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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/21UD/LSC/2014/0017**
Property	:	**Flat 2, 4 De Cham Avenue, St.. Leonards on Sea, East Sussex TN37 6HE**
Applicants	:	**Darren Barnes and Shellie Barnes**
Representative	:	**Mr N Ostrowski, Counsel**
Respondent	:	**Powell & Co. Property (Brighton) Limited**
Representative	:	**Mr Sean Powell (Director)**
Type of Application	:	**Liability to pay service charges under section 27A Landlord and Tenant Act 1985 ("the Act")**
Tribunal Member(s)	:	**Judge E Morrison (Chairman)** **Mr N I Robinson FRICS (Surveyor Member)** **Miss J Dalal (Lay Member)**
Date and venue of hearing	:	**18 June 2014 at Bexhill Town Hall**
Date of Decision	:	**10 July 2014**

DECISION

The Applications

1. On 17 February 2014 the Applicant lessees applied under section 27A of the Act for a determination of their liability to pay service charges for service charge years 2011-12, 2012-13 and 2013-14. The Respondent is the freeholder of 4 De Cham Avenue.

2. The Tribunal also had before it an application under section 20C of the Act that the Respondent's costs of these proceedings should not be recoverable through future service charges.

Summary of Decision

3. The service charges recoverable by the Respondent from the Applicants are determined as follows

Year	£
2011-12	804.81
2012-13	867.30
2013-14	1279.25

In respect of 2011-12 and 2013-14 the determination is provisional but will become final if no application under section 20ZA of the Act is lodged by 4 pm on 7 August 2014. If such an application is made, the determination may be subject to upward variation dependent on the outcome of that application.

4. An order is made under section 20C of the Act.

The Lease

5. The Tribunal had before it a copy of the original lease for Flat 2, 4 De Cham Avenue. The lease, dated 21 August 1987, is for a term of 99 years from 25 March 1987 at a yearly ground rent of £50.00 for the first 30 years and rising thereafter. On 19 June 2013 the original lease was surrendered and a new lease granted for 189 years from 25 March 1987 at a peppercorn rent. All material provisions with respect to insurance and service charge in the original lease were incorporated into the new lease.

6. The relevant provisions in the lease may be summarised as follows:

   (a) The lessee covenants to pay to the lessor on demand one third of the lessor's cost in insuring the building (clause 2);

   (b) The lessee covenants to pay to the lessor by way of service charge one third of the lessor's expenditure as mentioned in the Fifth Schedule (clause 5(ii);

(c) The lessor covenants to maintain repair and renew the main structure, which includes the roof, and to insure the building;

(d) The Fifth Schedule sets out the service charge expenditure, which includes the cost of maintaining repairing and renewing the main structure, the fees of the lessor's surveyor "in connection with the supervision of and carrying out or prospective carrying out of any of the repairs and maintenance referred to", the costs incurred in management and administration of the building, and provision for a reserve fund "to meet the future liability of carrying out works to the Building or the [flat] with the object so far as possible of ensuring that the contributions payable by the lessee shall not fluctuate substantially in amount from time to time";

(e) An on account payment of the service charge is payable on each 25th March and within 28 days of any subsequent demand;

(f) The service charges for each period shall be certified after the end of the period and the lessee shall then pay any balance due or be given a credit for any amount overpaid.

The Inspection

7. The Tribunal inspected the subject property on the morning of the hearing, accompanied by the Applicants and by Mr Goubel of the Respondent company. 4 De Cham Avenue is a mid-terrace three storey house built approximately 100 years ago and subsequently converted into three self-contained flats. The front elevation is brick bay fronted to the ground and first floor levels with a rendered mock Tudor section above which is in line with the front of the bays and therefore protrudes beyond the main front wall of the house. Unusually for a terrace house, the roof ridge runs front to back so that there are valley gutters between the subject house and those either side. The south facing rear of the property could be inspected via a pedestrian pathway accessed from De Cham Road. From the pathway, one could see the rear of the main building together with a two storey rear addition probably built at the same time as the main house with mainly brick and painted elevations and, on what appears to have originally been a flat roof, a further, more modern, extension was just visible. Areas of the brick have been rendered and painted.

8. The Tribunal was able to inspect Flat 2, which is on the first floor, in particular the living room at the rear, and the more modern extension above, including the surrounding balcony walkway. Internally, the inspection concentrated on the Flat 2 living room where a damp patch was still visible at high level on the west facing wall approximately half way along. This was noted to be the patch that originally started the concerns with the roof etc. above. Other areas to the ceiling and walls were pointed out where water penetration had occurred following the

initial works and where a section of plasterboard ceiling had fallen down as a result of the water penetration. The Tribunal's attention was also drawn to some damp /condensation staining visible under the rear south facing bay window to the living room.

