result of a failure to inform them directly of the Additional Works, and not necessarily of the failure to carry out a lengthy statutory consultation. Had the condition of the roof indeed been as found by Mr Byers, Dr Watters did no more than intimate that the specification might have been "complex". There was insufficient evidence to suggest that there was another sensible course of action Mr Byers could have taken. The Tribunal considers it unlikely, given his professional expertise, that Mr Byers would have misrepresented the physical state of the building he found on inspection.

21) The tenants in any event still have the opportunity to challenge the reasonableness of the costs on an application under s.27A of the Act.

22) The cost of lost car parking revenue to the landlord is sought from the tenants as a service charge. This cost is not qualifying work and is not therefore relevant to the s.20ZA application currently before the Tribunal. The real issue between the parties is whether these costs are reasonable and recoverable as a service charge. The Tribunal would have jurisdiction to consider this matter on an application under s.27A of the Landlord and Tenant Act 1985 (which could, this Tribunal considers, conveniently be dealt with on the papers and without a hearing), though having been aired before the Tribunal it may now be that it is the subject of negotiation between parties.

23) Furthermore, the apportionment of service charges between the flats and commercial premises is not within this Tribunal's jurisdiction on this application under s.20ZA.

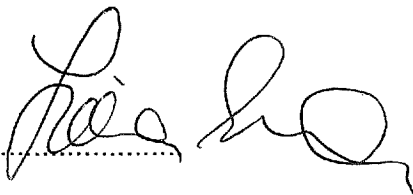
#### **s.20C Application**

24) The Respondents considered the Applicant unreasonably to have applied to the Tribunal without notice or consultation with them. The Tribunal was informed that a without prejudice meeting took place which did not result in settlement, but that the Applicants declined mediation. Thereafter the parties applied jointly for a paper determination in order to avoid the cost of an oral hearing. However, that application was made too late to be practicable within

the Tribunal's Regulations. The Applicants could not produce a summary of their costs of the proceedings. The Respondents considered there was nothing they could have done differently to avoid having to attend the Tribunal hearing. It was emphasised for the Applicant that the application to the Tribunal was not intended to be aggressive and that if successful it ought not to be penalised with an order under s.20C.

25) The fact that this application was opposed should be viewed in the light of the landlord's failure effectively to communicate about the Additional Works. Had the landlord succeeded in notifying the tenants (pursuing Mr Conway for a response or confirmation of instructions and/or contacting the tenants directly) the Tribunal considers that the likely result would have been the tenants' involvement and substantial cooperation with the Additional Works. This application was made out of an abundance of caution. The tenants have been deprived of the opportunity to consider whether, having been notified of the work at the appropriate time, the application could have been agreed and dealt with by the Tribunal on the papers. This has caused the tenants prejudice in their potential liability for the landlord's costs recoverable as service charges. In the circumstances the Tribunal considers it just and equitable to grant the application under s.20C to the extent that the landlord's costs of preparation for and attendance at the hearing are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenants of Wesley Court. Only costs up to and including preparing and filing of the application are to be so regarded and none thereafter.

Signed



Chairman

Dated 1<sup>st</sup> July 2010