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RESIDENTIAL PROPERTY TRIBUNAL SERVICE,

LEASEHOLD VALUATIONH TRIBUNAL.

Ref:MAN/00CA/LDC/2013/0009.

Landlord &Tenant Act 1985 Sections 20 and 20ZA

28 Flats at Hayward Court, Formby, Liverpool L37 3QP

Riverside Home Ownership *Applicant.*

Mr J E Allen *Respondent.*

Tribunal:

Mrs. A Franks.

Mr M J Simpson

5th June 2013.

Decision.

1. **That the applicant be granted dispensation from the consequences of its failure to consult in accordance with the requirements of S20.**

2. **The Tribunal, considering it just and equitable to do so, directs that none of the costs of the applicant in connection with this application shall be regarded as relevant costs for the purposes of the Service Charge, pursuant to S20C.**

ISP8

Application.

By an application dated 24 April 2013 and lodged with the Tribunal on 26th April, dispensation is sought by Riverside Home Ownership ('RHO') for the admitted failure to consult on respect of Fire Safety works at Hayward Court, the final cost of which was £16,241.95.

There are 28 flats. Accordingly S. 20 applies to any expenditure above £7000 (28 x £250)

Mr Allen was named as the Respondent because he had objected to any sum greater than £250 being taken from the sinking fund. The Tribunal notified all 27 other tenants of the application, as interested parties. None sought to join in.

The landlord's case is that, in 2010, they employed Consultants (Arcus), to survey and report on the need for and cost of Fire Safety works. There had been a previous survey in 2008 for which the budget had been set at £5000. The 2010 report indicated total potential costs of £15,878. During the course of the works some additional work was identified in connection with door closers and electrical testing taking the Final Account to £16241.95.

The landlord and it's consultants aver that because £7700 of the £15,878 were provisional costs they were either not alerted to the need to consult, or took the deliberate decision not to consult. It was previously thought, on the basis of pre-tender estimates of £11,450 that the cost, excluding pc sums of £7700 would be £3750.

Further the consultants aver that at the timed of inspection it was not possible to identify the need for new door closers.

Notwithstanding these failures, the landlord contends that the contract was competitively tendered, checked for value by the consultants, the lowest tender accepted and the works were necessary and properly supervised. There has, they say, been no financial prejudice to Mr Allen or his fellow tenants. In the light of Daejan V Benson dispensation should be granted in full.

Mr Allen's case is that RHO were well aware, in September of 2012, of the potential cost as being well over £7000. RHO paid the Arcus account based on a percentage of £15,878.

The existence of a significant amount of PC sums does not obviate the need to consult.

RHO was aware as long ago as 2008 of the need for Fire Safety works and that the cost, when subsequently analysed in detail, would potentially exceed £7000.

It is disingenuous of Arcus to say that it was not possible to identify the need for door openers until the contact was let and work had begun. The same request of tenants to open their doors for inspection as was made in April 2011 when the works had started, could just as easily have been made in 2010 when Arcus were preparing their Report.

Consultation may have obviated the need for some of the work which, Mr Allen suspects, duplicates previous maintenance work. Consultation would have afforded an opportunity to explain the works and some of the items in the estimates and tenders, such as the 11.10% OH&P. *(In fact a usual factor for Overheads and Profit to be added to the base costs)*

There are still some discrepancies between the invoice amounts and the precise amount claimed by RHO, which would have been avoided or at least explained if consultation had taken place.

Determination of the facts.

In every regard we find the evidence supports Mr Allen's version of events. If he had not queried the reduction in the sinking fund balances the whole issue may have gone by unnoticed.

We prefer his analysis of the information available to RHO and Arcus. The inclusion of large PC sums makes consultation more, not less, necessary. It is just as possible, indeed desirable, to consult on such a contract, as to consult on one with more precise figures.

We find the 'after the event' explanations of RHO and Arcus to be unconvincing.

However we can find no evidence of any prejudice to Mr Allen. There is no evidence before us that the costs were other than properly incurred through a competitive tender process. Mr Allen is free to take issue, by an application under Section 27of Landlord & Tenant Act 1985, with the reasonableness of any of the costs, whether they are duplications and whether they accord with the invoices. He can, if he wishes, challenge the reasonableness of the consultancy fees and the amount of the OH&P. That potential challenge is not inhibited by this application, If any of the costs have not been reasonably incurred, such an application will remedy any prejudice. The prejudice does not arise from the failure to consult.

