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RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0047/02/13

In the Matter of: Number 132 Hendre Farm Drive, Newport South Wales NP19 9LP (The Flat)

In the matter of an Application under Section 20ZA of the Landlord and Tenant Act 1985 (the Act) and Section 27A (and 19) of the Act

TRIBUNAL P H Williams, Chairman
NFG Hill, Surveyor

APPLICANT Newport City Homes

RESPONDENT Richard Elmes

ORDER

INTRODUCTION

1. We convened as a Leasehold Valuation Tribunal under the provisions of the Act on the 30th April 2013.We had before us an Order of the Newport Gwent County Court dated the 1st February 2013, requiring the Tribunal to determine the relevant issues arising from an Amended Particulars of Claim filed by the Applicant at the Court.

BACKGROUND

2. The Applicant is the freeholder of a block of four flats (the Building) at Hendre Farm Drive of which the Flat forms part. The Respondent is the lessee of the Flat which he sublets. The Applicant and its predecessor in title, Newport Borough Council, had carried out works to the Building since 2006 and thereafter raised Service Charges as listed in Appendix 2 of the papers before us.

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3. The Lease of the Flat is dated the 18th June 1990 and is made between Newport Borough Council of the one part and Terence Leslie Walters of the other part and is a demise of 125 years from the 18th June 1990 at a yearly rent of £10.Clause 5(4) of the lease states that " the Landlord will maintain and keep in good and substantial repair and condition the main structure of the Building including the foundations and the roofs together with its gutters and rain water pipes……". Clause 4 (2) provides that the lessee shall contribute one quarter of the costs expenses outgoings and matters mentioned in the 5th Schedule and the 5th Schedule refers to such matters as those arising under subclauses (4)(5)and (6) of Clause 5.

INSPECTION

4. Prior to the hearing we inspected the Flat and communal areas of the Building in the presence of the Respondent, Ms Sian Jones of Morgan Cole, solicitors to the Applicant and Mrs Lindsay Murphy, the Home Ownership Manager of the Applicant.

HEARING

5. The Hearing was held at Southgate House Cardiff. Ms Jones opened by running through the responsibilities and obligations of the parties as referred to above. She added that the Applicant took over responsibility for the Building on the 9th March 2009 and she produced an extract of the Transfer document between the Council and the Applicant. She also confirmed that under the terms of the transfer the Applicant was entitled to recover any arrears of rent and Service Charges from the tenants. She then addressed each of the items listed in Appendix 2.

   5.1 Service Charge years 2006/07 . Ms Jones stated that the 5th Schedule to the Lease expressly referred to costs and expenses incurred by the Landlord in fulfilment of its obligations under Clause 5 and that the costs were relevant costs under Section 18 (3) of the Act and thus the Management/Administration cost was recoverable for this Service Charge year, as well as for 2007/08 and 2011/12.

   5.2 2006/07. She proceeded by stating that the communal lighting and energy charges were both items covered by Clause 5 (5) of the lease and thus payable by the Respondent pursuant to Clause 4 (2). She made the same point for the years 2007/08 and 2011/12.

   5.3 2006/07. She then referred to the Major Works item. She acknowledged that the Applicant had only sent the Statutory Notice of the 7th September 2006,and which was sent pursuant to Section 20 of the Act and the Service Charges (Consultation Requirements) (Wales) Regulations 2004 (the 2004 Regulations), to the address of the Flat and not to the home address of the Respondent. She contended that as the statutes do not expressly set out that this is not good service, coupled with the fact that service of Notices is not dealt with in the Lease, then it was sufficient for the Council to serve the Notice to the Flat. She further argued that as the Flat was occupied by a subtenant of the Respondent and that there was usually a clause in the Tenancy Agreement obliging the subtenants to forward Notices on to their Landlords then service at the Flat might be sufficient. She then said that should these arguments fail then she wished to make an Application under section 20ZA of the Act for a retrospective determination to dispense with all, or any, of the consultation requirements in relation to any qualifying works. The original Statement of Case of the Applicant had stated in paragraph 11 that the Respondent had not suffered any prejudice by reason of the Notice not having been sent to his home address. Referring to the question of prejudice Ms Jones then mentioned the recent Supreme Court decision in Daejan Investments Limited v Benson and others [2013] UKSC14 (the Daejan Case). At this point we explained to the Respondent that as recently as March of this year the Supreme Court had decided that Daejan should be granted dispensation from the requirements of the 2004 Regulations on terms that Daejan reduced its claim and paid costs to the respondents. It had ruled that the correct question in the case was whether, if dispensation was granted, the respondents would suffer any relevant prejudice and, if so, what relevant prejudice, as a result of Daejan's failure to comply with the Regulations.

