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MAN/16UG/LSC/2009/0134

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE**

**LEASEHOLD VALUATION TRIBUNAL**

**of the**

**NORTHERN RENT ASSESSMENT PANEL**

**LANDLORD AND TENANT ACT 1985**

**SECTIONS 20, 20ZA and Section 27A**

**PROPERTY**

**Grayrigge Court, Kents Bank Road,  
Grange-Over-Sands, Cumbria LA11 7HD**

**Applicants:**

Mr J Bolton and Others

**Respondent:**

Peverel Properties Limited (referred to as Peverel Retirement and acting through its managing agent Peverel Management Services Limited)

**The Tribunal:**

Chairman:	John R Rimmer BA, LLM
Valuer Member:	John Faulkner FRICS
Lay member	Frank Kendall MA

**Date of Determination:**

4<sup>th</sup> May 2010

A paper determination without a hearing

## **ORDER**

**The Tribunal does not make an order under Section 20ZA Landlord and Tenant Act 1985 in respect of the qualifying works carried out at Grayrigge Court, Kents Bank Road, Grange-over-Sands, that are the subject of this application and in that circumstance the amount recoverable from each Applicant in respect of those works is the amount prescribed in Section 20(3) Landlord and Tenant Act 1985.**

**The Tribunal makes an order under Section 20C Landlord and Tenant Act 1985 that the landlord's cost in respect of these 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 tenant or any other person specified in the application.**

### **A. Application.**

1. The Applicant applied under Section 27A of the Landlord and Tenant Act 1985 for a determination that the service charge for year 2009-10 in so far as it related to the provision of a new door entry system to Grayrigge Court should only be payable to the extent of the amount allowed under Section 20 of that Act in the absence of a lawful consultation process prescribed by that Section.
2. It is conceded by all parties that the cost of the provision of the new system is such that it engages the provisions of Section 20 Landlord and Tenant Act 1985 and the Regulations made in relation thereto for there to be a required consultation process.
3. Application was also made under Section 20C Landlord and Tenant Act 1985 to limit the Respondent's entitlement under the terms of the lease to recover its costs in relation to the substantive application within future service charges.
4. In due course the Respondent provided a response to the Applications and included within this what amounted, without express reference to the statutory provision, to an application under Section 20ZA of the Act for retrospective dispensation to incur the costs without any prior consultation process, or at least one that did not stand full square with the relevant provisions. The provisions are outlined in more detail in below. The original application from the Applicant is dated 10<sup>th</sup> December 2009 and the Application effectively under Section 20ZA on behalf of the Respondent is dated 11<sup>th</sup> March 2010.

### **B Background**

- 5 The Applicant holds a long lease at low rent of his flat at 4, Grayrigge Court. It is dated 31<sup>st</sup> August 1990 for 125 years from 1<sup>st</sup> June 1990.
- 6 The lease contains the terms relevant to the service charge and by common consent the charge includes the cost of maintaining the door entry

system to Grayrigge Court and provides that the cost of replacement of the system should the need arise is a cost that may properly be attributed to the contingency fund for major expenditure into which the various leaseholders contribute on an annual basis. Schedule 4 of the lease deals at length with the service charge and paragraph 10 in particular with the use of the contingency fund for major capital expenditure. In the light of the consensus as to the use of the fund in relation to the door entry system it is not proposed to rehearse those provisions at length within this decision.

### **C. Inspection**

- 7 On the morning of 4<sup>th</sup> May 2010 the Tribunal inspected the development at Grayrigge Court.
- 8 It is a large modern development of 29 flats dating from 1990 situated near the centre of Grange-Over-Sands and within easy reach of all local amenities. The flats within the complex are accessed via a door entry system that operates for the occupants either by way of a door key or what is known as a "PAC-fob": a device that operates the lock remotely if placed within close range of the door entry unit. Visitors operate the system by means of a push-button call to the relevant occupier and are admitted remotely by the operation of the door lock within the relevant flat. The Tribunal also understands that whereas the previous system was connected to the fire alarm system for the development in such a way that a remote call centre could, in the absence of the warden/manager, identify the flat where the alarm originated, this facility is not yet available on the new system although it was intended that this should be so. The effect is that now the call centre has to call the fire brigade who then have to access the building to examine the alarm to identify the relevant flat/area. The call centre cannot identify any particular flat to ascertain if there is a false alarm and avoid a call to the emergency service(s). As this new system was the crux of the application and no other complaint was made in respect to the service charge the tribunal did not feel the need to inspect other aspects of the development in any detail.
- 9 It is conceded by all parties that the cost of the provision of the new system is such that it engages the provisions of Section 20 Landlord and Tenant Act 1985 and the Regulations made in relation thereto for there to be a required consultation process.

