Y TRIBIWNLYS EIDDO PRESWYL

RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0040/04/12/Moor Street/Thomas Street

In the Matter of Flat 1 and Flat 2 Number 33 Moor Street Chepstow Monmouthshire NP16 5DB and Number 11 Thomas Street Chepstow NP16 5DD (the Properties)

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

TRIBUNAL	P H Williams, Chairman J Singleton , Surveyor Dr A Ash, Lay Member
APPLICANT	Churn Valley (Monmouth) Limited
FIRST RESPONDENTS:	Mr Fai Woo and Mrs Cui Xiang Woo
SECOND RESPONDENT:	Mr A Short

ORDER

INTRODUCTION

1. We convened as a Leasehold Valuation Tribunal under the provisions of the Act on the 22nd April 2013.We had before us the First Application being an application for the retrospective dispensation of all or any of consultation requirements provided for by Section 20 of the Act and the Second Application being an application for a determination of liability to pay and reasonableness of service charges. The Respondents had both raised objections to the Second Application and the Second Respondent had raised objections to the First Application We consider that the First Respondents objections to the Second Application were also applicable to the First Application and accordingly have treated the First Respondents as objectors to the First Application. In practice we considered the two Applications together.

BACKGROUND

2. The Applicant is the freeholder of the Properties which is a Building currently converted into 3 flats. The First Respondents and the Second Respondent occupy Flat 1 and Flat 2 respectively and those flats front Moor Street whilst the third flat fronts Thomas Street. The Applicant carried out works to the Building in October 2011 and subsequently raised a Service Charge for Flat 1 and Flat 2

LEASES

3. The Lease of Flat 1 is dated the 24th March 2005 and is made between the Applicant of the one part and the Second Respondents of the other part and is a demise for 125 years from the 25th March 2004 at an initial yearly rent of £75 for the first 25 years with specified increases thereafter. Clause 1.3 of the Lease defines the Building as the land and premises owned by the Applicant and known as 33 Moor Street and 11 Thomas Street, Chepstow, Monmouthshire NP16 5DD shown edged red on Plan 2. Clause 1.12 defines (the Service Charge Percentage) as 31.80% subject to a provision for variation contained in the Second Schedule to the Lease. Clause 2.2 provides for the Service Charge payable under the Third Schedule to be paid as rent. The reference to the Third Schedule is in fact an error and should have referred to the Second Schedule. The First Respondents have not taken this point and the Second Respondent has waived any objection to this error. Paragraph 1 of the First Schedule states that, inter alia, the Landlord is to maintain and keep in good and substantial repair and renew or replace when required the " Main Structure " and Clause 1.4 of the Lease defines this as meaning the roof and foundations of the Building and the main load bearing walls of the Building. Paragraph 5 of the Second Schedule provides that the Landlord shall do or cause to be done all works installations acts matters and things as in the absolute discretion of the Landlord may be considered necessary or desirable for the proper maintenance safety amenity and administration of the Building. Paragraph 3.4 of the Second Schedule provides, inter alia, that as soon as convenient after the work has been carried out the Landlord shall give notice to the tenant (Final Notice) setting out the actual cost of the work and the amount payable by the tenant being a sum equal to the Service Charge Percentage of the cost of the work. Paragraph 4 of the Second Schedule provides that the Landlord shall be entitled to charge a management fee equal to 10% of the cost of the work. The Lease of Flat 2 is dated the 2nd August 2004 and made between the Applicant of the one part and Luke Thomas Burwood and Laura Marie Jones of the other part and is on identical terms to the Lease of Flat 1. The current lessee is the Second Respondent.

INSPECTION

4. Prior to the hearing we inspected the third flat fronting Thomas Street in the presence of Mr C Houghton who is a director and shareholder of the Applicant and a solicitor. We also inspected Flat 1 in the presence of Mr Houghton and the Second Respondent.

HEARING

5. The Hearing was held at Southgate House Cardiff.Mr Houghton represented the Applicant and the Second Respondent was also in attendance.
   Mr Houghton explained that the Service Charges arose as a result of works carried out to 11 Thomas Street, being part of the Building. Collett Maintenance had supplied and fitted a steel RSJ beam, installed a concrete pad and built a block pillar for beam support and removed a ramp and filled the floor with concrete at a cost of £1925.00p. During these works it discovered that there were defective joists in the smaller room and these had been had been replaced at a cost of £250.00p.The Applicant had employed Brook and Goodman, Chartered Surveyors to advise on the beam and joists at a cost of £540.00p and also employed GDL Consulting Limited to prepare structural calculation for the beam at a cost of £150.00p. He explained that whilst the beam, pillar and joists were not visible the beam was above the ceiling of the Thomas Street flat, and the pillar was made of breeze block and cladded and was located at the beginning of the bathroom. He then addressed the issue of consultation under the Service Charges (Consultation Requirements)(Wales) Regulations 2004 (the 2004 Regulations). He considered that as his company had obtained 3 quotations for the main work and had written to the Respondents on