   The Respondent was provided with a Press Summary of the case and asked whether he wanted a short adjournment to read the Summary or whether he was content with the explanation given to him. The Respondent opted for the latter and the matter proceeded. Ms Jones stated that as the Respondent had not objected to the works themselves, nor objected to the amount then no prejudice had been suffered by the Respondent. She added that the works became due because of the introduction of the Welsh Quality Housing standards. Further, she referred to paragraph 69 of the Daejan case in which the Supreme Court stressed that the loss of opportunity to make a representation was not a sufficient reason for an Application to fail as it did not show real prejudice to a respondent. Ms Jones then referred to the letter of the 5th December 2012 in which the Applicant offered to cap the Major Works for 2006/07 to £250 as

the Statutory Notice might have been flawed through only having been sent to the Flat. This offer was conditional upon the Respondent contacting the Applicant within 7 days in order to make arrangements to pay the balance of the Service Charges then due. She stated that the Respondent had not complied and accordingly the full amount was now claimed.

5.4 2007/08 Ms Jones, having already dealt with the first two items in Appendix 2 , then addressed the item of major Works. These works involved the replacement of the entrance door of the Flat and the kitchen door to the rear of the Flat and which gives access to the balcony belonging to the Flat. In addition the works include the replacement of communal windows to the Building. There is also a reference to a Fenestration Self Assessment Scheme certificate (the FENSA certificate) concerning the installation of two doors at the Flat on the 13th December 2007 by Brian James Window Group Limited. She stated that the Council's letter of the 8th June 2007 to the Respondent was sent pursuant to the 2004 Regulations and was sent to his home address as was the subsequent letter of the 16th August 2007 giving details of the estimated costs of the works, as was the following letter of the 13th November 2007 in which the Respondent's share of the cost of the work was stated at £1517.63p. She then referred to the Repairs to the block items, the cost of which did not exceed £250 .The works involved the remedying of a defective door entry system and that this door was the entrance door to the communal lobby. There was also a charge to repair the communal door itself, and there was a cost for the fitting of a padlock to a hatch in the communal area and to the cost of a repair to the lead flashing. The total cost to the Respondent for these repairs to the Building amounted to £64.58p

5.5 2008/09, 2009/10 and 2010/11 Ms Jones confirmed that the Respondent had paid these Service Charges in full.

5.6 2011/12 Ms Jones, having already addressed the first two items, then referred to the Repairs to the block items which all related to the roofing works to the Building. She pointed out that the Respondent's share only amounted to £148.68p and as it was under £250 then the works did not involve the consultation process set out in the 2004 Regulations. She confirmed that whilst the roofing works were all carried out by Edwards Roofing they were all carried out separately under invoices dated the 20th November 2011, 6th December 2011, 8th February 2012 and 20th March 2012 and were not part of any Major Works programme.

5.7 The Respondent then replied and explained that he had not been given notice of the Claim issued by the Applicant in the Northampton County Court, as the Court had sent Notices to the Flat and not his home address. Judgment had been obtained against him but had been set aside and the matter transferred to the Newport Gwent County Court. He then responded to the points raised by the Applicant.

5.8 2006/07 The Respondent stated that he had received a letter from the Head of Housing and Area Regeneration in about October 2010 stating that there were no arrears and he maintained that he had paid the sums of £40, £3.89 and £15.25.He produced neither the letter nor evidence of the said payments. He confirmed that he did not receive Notice of the intended Major Works programme as the Notice was sent to the Flat, and that he had been unaware of the intended works. He did not consider that the Major Works were necessary in that the gutters, downpipes and other items did not need replacing.