### **D. The evidence**

- 10 The Tribunal had the benefit of the statement of case and responses provided by both parties, supplemented by further observations as appropriate, together with a bundle of documents that included a large number of invoices and other information relating to the 2009-10 service charge year and, from the Respondent, of particular importance, the notice of intention to carry out works, specifications, tenders and instructions in relation to the works. Much the same documentation was forthcoming from the Applicant together with a wealth of correspondence generated by the issues surrounding the works involved.

11 Mr Bolton provided a clear and concise annex to the Application, 14 pages in length, that explained the full history of the process whereby the new installation was undertaken and included his argument that the Respondent had not complied with the consultation requirements prescribed by Section 20 Landlord and Tenant Act 1985. The first part of it may usefully be reduced to the following points:

- An original consultation process began on 27<sup>th</sup> November 2008.
- Mr Bolton and other leaseholders challenged the validity of the process on a number of grounds and suggested the timescale for responses from leaseholders was, by accident or design, too short.
- They nevertheless provided details of two contractors from whom estimates might be obtained and raised other salient issues with the Respondents.
- There was then a lengthy period of difficulty between the Respondent and the leaseholders as to whether their observations had been taken into account, responded to, or their suggested contractors' estimates properly considered.

The Tribunal is of the view that these matters need not be further considered by the Tribunal as, for whatever reason, the Respondent embarked upon a new consultation process with effect from 13<sup>th</sup> July 2009.

12 To look in more detail at the specific allegations that the Applicant makes as to the defects in this second consultation process:

- The Applicant immediately pointed out defects in the notice, being the same as in the earlier notice in that the notice did not properly describe the works to be carried out in general terms and restricted the leaseholders to one proposed contractor. The specification for the works deposited in the house manager's office was missing a number of pages. It is not clear from the way The Applicant's case is set out precisely how many were missing and at what time ( see paras 15-16 of his submission).
- A new notice, dated 14<sup>th</sup> July, but backdated to 13<sup>th</sup> July, and specifying a closing date of 13<sup>th</sup> August for observations and nominations of contractors, was then issued.
- The Applicant again challenged the validity of both notices and a reply from the Respondent dated 29<sup>th</sup> July was then received which conceded that errors had been made but indicating that the leaseholders had been put on notice as to what was happening by the earlier notice.
- The closing date for the receipt of tenders was the same date as for representations from the leaseholders (13<sup>th</sup> August).
- Two estimates were received in response to the tendering process initially and following the suggestion of two additional contractors by leaseholders a further estimate dated 16<sup>th</sup> September was obtained from one of those and all three were posted in a notice and statement of estimates although the Applicant advises that there was no accompanying statement of leaseholders' observations and replies.
- Issues then arose as to whether estimates were out of time or amounted to "non-compliant bids" when compared to the specification but notwithstanding those issues the leaseholders and the Respondent separately concluded that one bid from a company called Goldshield should be accepted and a notice proposing acceptance of that bid posted by the Respondent in the

manager's office. Once again the Applicant advises that no summary of observations or responses was provided.

- The Applicant also suggests that by this time two of the estimates had time-expired and not been extended and alterations had been made to the one that was to be accepted, together with an arithmetical error in relation to the amended price.
- The problem with the linkage to the fire alarm system, together with an additional problem relating to access to the emergency key safe then became apparent during the installation process. The Applicant alleges that this is because of unwarranted omissions in the specifications provided by the Respondent.