3 occasions advising them of the works, then the Applicant had complied with the spirit of the 2004 regulations. He also explained the problem with the joists was only discovered during the preparatory works for the beam and pillar and that it was clearly cost effective for the same builder to carry out the work but that, in any event the joists were in a dangerous condition and needed replacement as a matter of urgency. He added that the cost was modest. He was aware of the Supreme Court's recent decision in Daejan Investments Limited v Benson and others [2013] UKSC 14 (the Daejan decision) and considered that as there was no prejudice to the Respondents then the application for dispensation of all, or any, of the consultation requirements was merited. Mr Houghton then attempted to clarify the situation regarding a payment by the Second Respondent of the sum of £975.00p. He said that this related to arrears of insurance and ground rent demands and was not made in respect of the 2011 Service Charge demand. He also explained that the initial Service Charge demand of £1078.02 was incorrect as it had overstated the Builders' charge and misquoted the fees of GDC limited; but this had been corrected and a fresh demand served on the Respondents. He also accepted that there was an additional mistake in the Service Charge demand for the First Respondents as the wrong percentage had been applied but the correct percentage of 31.80% had now been applied. He had been concerned throughout over his inability to make contact with the Second Respondent other than directing letters to his Agents and he considered that he had done all he reasonably could to explain matters to the Respondents. He then addressed the points raised by the Second Respondent's solicitors, Gisby Harrison in the Statement of case they had prepared for him, and which was signed by the Second Respondent at the hearing. For convenience we shall use the same numbering as contained in the Statement

3A Mr Houghton referred us to the letters to the First Respondents and the Second Respondent dated the 18th July and 8th August 2012 respectively and which clearly state that a summary of the rights pursuant to the Service Charges (Summary of Rights and obligations and Transitional Provisions)(Wales) Regulations 2007 (the 2007 Regulations) were sent

3B He stated that the incorrect and correct Service Charge demands were both dated the 25th December 2011 and that they set out the name of the Applicant, its registered office and telephone number and that the accompanying letters contained the same details together with the registered office and he accordingly disputed any breach

3C Mr Houghton denied that the Applicant had failed to consult as referred to above; but he did accept that it had not invited the Respondents to propose the name of a person from whom the Applicant should try and obtain an estimate for the carrying out of the proposed works pursuant to Paragraph 1 (3) of Part 2 of Schedule 4 to the 2004 Regulations. He argued that any transgression was minor and that the Respondents had not been prejudiced.

3D(I) He noted that the Second Respondent's solicitors were not taking the point that Clause 2.2 of the Lease erroneously refers to the third schedule and not the second. He denied that the wooden beam and pillar did not form part of the Main Structure as they were integral items needed to support the Building. He further argued that the replacement of those items were in any event covered by Paragraph 5 of the Second Schedule. He also expressed the opinion that if they were correct in their argument then the flat would become unsaleable.

3D(2)Mr Houghton did not accept that the substitution of a steel RSJ for a wooden beam and a block pillar were improvements and denied that the words "renew" and "replace" denoted use of the same materials as set out in Paragraph 1 of the First Schedule. He argued that a Landlord was entitled to use modern materials as replacements and that in any event a new wooden beam would have been considerably more expensive.

3D(3) Mr Houghton noted that the Second Respondent's solicitors had clearly not seen the revised Service Charge demand which contained the same figures as set out in the Applications and that their argument was therefore incorrect. Mr Houghton did, however, accept that the charge of £50.00p relating to the ramp should not have been claimed and that the Service Charge demand should be reduced by that amount.