5.9 The Respondent stated that the front door to the Flat did not need replacing as it had only been installed in July 2006 and he denied that the Council had replaced the kitchen door, which had also been installed by him in July 2006. He did not produce evidence of his purchases and

could not explain why the FENSA certificate related to two doors ,unless the Contractor had made a mistake or that one of the doors did not relate to the Flat at all, but rather a communal entrance door. He also argued that as the communal entrance door was new the Applicant should have made a claim under its guarantee rather than recover the cost from him. He further argued that this cost should have been part of the Major Works. He also took the view that the Major Works for 2006/07 and 2007/08 should be seen as one job as they took place at the same time. He added that in view of the Applicant's letter to him of the 5th December 2012 then both sets of costs for these Major Works should be combined and treated as a 2006/07 item, and that they should then be capped at £250. He also said that he should have been consulted over the Repairs to the block.

5.10 2011/12 The Respondent stated that he was withholding the Management/Administration fee because of the way he had been treated but acknowledged that he did owe £15.70p in energy charges. He also considered that he should have been consulted over the Repairs to the block but he did not object to the amounts involved. The Respondent also said that he tried to pay a sum of £ 301.75p off his arrears but that his payment had not gone through. However, Appendix 5 does show that he had been credited for this sum.

5.11 Ms Jones then stated that Appendix 2, which sets out the Service Charges and the arrears was part of the papers filed at Court and that the Respondent could have produced evidence of any letters or payments as he had plenty of prior notice. Whilst she denied that the two Major projects were in any way linked, she made a further Application under Section 20ZA of the Act for retrospective dispensation. Ms Jones argued the same points for this Application as she had for the first, namely that the Respondent had not been prejudiced and had not objected to either the nature nor the cost of the works, and that Notice of the second Major Works programme had been served on the Respondent at his home address. She also stated that the second set of Major Works were completed on the 13th December 2007 and that the latest that the first set of Major Works could have been completed was March 2007 for it to appear in the 2006/2007 Service Charge year. As regards the two doors to the Flat and the communal external door, she advised that the latter door was installed some two years prior to replacement of the two Flat doors. She added that there was no evidence that the doors did not need replacing and that the Respondent had not produced evidence that the doors had been purchased by him in recent times. She said that all the evidence pointed to the Council's Contractor having replaced both the Flat doors. Further, the Council's letter of the 13th November 2007 gives a price of £820 for the Flat entrance door and £434.70p for the Flat kitchen door. Neither of these figures relate to the communal entrance door, which as a security door would have cost considerably more. She added that it would have cost more to investigate a claim under any Guarantee, particularly given that it was a relatively small charge.

5.12 The Respondent then stated that he was not aware of the second consultation Notice under the 2004 Regulations as the letter had been sent to the Flat. He had discovered this only after he had been sent copies of the correspondence after the event and he referred us to the letter in his possession from the Council dated the 8th June 2007. He did, indeed, have a copy of this letter showing the Flat address but we had a copy of this letter sent to his home address. Mrs Murphy then referred us to a copy of an internal Memorandum of the Council dated the 22nd June 2007 in which she gave her colleague Vanessa Duggan details of the Respondent's tenant and advised that he was waiting for a call to arrange access to the windows at the Flat following a telephone call from the Respondent. She further explained that the Memorandum referred to her maiden name. She stated that her telephone conversation with the Respondent was all to do with the consultation process and related to the replacement of the Flat doors as well as the communal windows and that this contradicted the Respondent's recollection that he

was unaware of the intended Major Works. Further, she considered that the Respondent would have objected at that time to the replacement of the Flat doors if they did not need replacing, but that he had not raised any such objection. She added that FENSA certificates are not applicable to communal doors. She explained that the Flat entrance door cost nearly twice as much as the kitchen door because it was a fire safety door. She explained that the internal Memorandum was dated after the date of the second consultation Notice but prior to the works being carried out. She added that it was the Council's policy to send out letters to both a home address and a property address in Service Charge cases and that the Council had sent further copies of the letters for information only, and not for evidencing which address letters had been sent to.

5.13 The Respondent then argued that the kitchen door was not in keeping with the other doors in the Flat nor in the Building, and that this was evidence that it was his door, and had not been replaced. He repeated that he had evidence that he had purchased the two Flat doors but that he did not have the evidence with him.

5.14 The Respondent stated that the telephone message recorded by Mrs Murphy was only a request to carry out a survey of the windows and he maintained that the two sets of Major Works were carried out at about the same time.

5.15 Ms Jones finally argued that the Respondent was not entitled to withhold the Management/Administration fee, nor any of the Service Charges in view of Clause 3(1)(a) of the Lease which provides that the tenant should pay the rents without any deduction.

