LON/00AZ/LSL/2003/0028

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATIONS UNDER SECTIONS 27A AND 20C OF THE LANDLORD AND TENANT ACT 1985 (AS AMENDED)

Applicant: Ms G Hitchcock

Respondent: Three Key Properties Ltd.

Re: Flat 5, 68 London Road, Forest Hill, London SE23 3HQ

Members of the Residential Property Tribunal Service:

Mrs F R Burton LLB LLM MA
Mr J R Humphrys FRICS

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FLAT 5, 68 LONDON ROAD, FOREST HILL, LONDON SE23 3HQ

BACKGROUND

1. This was an application under s. 27A of the Landlord and Tenant Act 1985 ("the Act") for determination of liability to pay service charges. The application was dated 16 December 2003, and was in respect of costs incurred in the service charge year 2002/3 for major works and damp proofing, for which the applicant had paid respectively £700 on 24 January 2003 and £580.64 on 9 June 2003. In order to save costs, the parties agreed that the matter should be dealt with on paper without a hearing, and on 23 January 2004 the Tribunal issued Directions requiring a statement of case by the Applicant to be sent to the Respondent and the Tribunal by 6 February 2004, and a reply from the Respondent, to be sent to the Applicant and copied to the Tribunal by 20 February 2004.

1. The Tribunal then considered the case without a hearing on 24 February 2004.

THE ISSUES

2. The matters raised by the application were as follows: (1) Whether the landlord had complied with the notice procedure laid down by s. 20 of the Landlord and Tenant Act 1985 in relation to the major works. (2) Whether it was correct that the damp proofing work should not be the subject of consultation under the s. 20 procedure. (3) Whether the costs incurred were properly recoverable if the landlord had not so complied.

(1) THE s.20 NOTICE PROCEDURE

3. In her written representations, the Applicant contended that the s. 20 notice procedure had not been properly complied with in respect of the major works. At the time at which the relevant notice should have been given (September 2002) s. 20 of the Act required that

> "Where relevant costs incurred on the carrying out of any qualifying works exceed the limit specified in subsection (3) the excess shall not be taken into account in determining the amount of the service charge unless the relevant requirements have been either (a) complied with, or (b) dispensed with by *the court* in accordance with subsection (9) and the amount shall be limited accordingly".

That subsection formerly permitted the court to dispense with all or any of the relevant requirements if satisfied that the landlord has acted reasonably, although since the amendment of s. 20 by the Commonhold and Leasehold Reform Act 2002 the Leasehold Valuation Tribunal now has this power of dispensation. The Applicant included with her application a copy of the letter dated 27 September 2002 from the Landlord's property consultants purporting

to give such a notice in relation to major works involving the installation of safety railings, redecoration and maintenance at the property, but not attaching the estimates themselves, although a detailed schedule of works was attached on which the prices for each item had been clearly annotated, adding up to the total price for the lowest of the three tenders to which the covering letter referred. The Applicant contended that it was not a valid notice as it did not attach at least two estimates for the works and nor were the estimates displayed in one or more places where they were likely to come to the notice of all the tenants so as to comply with s. 20(4) (a) and (b).

4. In their written representations, the Landlord contended that the reason for not sending with the letter all the tender documents, other than the detailed estimate which it was intended to accept, was to save costs and avoid large amounts of unnecessary paperwork. They explained that in any case often tenders were not priced in detail but were returned merely with a global figure appended. They claimed that sending the tender document from the contractor whom it was proposed to use, plus the figures quoted by the other two contractors who had replied, together with their property consultants' assurance in the covering letter that any discussion in relation to the works should be directed to them as soon as possible, was sufficient compliance with the s.20 procedure.

5. The Tribunal considers that this common sense approach was adequate to comply with the section, especially as the letter dated 27 September 2003 clearly states that the month's consultation period specified by s. 20 (4)(d) will run well beyond the month specified and that the works would not commence until 6 November.

(2) THE DAMP PROOFING WORK

6. In her written representations, the Applicant contended that the Landlord had split this work into two discrete stages, (i) the damp proofing itself, and (ii) the restoration of the plaster, taking the costs below the threshold for consultation under the s. 20 procedure. She says that these items were "artificially separated", and relied on the Court of Appeal case of Martin and another v Maryland Estates Limited [1999] 2 EGLR 53 in support of her argument that the Landlord should have adopted the common sense approach approved in that case and consulted the tenants, especially as the result of splitting the job into two parts undertaken by two different contractors meant that only part of the work was guaranteed by the damp proofing contractor, and the work had in fact not proved entirely satisfactory.