3D(4) Mr Houghton stated that the joists had to be reinforced and that the Respondents had been made aware of this, a demand had been served showing the cost and that joists form part of the Main Structure, failing which the cost were covered under Paragraph 5 of the Second Schedule to the Lease.
E. Mr Houghton acknowledged that there was a history of leaks from the bathroom of Flat 1. Indeed, it was such a leak that caused a collapse of the ceiling to the third flat when it was commercial premises and that this occurred in approximately 2010. The Applicant tried to get the First Respondents to remedy the problem as the bath and waste pipes therefrom were their responsibility. However, in the absence of any action the Applicant did send in a builder to carry out some remedial work but had to resort to a Section 146 of the Law of Property Act 1925 Notice to force the issue. The First Respondents subsequently took action to seal the bath surround and it is believed that this has resolved the problem. The fact remained that the beam was at least 100 years old and the damage was such that it needed replacement. Mr Houghton did not accept that the leak from the bathroom could have caused the water damage to the beam although it could have been a contributing factor. Accordingly, he did not consider that it would have been reasonable to solely claim off the First Respondents. He also did not believe that there was any prospect of successfully claiming off the Insurers for such an old beam. He concluded that it was reasonable to treat the replacement of the beam as a Service Charge item, particularly as the Applicant would then be contributing to the cost as owner of the third flat.
F. Mr Houghton stated that although the necessity for the works only became apparent during the conversion of the commercial premises to a flat the work was necessary for the integrity of the Building and the cost of the work was therefore claimable.

Mr Houghton then addressed the two issues raised by the First Respondents in Evans and Ellis's letter of the 19th February 2013. He said that there was no evidence that Collett Maintenance were not competent. The work was completed in October 2011 and the Building Inspectorate had passed the work. Mr Houghton denied that any of the damage was caused as a result of default by the Applicant whilst effecting repairs to the roof and rear wall of the Building and nor had the Applicant allowed rainwater ingress over a substantial period of time. He recollected that about 6 years ago the adjoining owner rendered his property which caused a roof problem at the Building. The Building Inspector ordered the adjoining owner to rectify but that there was no evidence that this in any way affected the beam.

Mr Short then stated that he genuinely did not believe that the Service Charges had anything to do with him as he felt that there should have been an insurance claim and that it was the First Respondents who had caused the problem to the beam through the bath leak. He also felt that the Applicant should have made direct contact with him and produced photographs of the beam and pillar. Mr Houghton responded that he had made every effort to contact Mr Short but telephone calls were not returned and he had no home address for Mr Short and had to resort to sending letters to him via his Agents. Furthermore the Agents had refused to disclose his address on the grounds of confidentiality. It appeared that Mr Short had, in fact, received the correspondence from his Agent Mr Houghton continued by stating that Mr Short had not made any contact during the period of the building works to discuss the matter and had not requested photographs. Mr Short complained about vegetation and the absence of a down pipe to the front of the Building in Moor Street. Mr Houghton acknowledged that he was also disappointed to find these defects and that they would be remedied, although this would mean another Service Charge demand in time. Mr Houghton advised that the First respondents had accepted the revised Service Charge demand and were paying by instalments .He added that the figures would be adjusted by omitting the sum of £50 referred to above.

6. THE LAW
   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.
   2. The Secretary of State prescribed the 2004 regulations
   3. Section 27A(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 person to 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.
   4. Section 19 of the Act introduces tests of whether relevant costs are reasonably incurred and whether the works are of a reasonable standard
   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. The Supreme Court has decided in the Daejan Case that the correct test for a Section 20ZA 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.
   7. The 2004 Regulations. The 4th Schedule Part 2 provides that a Landlord shall give notice in writing of 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 with a specified period and the date on which the specified period ends. Sub paragraph (3) is referred to above and gives the tenant a right to suggest a contractor.

7. Our Conclusions

   7.1 The Applicant did not serve the prescribed Notice under the 2004 Regulations but it made efforts to explain the necessity for the works and the cost thereof and that the Respondents did not raise any objections until after the work had been completed. We shall address the question of prejudice hereafter.

   7.2 Referring to the Second Respondent's Statement of Case and using the same numbering we concluded that:-

   3A The Applicant was not in breach of Section 21B of the Act in that there is clear evidence that it did serve a summary of the tenants rights and obligations in accordance with the 2007 Regulations
   3B The Applicant did not breach Section 48 of the Landlord and Tenant Act 1987 as the Service Charge demand and accompanying letter contained the name, address and telephone number of the Applicant.
   3C There was a breach of the 2004 Regulations as referred to above.
   3D(1) That the beam and pillar do form part of the " Main Structure " .A beam enables the main load bearing walls to remain standing and the beam needed to be supported by the pillar. Further Paragraph 5 of the Second Schedule is drafted widely enough to cover these remedial works in any event. There is an error in the Leases as regards a reference to the Third Schedule rather than the Second Schedule, as referred to above, which the parties might well wish to rectify in order