6. THE LAW

6.1 Section 20ZA of the Act places a test of reasonableness on whether to dispense with all or any of the consultation requirements in relation to qualifying works. Subclause (4) states that for the purposes of Section 20 of the Act and for this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

6.2 The Secretary of State prescribed the 2004 Regulations.

6.3 Section 27 (A)(1) of the Act provides that an application can be made to a Leasehold Valuation Tribunal for a determination of whether a service charge is payable and if it is, as to the person by whom it is payable, the date at or which it is payable, the amount which is payable and the manner in which it is payable.

6.4 Section 19 of the Act introduces tests of whether relevant costs are reasonably incurred and whether the works are of a reasonable standard.

6.5 Section 20 (c) of the Act provides that a tenant can make an application prior to a hearing, during a hearing, or after a hearing for an order that all or any of the costs incurred 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.

6.6 The Supreme Court has decided in the Daejan Case that the correct test for a Section 20 ZA of the Act application is whether, if dispensation is granted, the tenants would suffer any relevant prejudice, and if so, what relevant prejudice as a result of a Landlord's failure to comply with the 2004 Regulations.

6.7 The 2004 Regulations. The 4th Schedule Part 2 provides that a Landlord shall give notice in writing of an intention to carry out qualifying works to each tenant, shall describe in general terms, the works to be carried out or specify the place and hours at which a description of the proposed works may be inspected, state the Landlord's reasons for considering it necessary to carry out the proposed works and specify the address to which observations may be sent, that they must be delivered within a specified period and the date on which the specified period ends. Subparagraph (3) gives the tenant a right to suggest a contractor of his own.

6.8 Section 18 (3) of the Act states that "costs" include overheads and that costs are relevant costs in relation to a service charge whether they are incurred or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

6.9 Section 38 of the Act defines "address" as meaning inter alia, a person's place of abode or place of business.

7. OUR CONCLUSIONS

7.1 2006/07. The Management/Administration fee of £40 and the communal lighting and energy charges are reasonable and reasonably incurred and hence properly recoverable under the terms of the Lease and the Act. The Respondent did not produce any evidence of payment and we concluded that they were unpaid. It is common ground that the Council did not serve the statutory Notice on the Respondent at his home address and that it was only sent to the Flat. The Respondent denies having received it. Section 38 defines "address" as, inter alia, a person's place of abode. Common sense dictates that Notices should be sent to an address where the lessee will receive them. We do not know whether the Respondent had advised the Council of his home address or whether the Council was aware that the Respondent was not resident at the Flat. In the absence of any such argument by the Applicant we consider that the Council was aware of the true situation as it acknowledged that service might be an issue and offered to cap the claim for Major Works at £250 on terms. We were not convinced by the Applicant's argument that any Tenancy Agreement might oblige a subtenant to forward on Notices to the Landlord. There is no evidence of the existence of a Tenancy Agreement and no evidence that any agreement had that provision. Even if this could be proved we are not minded to accept that this would be good service where an alternative address was known. We have therefore concluded that the Council did not comply with Section 20 of the Act nor with the 2004 Regulations. We then considered the Applicant's application under Section 20ZA of the Act and the implication of the Daejan Case. The Respondent has argued that the major Works were not necessary but we consider that as the works were carried out as a result of the Welsh Quality Housing standards it was not unreasonable for the works to be undertaken. We also noted that the Respondent had not queried the costs of the Major Works and we consider that the costs themselves were reasonable. We then considered whether the Respondent had been prejudiced in accordance with the test set out in the Daejan Case. The Respondent may not have realised that he had the right to suggest to the Council the name of a contractor but we accept the argument of the Applicant that the loss of opportunity to make representations (Paragraph 69 of the Daejan Case) was not a reason for an Application to fail. The Respondent did not make any objection to the Council during the period that the works were being carried out and accordingly we consider that the Applicant should succeed in its Application under Section 20ZA of the Act. We also accept that the Council's offer to cap the cost of the Major Works at £250 was conditional and that the Respondent had failed to take advantage of this, and that the offer therefore lapsed. This is unfortunate from the Respondent's viewpoint, as he could not have been aware of the subsequent Daejan Case which changed the interpretation of the law.

