3193

Residential Property
TRIBUNAL SERVICE

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE ON AN APPLICATION UNDER SECTIONS 20(C), 20ZA & 27(C) OF THE LANDLORD AND TENANT ACT 1985, AS AMENDED

LON/00AP/LSC/2007/0069

Applicants: Mr P Forrest and Mrs A D Forrest

Respondent: Southwood Hall Estate Limited

Address of Property: 17 Wood Lane
London
N6 5UE

Hearing date: 03 May 2007

Date of Decision: 07 June 2007

Appearances: Mr P Forrest and Mrs A D Forrest — For the Applicants

Mrs Rachel Pierce — For the Respondents

Members of the Residential Property Tribunal Service:

Professor James Driscoll
Mr John Power FRICS
Mr Shirley Baum JP

Residential Property Tribunal Service

Case reference: LON/00AP/LSC/2007/0069

Applications under Sections 20(C), 20(ZA) and 27(C) of the Landlord and Tenant Act 1985

Applicants: Mr P Forrest and Mrs A D Forrest

Respondent: Southwood Hall Estate Limited

Premises: 17 Wood Lane, London, N6 5UE

Date of hearing: 3 May 2007

The Tribunal: Professor James Driscoll, John Power FRICS and Mrs Shirley Baum JP

The Applicants Mr and Mrs Forrest appeared in person.

Mrs Rachel Pierce a director and chair of the directors of the Respondent appeared on their behalf.

DECISION

The decision of the Tribunal is that service charges made for the periods 2005/6, 2006/7 and 2007/8 in respect of fees payable under two successive agreements between the Respondents and Lamberts a firm of managing agents are reasonable and recoverable. The Tribunal also decides that the first of the two agreements is a qualifying long-term agreement but that it is reasonable to dispense with the statutory consultation requirements that should precede such agreements. The Tribunal further decides that the second agreement is not a qualifying long-term agreement. No order is made under Section 20C of the Landlord and Tenant Act 1985. The Respondent is ordered to pay to the Applicants the sum of £100 representing one-half of the application fee.

THE APPLICATION

1 The Applicants seek a determination of their liability to pay service charges for the periods 2005/06, 2006/07 and 2007/08 in respect of managing agents fees. They argue that two successive annual contracts entered into by the Respondent and a firm of managing agents called Lamberts are 'qualifying long-term agreements' (within the meaning of [Section 20 ZA (2) of the Landlord and Tenant Act 1985 (the '1985 Act')). They argue that the Respondent should have complied with the appropriate statutory consultation requirements before entering into these agreements. In consequence, recovery of the costs under each agreement is limited to £100 per year per leaseholder. The Applicants seek also an order Section 20(C) of the 1985 Act limiting recovery of the cost of the proceedings through future service charge demands. They also seek an order that the Respondent reimburse them for the cost of the application fee.

2 Section 20 of the 1985 Act provides as follows:

" *(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.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations 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.] ".

3 Section [20 ZA of the 1985 Act provides as follows:

"(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, and

" qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a) if it is an agreement of a description prescribed by the regulations, or

(b) in any circumstances so prescribed.

(4) In section 20 and this section " 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 or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(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 agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(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. (7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.[...]"

4 The consultation requirements and procedures are contained in the Service Charge (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987).

5 In response to the Applicant's contentions, the Respondent argued that the two management agreements entered into are not 'qualifying long-term agreements'. The statutory consultation procedures do not, therefore, apply. Alternatively, the Respondents argued that if either of the agreements are qualifying long-term agreements, the Tribunal should exercise its discretion under Section 20(ZA)(1) of the Act to dispense with the statutory consultation procedures.

THE PREMISES

6 The subject premises consists of a flat in a building situated on an estate owned by the Respondent,. The estate consists of several blocks of flats and of one block of garages. There are 79 flats in all. The block in which the Applicant's flat is situated is known as Wood Lane They are joint leaseholders under a lease made on the 30 December 1992 between Southwood Hall Estate Limited of the first part (the Respondent to these applications), Southwood Hall Management Limited (referred to in the lease as "the management company") of the second part, and the Applicants of the third part. The management company was formed for the purpose of maintaining and managing the buildings in the estate. The members of the management company are the leaseholders for the time being on the estate. In practice, managing agents have been employed to undertake the day-to-day management.