to make the Leases marketable but in the absence of any issue being taken by the parties we have accepted that this was either a typing or drafting error and should not prejudice the parties for the purpose of our determination
3D(2) It is perfectly acceptable to replace a beam and pillar with modern building materials and we do not consider such replacements as improvements. Nor do we accept such a narrow interpretation that renewal or replacement means having to use the same materials. We agree with the Applicant that a replacement wooden beam would have resulted in a much greater cost. Such a narrow interpretation would also mean that the marketability of the leases was likely to be adversely affected.In any event Paragraph 5 of the Second Schedule would, in our view, enable the Applicant to replace the beam and pillar
3D(3) It is clear that the Second Respondent's solicitors had not seen the replacement Service Charge demand which equates with the claim set out in the two Applications. Accordingly, the Service Charge demand complies with the definition of " Final Notice " contained in paragraph 3.4 of the Second Schedule to the lease.
3D(4) The revised Service Charge demand does refer to the cost of £250.00p for the joist treatment and we consider that the joists are part of the " Main Structure "and would, in any event, be covered by Paragraph 5 of the Second Schedule

E On the 25th July 2011 Brook and Goodman wrote to the Applicant stating that due to significant water damage from the bathroom above the timber beam supporting the floor above was in a very poor condition and advised that it should be replaced. Whilst we have not seen the timber beam it is clear that it must have been substantial and load bearing. The evidence available to us is that there was a leak in the bathroom for several years which the Applicant tried to remedy but was subsequently repaired by the First respondents' builder. Further, the First Respondents have referred to a problem to the roof some years previously but which now appears to have been rectified. We do not believe that the roof problem would have affected a beam above the ceiling to the third flat but it is possible that the bathroom leak in Flat 1 did contribute to the deterioration of the beam. The evidence before us is that the beam was at least 100 years old. Indeed, it might well have been the original beam. The Building is considered to be at least mid Victorian if not older. We have concluded that it was not the relatively recent leak from the bathroom that would have caused the beam to have deteriorated to the extent where it needed replacing, although it might have contributed to the decay. Accordingly we consider that it was only reasonable for the Applicant to replace the beam, pillar and joists in order to maintain the integrity of the Building. It is not within our remit on whether the Applicant should have submitted an insurance claim

F We do not accept that the works were only undertaken to enable the Applicant to convert the Thomas Street premises from commercial to residential use. The works were part of the Main Structure of the Building and the Applicant was obliged to remedy the defects for the protection of the Respondents as well as itself.

7.3 There is no evidence to suggest that Collett Maintenance is not competent and given that no problems have arisen and the works have been passed by the Building Inspectorate we do not accept the point made by the First Respondents.

7.4 The Respondents have not made any application under Section 20 (C) of the Act regarding costs. The Upper Chamber of this Tribunal has decided that it is not generally open to Leasehold Valuation Tribunals to raise issues that the parties have not themselves raised. Further, the Respondents did not respond to the Second Application form which enquires whether the tenant wants to make an application for an Order under Section 20 (C) of the Act.

7.5 Regarding the question of prejudice, as mentioned in the Daejan Case, we considered the breach of the 2004 Regulations in that a prescribed Notice was not served. We appreciate that the Applicant did make the Respondents aware of the necessity for the works, obtained 3 estimates and gave an indication of the costs involved. The Respondents did not, apparently, reply to any of the correspondence and nor have they argued that the costs were unreasonable or were not necessary. We also noted that the Applicant opted for the lowest estimate for the work to the beam. We considered that it was the failure to invite the Respondents to nominate their own builder for the purposes of the estimate exercise that was the area that might have caused prejudice. Against this, the Respondents have not submitted any evidence that a builder could have carried out the work more cheaply and our view is that the estimate from Collett Maintenance was very competitive. We came to the conclusion that the Respondents had not suffered prejudice. Given that the problem with the joists were not discovered until the other works had commenced we believe it was reasonable for the Applicant to proceed without delaying for further estimates, especially as it had been advised that the position was serious. We therefore follow the Daejan case and determine that the Applications shall not fail on the grounds of a failure to strictly comply with the 2004 Regulations as the Respondents were not prejudiced.

8. 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 as set out in the revised demand dated the 25th December 2011, subject to a further adjustment as conceded by the Applicant

The revised calculation is as follows :-

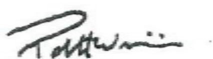
SERVICE CHARGE 2011

Structural repairs/works at 33 Moor Street Chepstow and 11 Thomas Street Chepstow

Collett Maintenance		250.00
Collett Maintenance		1875.00
GDC Consulting		150.00
Brook and Goodman		540.00
		2815.00
Service Charge Percentage for Flats 1 and 2	31.8%	895.17
Management charge paragraph 4 Second Schedule to the Lease		89.52
TOTAL		**£984.69p**

The total of £984.69p is now recoverable from both the First Respondents and the Second Respondent

Dated this 7th day of May 2013



CHAIRMAN