7.2 2007/08. We consider that the Management/Administration fees, communal lighting and energy charges are all reasonable and reasonably incurred. We do not accept the Respondent's argument that these Major Works formed part of the 2006/07 Major Works programme. They were clearly two separate programmes although they might have been carried out within one year of each other. There is, however, a contentious issue regarding the kitchen door to the Flat. The Respondent has stated that the door we inspected was the one he purchased in July 2006, whilst the Applicant maintains that this door was installed as part of the Major Works. The Respondent has not produced any evidence of purchase but has argued that the kitchen door was not in keeping with the other doors in the Flat and in the Building, and that this supports his contention. We were not persuaded by this argument, although we had not inspected the other kitchen doors in the Building. It is clear to us that the FENSA certificate relates to the front Flat door and the Kitchen door in the Flat and not to the front communal door. However, the question does arise as to whether the front door to the Flat and the kitchen door needed replacing, particularly if they had indeed been purchased in 2006. Not having seen either of these doors prior to the Major Works, this is difficult to determine. Even if the Respondent is entirely correct the Council would have had to comply with the Welsh Quality Housing standards and it is certainly possible that neither door was compliant when the Council decided to install the new doors. In our view the FENSA certificate is the deciding factor and we conclude that the Council did replace both doors. If we are wrong as regards the kitchen door then the Respondent will still have a remedy as there would have been a very unfortunate mistake made. We do not accept that the communal entrance door repair formed part of the Major Works programme. Even if it did, the cost would be recoverable in view of our conclusions. Neither do we accept that the Council failed to serve the Respondent with the statutory Notice under Section 20 of the Act and the 2004 Regulations as we have a copy of the letter sending out this Notice on the 8th June 2007 to the home address of the Respondent. Whilst we accept that the Respondent was subsequently sent a copy of the same letter addressed to the Flat, this is easily explained as the Council clearly sent out the Notice to both addresses. We therefore conclude that the Council complied with Section 20 of the Act and the 2004 Regulations and in the absence of the Respondent arguing that the works were unreasonable , other than with regard to the kitchen door, or that the costs were unreasonable, we consider that the Major Works were reasonable and the costs reasonably incurred. We also consider that the evidence of the internal Memorandum of the 22nd June 2007 is additional evidence that the Respondent was aware of the Council's intention to carry out the Major Works. However, we cannot be certain that the Respondent was specifically made aware that the two doors were going to be replaced. In view of the fact that we have determined that the Council properly served the statutory Notice concerning the Major Works it is not necessary for us to determine the Section 20ZA Application. As regards the Repairs to the block charges we accept that as the Respondent's share is less than £250 then no consultation is needed. Further, we consider that these Repairs to the block were reasonable, as were the costs.

7.3 The parties were agreed that the Respondent had paid the Service Charges for the years 2008/09, 2009/10 and 2010/11 in full.

7.4 2011/12. We consider that the management/Administration fees and the energy charges are recoverable for the same reasons as above. The Repairs to the block did not require consultation as they did not exceed £250 and we consider that the works and costs were reasonable. Whilst we agree with the Applicant that the Respondent did not have any right to withhold payment we consider that this is because of the direct covenant in Clause 4(2) of the lease and not Clause 3(1)(a) of the lease as Service Charges are not defined as rent. We also

concluded that there were four separate roofing contracts and that they did not form part of the Major Works programme.

8. COSTS

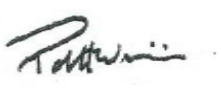
The Respondent has not made any application under Section 20 (c) of the Act and thus no order is made. The Upper Chamber of this Tribunal has issued guidance that as a general rule it is not open to a Tribunal to raise issues that are not raised by the parties themselves, and accordingly this section of the Act was not addressed by the Tribunal at the Hearing. It is noted that the Applicant is claiming interest under Section 69 of the County Courts Act 1984. The Applicant's calculation in the Amended Particulars of Claim appears correct; but we respectfully submit that it is for the County Court to add such interest and that it is not a matter for this Tribunal. We did consider the question of costs against the Applicant following the Daejan Case but concluded that as there was no relevant prejudice then none would be awarded.

9. DECISION

We determine that the works carried out on behalf of the Applicant were reasonably incurred and were for a reasonable amount. Accordingly, the Applicant is entitled to recover the Service Charges of £3011.97p as detailed in Appendix 2, together with such interest as the County Court shall determine pursuant to Section 69 of the County Courts Act 1984.

The Tribunal made its decision on the 30th April 2013

Dated this 16th day of May 2013



CHAIRMAN