7 In 1988 the leaseholders on the estate exercised the right collectively to enfranchise under the provisions contained in Part I of the Leasehold Reform, Housing and Urban Development Act 1993. Both the Applicant and the Respondent told the Tribunal that the majority of the leaseholders on the estate participated in the enfranchisement claim and that they are members of both the Respondent which owns the freehold and members also of Southwood Hall Management Limited which has responsibility under the leases for the management of the Estate. It is, therefore, the leaseholders for the time being who both collectively own and control the freehold to the estate and the management company which manages it.

8 The Applicant's lease includes the usual provisions relating to payment of service charges. The services charges are calculated annually from 26 March to the 25th March the following year. The lease fixes their service charge contribution at 1.446 percent of the total service cost during each accounting period. The service charge provisions in the lease also make provision for interim charges to be recovered.

9 It has been noted that the Applicants seek a determination as to the charges of employing managing agents in relation to charges for the three financial periods referred to in paragraph 1 above.

10 The basis of their challenge to the recovery of these charges may be summarised quite shortly. It relates first, to the appointment on 14 October 2005 of a firm called Lamberts (who are Chartered Surveyors) to manage the estate. A full copy of that contract is contained in the Respondent's bundle starting at page 49. This contract entered into by Lamberts Chartered Surveyors and on behalf of Southwood Hall Management Limited on the 7th October 2005.

11 Paragraph 11 of that contract (under the heading "Contract Terms") provides as follows:

> "the initial contract shall be for a period of 12 months, after which time either party may terminate the contract on giving a minimum of 6 months prior written notice. In the case of an unremedied gross breach of contract, the notice period shall be at the discretion of the client.
>
> The contract terms shall be subject to annual review from the commencement date of the contract."

12 According to the Applicants this is a Qualifying Long-term Contract under Section 20(ZA) of the 1985 Act which defines a qualifying long-term contract as a contract entered into by or on behalf of the landlord for a term exceeding 12 months. [There are a number of statutory exceptions to this which are not material to the Applicant's case]. Under Section 20(ZA) of the 1985 Act (and the Service Charge (Consultation Requirements) Regulations 2003), if the cost to any leaseholder exceeds £100 per annum during the period of the contract, recovery from the leaseholders is capped at £100 unless the landlord has carried out the detailed consultation requirements in the 2003 Regulations or this has been dispensed with by the Tribunal. The Applicants also claim that such a

consultation was not carried out. They claim that they asked for proper statutory consultations to take place on several occasions through emails sent to the board of directors of the Respondents, to the current managing agents and to others.

13 The next contract that the Applicants put in issue is a second contract entered into between Lamberts Chartered Surveyors and Southwood Hall Management Limited for the period 14 October 2006 to 13 October 2007 (inclusive). A copy of this contract appears at page 59 of the Respondent's bundle. But a second version of this second contract, was signed by the parties in February 2007. This was to replace the first version of the contract which was signed on behalf of the parties on 19 November 2006.

14 In summary, the Applicants claim that the Respondent entered into what they described as "back to back" contracts, that is to say two successive contracts, both of which are qualifying long-term agreements, without carrying out the required prior consultation required by the legislation. The Applicants argue that the motive for entering into these contracts was to avoid the statutory consultation requirements with all the leaseholders. The Applicants also claim that the Respondent only changed the second contract following a complaint made to the Association of Residential Managing Agents.

15 Asked by the Tribunal about the likely financial consequences to a the estate should the Tribunal determine that recovery is limited to £100 per leaseholder for the duration of each contract, Mr Forrest suggested that the excess of the sums due under the contact would either have to be recovered from the directors who took the decision to enter into these contracts, or by realising some development potential by selling land on the estate. Mr Forrest thought it should be possible to raise this money in one of these ways.

16 The Applicants also told the Tribunal that a statutory consultation is currently being undertaken on behalf of the Respondent for the appointment of managing agents from October 2007 when the second contract comes to an end. However, they believe that the

Respondent has only undertaken this because of the Applicant's reference to the Tribunal in this matter.

THE RESPONDENT'S CASE

17 The Respondent was represented by Mrs Rachel Pierce. She is a director of the Respondent and also currently the Chair of the Directors. She is one of the leaseholders on the estate. She told the Tribunal that all of the directors are leaseholders. There is a common Board of Directors for both the landlord company and the management company.