9. The Tribunal then visited Flat 3 above and went out on the balcony / walkway area. Access was obtained via a set of UPVC doors. It appears that the area above the lounge to Flat 2 may originally have been a flat roof but this is by no means certain as other properties in the terrace have a mixture of flat roofs and mono-pitched roofs at this level. Whatever the original layout, at some stage, possibly when the conversion to flats was undertaken, an extension was built to form a living room for the top floor flat. This extension is not built directly on top of the original addition walls but set back on the south (rear) and west sides to create a balcony / walkway of approximately 1/1.5 metres width. The extension itself is anticipated to be of lightweight timber construction but finished externally with tile hanging. The nature of the design of the original building and the modern extension together with the exposed south facing elevation suggested to the Tribunal that ongoing careful maintenance is particularly important.

10. From the Tribunal's brief inspection, the building generally appeared in fair order although it was obvious that some repairs and redecorations were necessary. It could be seen that the balcony / walkway had been re-covered but the flat roof above could not be reached. At the time of the inspection, the Applicants were not complaining of any further water penetration although the damp staining in the living room referred to above, was understood to remain unresolved.

Procedural Background

11. A case management hearing was held on 11 March 2014, following which Directions were given that identified the matters in dispute and provided, amongst other things, for the parties to prepare statements of case and witness statements, and to produce copies of the documents they relied upon. Permission was also given for each party to rely on evidence from an expert surveyor.

12. It was noted that the Respondent might wish to make an application under section 20ZA and provision was made for this to be heard with the main application provided that it was made by 1 April 2014. In the event the Respondent made no application under section 20ZA prior to the hearing.

Representation and Evidence at the Hearing

13. In accordance with the Directions, the Applicants prepared the Bundle. This ran to 611 pages.

14. The Applicants were represented by Mr N Ostrowski, who provided a Skeleton Argument and Chronology. At the outset of the hearing, Mr Ostrowski applied to introduce a further witness statement from Shellie Barnes. The Tribunal was told this provided an update on the damp situation in the Applicants' flat. The Respondent objected to the lateness of the statement. The Tribunal declined to admit the statement, there already being sufficient information as to the condition of the flat, which the Tribunal had viewed in any event at the inspection.

15. The Respondent appeared through its directors. Mr S Powell and Mr P Goubel. Mr Powell took the lead in presenting the Respondent's case.

16. The Tribunal heard oral evidence from each Applicant, and their witnesses Mr Jed Francis and Mr Roy Jupp, all of whom had provided witness statements. On the Respondent's side, only Mr Goubel had provided a witness statement, but Mr Powell had signed the statement of case verified by a statement of truth. Both gave oral evidence. The Respondent had also obtained a short witness statement from Tracey Snooks, the lessee of Flat 3. She did not attend the hearing.

17. Each party had filed a report from an expert surveyor and a joint statement had been prepared noting areas of agreement/disagreement. Sensibly, in order to reduce costs, the experts did not attend the hearing.

The Law and Jurisdiction

18. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable, even if it has been paid.

19. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard. If service charges are paid in advance the amount must be reasonable, and after the costs are incurred any necessary adjustment shall be made.

20. Section 20 of the Act provides that where costs have been incurred on qualifying works, the relevant contributions are limited to £250.00 per tenant unless the consultation requirements have been either complied with or dispensed with by the determination of a Tribunal.

    Details of the consultation requirements are contained within a statutory instrument entitled Service Charges (Consultation Requirements) (England) Regulations 2003, SI 2003/1987. These were

conveniently summarised in *Daejan Investments Ltd v Benson* [2013] 1 WLR 854 (SC) at [11] as follows

Stage 1: Notice of intention to do the works
Notice must be given to each tenant and any tenants' association, describing the works, or saying where and when a description may be inspected, stating the reasons for the works, specifying where and when observations and nominations for possible contractors should be sent, allowing at least 30 days. The landlord must have regard to those observations.
Stage 2: Estimates
The landlord must seek estimates for the works, including from any nominee identified by any tenants or the association.
Stage 3: Notices about Estimates
The landlord must issue a statement to tenants and the association, with two or more estimates, a summary of the observations, and its responses. Any nominee's estimate must be included. The statement must say where and when estimates may be inspected, and where and by when observations can be sent, allowing at least 30 days. The landlord must have regard to such observations.
Stage 4: Notification of reasons
Unless the chosen contractor is a nominee or submitted the lowest estimate, the landlord must, within 21 days of contracting, give a statement to each tenant and the association of its reasons, or specifying where and when such a statement may be inspected.

21. Under section 20C a tenant may apply for an order that all or any of the costs incurred by a landlord in connection with proceedings before a tribunal 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 or any other person or persons specified in the application.