If he does raise such issues it is incumbent upon both parties to address them in a mature and conciliatory manner so as to avoid, if possible, an unnecessary application,

The Law is clear, as set out in the judgement of Lord Neuberger:-

LORD NEUBERGER (P) (with whom LORDS, CLARKE, SUMPTION agree):

[44] Given that the purpose of the Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under s 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements.

[45] Thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the Requirements, I find it hard to see why the dispensation should not be granted (at

least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be – ie as if the Requirements had been complied with.

[46] I do not accept the view that a dispensation should be refused in such a case solely because the landlord seriously breached, or departed from, the Requirements. That view could only be justified on the grounds that adherence to the Requirements was an end in itself, or that the dispensing jurisdiction was a punitive or exemplary exercise. The Requirements are a means to an end, not an end in themselves, and the end to which they are directed is the protection of tenants in relation to service charges, to the extent identified above. After all, the Requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by, and what amount is to be paid for them.

[47] Furthermore, it does not seem to be convenient or sensible to distinguish in this context, as the LVT, Upper Tribunal and Court of Appeal all thought appropriate, between "a serious failing" and "a technical, minor or excusable oversight", save in relation to the prejudice it causes. Such a distinction could lead to an unpredictable outcome, as it would involve a subjective assessment of the nature of the breach, and could often also depend on the view one took of the state of mind or degree of culpability of the landlord. Sometimes such questions are, of course, central to the enquiry a court has to carry out, but I think it unlikely that it was the sort of exercise which Parliament had in mind when enacting s 20ZA(1). The predecessor of s 20ZA(1), namely the original s 20(9), stated that the power (vested at that time in the County Court rather than the LVT) to dispense with the Requirements was to be exercised if it was "satisfied that the landlord acted reasonably". When Parliament replaced that provision with s 20ZA(1) in 2002, it presumably intended a different test to be applied.

OVERVIEW OF THE ANALYSIS SO FAR

[70] Before turning to the disposition of this appeal, it is worth considering the effect of the conclusions I have reached so far.

[71] If a landlord fails to comply with the Requirements in connection with qualifying works, then it must get a dispensation under s 20(1)(b) if it is to recover service charges in respect of those works in a sum greater than the statutory minimum. Insofar as the tenants will suffer relevant prejudice as a result of the landlord's failure, the LVT should, at least in the absence of some good reason to the contrary, effectively require the landlord to reduce the amount claimed as service charges to compensate the tenants fully for that prejudice. That outcome seems fair on the face of it, as the tenants will be in the same position as if the Requirements have been satisfied, and they will not be getting something of a windfall.

[72] On the approach adopted by the courts below, as the Upper Tribunal said at the very end of its judgment, requiring the landlord to limit the recoverable service charge to the statutory minimum in a case such as this "may be thought to be disproportionately damaging to the landlord, and disproportionately advantageous to the lessees". That criticism could not, it seems to me, be fairly made of the conclusion I have reached.

[73] However, drilling a little deeper, if matters rested there, the simple conclusion described in para 71 could be too favourable to the landlord. It might fairly be said that it would enable a landlord to buy its way out of having failed to comply with the Requirements. However, that concern is, I believe, answered by the significant

> disadvantages which a landlord would face if it fails to comply with the Requirements. I have in mind that the landlord would have (i) to pay its own costs of making and pursuing an application to the LVT for a s 20(1)(b) dispensation, (ii) to pay the tenants' reasonable costs in connection of investigating and challenging that application, (iii) to accord the tenants a reduction to compensate fully for any relevant prejudice, knowing that the LVT will adopt a sympathetic (albeit not unrealistically sympathetic) attitude to the tenants on that issue.
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> **[74]** All in all, it appears to me that the conclusions which I have reached, taken together, will result in (i) the power to dispense with the Requirements being exercised in a proportionate way consistent with their purpose, and (ii) a fair balance between (a) ensuring that tenants do not receive a windfall because the power is exercised too sparingly and (b) ensuring that landlords are not cavalier, or worse, about adhering to the Requirements because the power is exercised too loosely.

Accordingly there is no good reason why the application should not be granted.

The need for the application arises entirely from the applicant's failures and it would be unjust for them to recover any of the costs of this application from the tenant or any of them, through the Service Charge account. We accordingly make a S20C Order.

M J Simpson.

Chairman