18 She told the Tribunal about the circumstances in which the first contract was entered into. These events started in June 2005. At that time there had been considerable disagreement between many of the leaseholders and with Mr Forrest who was the then Chair of the Board of Directors of the Respondent. Following a general meeting of the Respondent, Mr Forrest resigned. There were resignations also from a company called Parkwood run by a Mrs Lucy Lowe who had been managing the estate for several years. Mrs Lowe became very upset when she heard that there was a general level of dissatisfaction with the services provided by her company. As a result she informed them that her company would be resigning its contract. There was no written long-term contract. Although Mrs Lowe had decided to resign, she undertook to continue to manage the estate until September 2005 to allow for new managing agents to take over.

19 Mrs Pierce said that she and many of the leaseholders and her co-directors would have preferred Mrs Lowe to continue to manage the estate.

20 At this time there were further pressures created following resignations from the solicitors who were then advising the Respondent and also by the Respondent's auditors.

21 It was, therefore, said Mrs Pierce, a very difficult period for everyone living on the estate. She was one of the new Directors

who were appointed and urgent steps were taken to try to secure the long -term maintenance of the estate. A Director's Sub-committee was set up and a tender document seeking the appointment of new managing agents was drafted. This process was undertaken with a considerable degree of expedition and the tender document was drafted with advice from the Association of Residential Managing Agents. A short list of five companies was made. Following the taking up of references, three of these companies were interviewed by members of the Board of Directors. During these interviews, representatives from each of the short listed companies recommended to the Board that a contract for one year only should be entered into in the first instance. There was, however, no suggestion that this course should be taken to avoid the statutory consultation requirements: it would be sensible for the newly appointed managing agent to demonstrate to the Respondent and leaseholders how well or otherwise they would be able to manage the estate, before committing to a longer-term contract.

22 In the event the contract was awarded to Lamberts Chartered Surveyors. Mrs Pierce said that she and her fellow Board members thought that that contract was a contract for one year that it was not, therefore, a qualifying long-term contract that required a prior consultation under the 2003 Regulations. She pointed out to the Tribunal that such a statutory consultation requirement could not, in any event, have been undertaken in time for new agents to be appointed from the beginning of October 2005 when Mrs Lowe, the current managing agent, was to resign.

23 Mrs Pierce said that she and her fellow Board members were striving to ensure that the estate would continue to be properly managed whilst longer-term arrangements could then be worked out.

24 She also told the Tribunal that she and her board members and many leaseholders were not entirely happy at first with the performance of Lamberts. She said that the manager they employed struggled to contain matters and she also said that part

of the strain on him was that he had received what she described as a barrage of complaints from Mr Forrest.

25 After further meetings with Lamberts it was agreed that this manager would leave his post and would be replaced by a more experienced manager.

26 This explains the background to the decision to enter into a second contract with Lamberts. Once again she and her board assumed that this too was a one year contract and not one that required the statutory consultation procedures to be followed. But later she and others received emailed advice from the Association of Residential Managing Agents (a copy appears on page 20 of the Respondent's bundle). This email suggested that the termination notice provisions in the second contract were ambiguous. As a result this contract could be construed as being a contract for longer than 12 months. This was why she and her fellow board members agreed with Lamberts that a fresh contract should be signed to replace the second contract making it clear that the second contract is for less than 12 months. She said that her understanding was that this second version replaced the first of the signed contracts. She drew the Tribunal's attention to paragraph 11 of the second version of the contract which was signed on 6 February 2007. Paragraph 11 of the amended second contract states:

> "The contract shall be for a period of 12 months only, expiring on 13 October 2007. However, in the case of an unremedied gross breach of contract, the contract may be terminated on such notice as shall be at the discretion of the client"

She said that Mr Forrest is the only one of the 79 leaseholders on the estate who has continued to demand a formal statutory consultation procedure for either of the contracts.

27 She told the Tribunal that she and her fellow Board members are still not satisfied with the performance of Lamberts and has decided to go out to tender before entering into a new contract for the management of the Estate from October 2007 when the current

contract with Lamberts comes to an end. She said that Lamberts will be considered along with any other contractors who tender. She said that the statutory consultation process required by the 2007 Regulations has already started.

THE TRIBUNAL'S DECISION ON WHETHER THE CONTRACTS ARE QUALIFYING LONG TERM AGREEMENTS

28 The Tribunal decides that the first contract which was entered into was intended by the Respondent and by Lamberts to be a contract for one year. However, the wording in paragraph 11 of the first contract can only be construed as an agreement for a term exceeding one year. This is because that contract would have continued at the end of the first year and could only then have been terminated on the giving of six months notice by either party. In other words, the contract would have lasted for at least 18 months. The Tribunal is of the view, therefore, that the Board of Directors at the time had intended to enter into a contract for one year but had inadvertently entered into a contract for a term in excess of this.