13 The Respondent made submissions in reply and the following points appear to be the most pertinent:

- In 2008 it became apparent that the warden call system was obsolete and needed replacing.
- The consultation process was started in November 2008 and was subsequently accepted as being defective. Notwithstanding that, the Respondent was engaging with the leaseholders in the process of effecting a replacement.
- The notice starting the second consultation was also defective, the date of the notice, 13<sup>th</sup> July, being the date also specified for the end of the consultation. A replacement notice was issued immediately and the leaseholders were not prejudiced by the defect.
- The process of consultation involved negotiation with two leaseholders on behalf of their colleagues and further estimates obtained as a result of their input.
- Matters were becoming pressing as a result of further failures of the existing system.
- Eventually the Goldshield quotation was accepted, involving an amended specification to include a fob system, apparently at the suggestion of leaseholders.
- The second consultation may not have followed the requirements of statute and regulations but had been carried out within the spirit of those requirements and achieving the aims of the consultation process.
- The Tribunal was asked that if it did not consider the consultation process entirely satisfactory it should exercise its powers to dispense with the process in view of the need to carry out the work and the lack of prejudice to the leaseholders.
- The Tribunal was respectively referred to two cases decided by the Lands Tribunal indicating that the consultation process is not one whereby a party could be punished for a breach of the requirements and that leaseholders should not benefit from an unmerited windfall through limiting the cost payable by them to the £250 provided for in Section 20. ( Those cases, *Eltham Properties Limited v Kenny and Others* and *Hadayah v London Borough of Camden*, may be found respectively on the Lands Tribunal website under reference LRX/16/2006 and the Residential Property Tribunal Service website under reference LON/00AG/LSC/2006/0229.)

14 Section 20 Landlord and Tenant Act 1985 provides

- (1) Where this section applies to any qualifying works...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
  - (b) dispensed with in relation to the works... by (or on appeal from) a leasehold valuation tribunal
- (2) In this section "relevant contribution, in relation to a tenant and any works... 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...
- (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed the appropriate amount
- (4) (not applicable)
- (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 the 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... 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.

15 Section 20ZA Landlord and Tenant Act 1985 provides supplementary requirements for the consultation process:

- (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..., 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 work on a building or other premises...
- (4)... "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.
- (5) Regulations under subsection 4 may in particular include provision requiring the landlord-
  - (a) To provide details of proposed works...to tenants or the recognised tenants' association representing them,
  - (b) To obtain estimates for proposed works...
  - (c) To invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates

- (d) To have regard to observations made by tenants or the recognised tenants' association in relation to proposed works...or estimates
  - (e) To give reasons in prescribed circumstances for carrying out works...
- (6) Regulations under section 20 or this section-
- (a) may make provision generally or only in relation to specific cases, and
  - (b) may make different provision for different purposes.
- 16 The relevant regulations are to be found in the Service Charges (Consultation Requirements)(England) Regulations 2003, particularly in paragraph 7 and Schedule 4 to the regulations in so far as they relate to such qualifying works as were proposed relating to the call system and may be summarised as follows:
- notice of the works must be given to each tenant and any recognised tenants' association
  - specifying in general what the works are
  - why they are considered necessary
  - inviting written observations on the proposals
  - specifying where they are to be sent and by when, together with the date on which the relevant period ends
  - and inviting each tenant and relevant association to propose within the relevant period one person from whom the landlord shall try to seek an estimate
  - if the proposals are to be open for inspection specific details of where and when and at what reasonable hours together with provision for taking or obtaining free copies.
- 17 Thereafter the landlord shall have regard to any observations as are made within the relevant period and where nominations are forthcoming Regulations 11(3 and 4) provide clear rules as to how many estimates and from whom the landlord should seek relevant estimates, depending upon how many nominations are made and from what sources (as between a tenants' association and one or more tenants).
- 18 Regulation 5 requires the landlord to obtain estimates and supply a statement (referred to as the "paragraph b" statement) setting out for at least two of the estimates the cost of the qualifying works according to those estimates, together with a summary of any observations, his response to them and make available copies of all estimates. In accordance with paragraph 6, at least one of the estimates must be from a person wholly unconnected with the landlord and paragraph 7 defines certain situations where the estimator and landlord are deemed to be connected. If the landlord has obtained an estimate from a nominated person then that estimate must be one of those in the "paragraph b" statement.
- 19 Paragraphs 9-11 make provision for making those estimates available for inspection by the tenants and any recognised tenants' association and inviting observations upon them, to which the landlord must then have regard. If thereafter the landlord enters into a contract for the qualifying works he must within 21 days thereafter give reasons for entering into that particular contract and summarise

any observations upon the estimates. Again provision is made for inspection and copying of those documents.