7. In their written representations on this issue, the Landlord stated that they had first attempted to have the plastering reinstatement work paid for by insurers under the buildings insurance, on which they believed there was a valid claim. The "rectification works to eradicate damp" fell below the cost threshold for s. 20 consultation. No s. 20 notice was therefore issued, although in view of the reasons for proceeding in the manner stated there had been no attempt to circumvent the s.20 requirements.

8. The Tribunal considers this to have been a reasonable approach, since the tenants should clearly have had the benefit of their insurance premiums if payment by the insurance company was available. It appears that the fact that it ultimately was not does not detract from the fact that the Landlord had acted reasonably and had an application been made to the court to dispense with the s. 20 procedure to the limited extent of £366.60 above the relevant limit of £1400 which triggered the consultation threshold in this case it seems to us that it would have been likely to have been granted. The Tribunal would certainly have granted such a dispensation had the case come to us under our new powers given by the amendment to s. 20(1)(b) of the Act made pursuant the Commonhold and Leasehold Reform Act. In the circumstances the Tribunal considers that the Applicant may be correct that the Landlords should technically have gone to the court for dispensation from the requirements of the s. 20 procedure once the insurers' position was clarified, although the costs of such an application would obviously have been disproportionate.

(3) RECOVERABILITY OF THE COSTS INCURRED WITHOUT s. 20 CONSULTATION

9. The Applicant contends in her representations that the Landlord should not recover more than £50 per flat but states that she has paid the invoice in question. The Respondent Landlord contends, on the other hand, that the money was not paid on a without prejudice basis.

10. The Tribunal considers that, in view of the fact that the payments in question were made well before the Commonhold and Leasehold Reform Act 2002 changed the law, these payments are caught by the decision in R (Daejan Properties Ltd) v London Leasehold Valuation Tribunal [2001] EWCA Civ 1095, [2001] 43 EG 187 which at the time of payment limited the LVT's jurisdiction in determination of service charges to those which were unpaid. Although the Applicant's application is made under the new s. 27A of the 2002 Act, whereby s. 27A(1) permits the LVT to entertain an application regardless of whether a tenant has already paid the charges now challenged, it is clear that the Applicant has had over a year in which to challenge the costs and she appears to have indicated agreement with the works and their costs, having stated in a letter of 24 January that "the relevant major works have still to be completed and I am concerned that not all the money is released before completion". This would mean that s. 27A4) (a) of the 2002 Act applies as pursuant to that section no application may be entertained under s. 27A(1) where the matter has been "agreed or admitted by the tenant".

11. The Applicant mentions as additional information discontent with the quality of the work done in respect of the damp but provides no further evidence on which the LVT could determine whether the works are of a reasonable standard, nor has the Tribunal had the opportunity to inspect the property, and no determination is therefore made in this respect. The Landlord has not addressed this in his representations and the Tribunal is not aware of the specification of the works carried out. However, the Tribunal notes that the Applicant is in contact with the Landlord and that a guarantee may be in place and hopefully these issues may be resolved. If not, a further application may be

made on this point. The Tribunal's experience suggests that the fact that damp reappears does not in itself mean that the quality of work or the cost of works is unreasonable.

APPLICATION UNDER s.20C

12. The Applicant also applies for an order that the Landlord's costs in relation to the application should not be applied to any service charge, pursuant to s. 20C of the Act. The Applicant does not support this application with any further representations. However the Landlord indicates that legal representation was not sought in view of the disproportionate cost, and on the basis that there will therefore be no costs which could be the subject of a s. 20C order, the Tribunal makes no such order.

DECISION

13. The Tribunal therefore determines that (1) the Landlord has complied with the s. 20 procedure in respect of the major works the subject of the notice letter of 27 September 2002; (2) the Landlord has not artificially split the damp proofing work, and has addressed that matter reasonably; (3) the Applicant has agreed the costs paid on 24.1.03 and 9.6.03, and that there shall be no s.20C order in respect of the costs of this application to the LVT , the Landlord having incurred no such costs.

Chairman.....

Date.....24.2.04