29 Turning to the second contract, the Tribunal concluded that the intention of the parties to that contract was again to enter into another contract lasting for one year. Once again they had inadvertently entered into what would have been a contract in excess of that period because the same mistake about the termination clause had been made as was made under the first contract. Following the advice from the Association of Managing Agents, the parties to the second contract agreed to in effect rescind it and replace it with a fresh contract which is for a period of 12 months less one day.

30 The Tribunal concludes, therefore, that this second contract is not a long term qualifying agreement.

31 The Tribunal asked the Mrs Pierce if on behalf of the Respondent she wished to apply for an order dispensing with the statutory consultation requirements in relation to the first contract (under Section 27 ZA(1) of the 1985 Act) in relation to the first contract.

She confirmed that she wished to make such an application. In turn the Applicants confirmed that they agreed to the Tribunal hearing this Application to dispense.

32 In relation to this application, Mrs Pierce reminded the Tribunal of the circumstances and pressures that existed in the period leading up to entering into the first contract with Lamberts. She also reminded the Tribunal that the Respondent and the leaseholders were doing the best they could to put in place new management arrangements following the resignation of Mrs Lowe. Given the size and the complexity of the estate, appointment of new competent managing agents was imperative.

DECISION

33 The Tribunal decides that the contract entered into between the parties in October 2005 was a qualifying long term agreement. The reason for this is that the contract would have lasted for a minimum period of 18 months. It is common ground between the Applicant and the Respondent that the statutory consultation process did not take place. However, the Tribunal decides that it is reasonable in the circumstances of this matter to exercise its discretion to dispense with the consultation requirements for the reasons set out in paragraph 39 below.

34 The Tribunal also decides that the first version of the second contract was rescinded by the parties and replaced by a new version when they realised that a mistake had been made on the termination notice provisions. The new and the current version of the second contract is for a period of one year less one day. That contract, which currently governs the position, will expire in October 2007. Since it is not a qualifying long term agreement no statutory consultation was required.

35 The Tribunal notes that all the parties accept that when Mrs Lowe, the original managing agents tendered her resignation in the summer of 2005 it was have been practically impossible for the full

statutory process to have taken place prior the appointment of new managing agents from the beginning of October 2006.

36 Bearing this in mind and the fact that an estate of this size and complexity requires the employment of professional managing agents, it was imperative and in the best interests of all concerned that the directors entered into the first contract which appointed Lamberts as the new managing agents.

37 The Tribunal also accepts that the Respondent genuinely intended to enter into a contract for one year had quite deliberately (and on the advice of all of the prospective managing agents who had been interviewed) felt that setting up a short-term arrangement would be the best way to proceed. In this way the Respondent could assess the performance of the appointed managing agent during the period of the first contract.

38 The Tribunal notes that the Respondent was not happy with the performance of Lamberts. This is why they decided to enter into a second contract which they also believed would not be a qualifying long term agreement either to give Lamberts another chance to prove themselves.

39 With all these factors in mind the Tribunal is of the view that it is reasonable to make an order under Section 20(ZA)(1) dispensing with the consultation requirements that should have preceded the first contract. In reaching this decision the Tribunal notes the Respondent made efforts through a regular newsletter sent to leaseholders (and at annual general meetings) to explain the current position of appointment of agents to all of the leaseholders. The Tribunal is also of the view that it is relevant when considering whether it was reasonable to dispense with the consultation requirements to bear in mind that this is an estate is leaseholder owned and managed.

COSTS

41 The Tribunal heard arguments on the Applicant's case for an order to be made under Section 20C of the 1985 Act and for an order that the Respondent reimburse them for part or all of the fee

they paid when making the application. For the Respondent, Mrs Pierce told that Tribunal some professional costs have been incurred in obtaining legal advice from solicitors in relation to these applications. The Applicants argued that the decision on the first contract vindicates the position they have taken.

42. The Tribunal decides that no Section 20 C order should be made. It was reasonable for the Respondent to obtain legal advice on these applications. However, the Respondent should pay £100 to the Applicants in respect of the application fee reflecting the decision that the first contract is a qualifying long-term agreement, as the Applicants argued.

Signed... James Driscoll

Dated 7 June 2007