## **F Tribunal's Conclusions and Reasons**

- 20 The works to the door entry system are clearly ones to which the consultation requirements apply as the relevant contribution of each tenant referred to in Section 20 Landlord and Tenant Act 1985 exceeds the currently prescribed amount of £250.
- 21 By common consent the consultation processes (being the consultation begun on 28<sup>th</sup> November 2008 and the second consultation begun on 13<sup>th</sup> July 2009) were defective. So much is clear from the actions of the Respondent in relation to the earlier one and its observations in relation to the second made to the Tribunal.
- 22 The extent and effect of the failures are in dispute. The Respondent may have been implicitly suggesting that the Tribunal should concentrate on the second consultation process given that the Respondent abandoned the first and in effect started again. The first process is however relevant to the issue of a dispensation under section 20ZA, given that the Respondent refers to the problems relating to the existing door entry system being pressing; which may not have been so had the first process been undertaken correctly.
- 23 It is clear that the Respondent tried to engage in a process of consultation to appraise the Applicant and fellow tenants of what was proposed and why and to engage them in the various stages of the tendering and contract process. Equally that consultation was not in accordance with the requirements of the statutory provisions. It is not for the Tribunal then to determine that the process was sufficient, depending upon how near the Respondent was to complying with the requirement, but rather to determine in such circumstances whether or not it is appropriate to dispense with the requirements by granting a dispensation under section 20ZA.
- 24 If dispensation is granted, the Respondent recovers all the costs Of the installation, if not, it recovers only £250 per tenant. As the Respondent argued in its submission there is the possibility of an unmerited windfall to the tenant(s) and a severe financial penalty to the Respondent.
- 25 Any detriment to the Applicant/tenant(s) is, in general, not so easy to establish when the starting position is that they know, once estimates have been submitted and a contract awarded, what their individual costs and contributions are likely to be. In this present case however, opportunities that the tenants have missed through lack of proper consultation that become material:-
  - The outline of the works in general terms in the notice is very brief and the further details deposited are alleged to be without certain pages. (The Respondent does not dispute this in its submissions).



- Either by misunderstanding or poor wording the notice restricts beyond the terms of the statutory requirements the ability to nominate possible sources of tenders.
- The dates specified in the notice appear to restrict the period required by the regime for tenant responses.
- The "paragraph b" statement apparently did not contain all the relevant information required.
- There appears by common consent to be a difficulty in dealing with fire alarms that was not present under the previous system.

At each of those stages it is possible, but by no means certain, that contributions or observations might have been made that were not made, because of the defective information provided.

26 The starting point must be that there is a statutory framework within which the Respondent is required to operate. That framework was put into place to protect tenants in the event of expensive work being required to their homes. It is first of all against that framework that the Respondent must be judged. The effect of any particular failure may or may not be significant. The fact that the issues raised in paragraph 25 cannot easily be considered and answered without a great deal of speculation makes them, in the opinion of the Tribunal, significant.

27 The question then is whether or not it is reasonable for the Tribunal, given the significant failures, to grant a dispensation under Section 20ZA. The Tribunal is asked to consider the financial effects upon the Respondent against an unmerited windfall to the Applicant. The statutory regime does not refer directly to such matters and had they been paramount the Tribunal would have expected them to be identified accordingly. It is the opinion of the Tribunal that the regime does not set out to impose any penalty on a landlord for failing to comply with the requirements: rather that is a consequence of a decision by the Tribunal if it determines that the balance of reasonableness lies with a decision not to grant a dispensation. In this case the Tribunal is of a mind that the failure to comply with the requirements has prejudiced the Applicant significantly and is not persuaded by the argument that the works had eventually become so pressing as to demand a dispensation given the failures in the first consultation process. It is the decision of the Tribunal that it is therefore not appropriate to grant a dispensation.

28 In the light of the above the Tribunal is of a view that in all the circumstances it is appropriate to make an order under Section 20C Landlord and Tenant Act 1985 preventing the Respondent from including any relevant costs of these proceedings before the Tribunal in any subsequent service charge account.



J R RIMMER (CHAIRMAN)  
10 June 2010