The issues

22. The following were identified and agreed as the issues for determination:

- The reasonableness and recoverability of service charges representing the cost of four distinct sets of major works to the roof and other external areas. These comprise:

  (1) Two sets of works carried out by Alan Haldane in 2011-12 costing £3700.00 and £3600.00 respectively

  (2) Works carried out by Westoaks in 2012-13 (but billed in 2013) costing £1758.00

  (3) Works carried out by Westoaks in 2013-14 costing £13300.80 plus surveyors' fees of £1330.08

- The reasonableness of the insurance premium in 2011-12.

- The reasonableness of the Reserve provision of £600.00 in 2012-13 and 2013-14.

- The reasonableness of surveyors fees of £540.00 in 2012-13 and £270.00 in 2013-14.

- The reasonableness of management fees of £600.00 in each of 2011-12, 2012-13 and 2013-14, and an additional management fee of £1330.08 in 2013-14.

  The Applicants have paid one-third of all the above costs as demanded.

- Whether an order should be made under section 20C.

The Major Works

Chronology

23. In order to consider the Applicants' objections to the charges for the major works, it is necessary to set out the sequence of events. The following essential facts, as put forward by the Applicants, were not challenged by the Respondent and are therefore accepted by the Tribunal. The numbers in brackets refer to the relevant page(s) in the Bundle.

- In 2006 the felt covering to the balcony roof directly above the Applicants' living room was renewed by Mr Jupp of Southern Roofing (144).

- In March or April 2011, just after the Respondent had acquired the freehold, the Applicants put the Respondent on notice of a damp patch on the west-facing wall of their living room (123).

- By 17 August 2011 the Respondent had obtained estimates from three contractors to undertake roof works (298).

- A Stage 1 section 20 notice was issued by the Respondent on 26 September 2011 describing the proposed works as "Works to the flat roof/balcony area which is causing penetrating damp into the building" (78).

- A Stage 3 section 20 notice along with three contractors' estimates was issued on 28 October 2011 (302).

- Mr Haldane had provided two estimates, one for £1700.00 (336), one for £3700.00 (337). They were identical save that the higher estimate included "a contingency for unidentified problems". The higher estimate was the one provided with the stage 2 notice.

- The Applicants made no observations in relation to either notice.

- On 4 November 2011 the Respondent wrote to the Applicants stating they were going to instruct Mr Haldane and inviting them to agree to a start date of 21 November (303)

- The Applicants agreed that Alan Haldane should start work on 21 November 2011 (84). The work took about a week (125).

- Immediately afterwards the Applicants experienced serious water ingress (125).

- Alan Haldane was instructed by the Respondent to carry out further work on the top flat roof (126).

- There was no section 20 consultation in respect of this work, which cost £3600.00, but the Respondents gave written consent on 7 December 2011 for the work to go ahead (84).

- Mr Haldane carried out the work on the top flat roof in December 2011 and January 2012(126). This set of works cost £3600.00. Over Christmas the Applicants suffered more serious water ingress (127) and ingress continued after the work was completed (128-129).

- In April 2012 the Applicants asked Mr Jupp to attend. He found the new felt was not properly adhered especially around the upstands and he torched it down (145) and applied some Isoflex coating to the outlet areas by way of temporary repair (244). This improved but did not entirely cure the water ingress (130).

- The Respondent instructed Meridian Surveyors to inspect and report. The report, written by Mr Boles, is dated 1 May 2012 (242). In summary, Mr Boles stated that much more extensive work was required to the area where the felt met the abutments and to the surrounding parapets. Work was also required to the external walls.

- On 17 June 2012 part of the Applicants' living room ceiling fell down, injuring Mrs Barnes (132, photographs).

- The Applicants instructed their own surveyor, Mr Goddard of ACC. In July the parties, their respective surveyors and a contractor named Westoaks met at the property. Westoaks had been brought in by Meridian. Mr Goddard suggested a full survey be carried out (132-133)

- Scaffolding was erected by October 2012. Without section 20 consultation, Westoaks proceeded to carry out a limited amount of work on and around the balcony flat roof. The cost of this work was £3192.00 (116). Originally the lessees were asked to pay this amount (116, 271) but they were then given a credit of £1434.00 "for work

carried out to correct the original contractor's work on the roof" (119, 277). The cost per lessee was therefore reduced to £586.00.

- A Stage 1 section 20 notice was issued by the Respondent on 28 November 2012 proposing the preparation of a full surveyor's report for tender based on carrying out all necessary work on and around the balcony flat roof and adjacent areas (304).

- The Westoaks patch repair did not fully cure the water ingress. Over Christmas 2012 there was a new point of water ingress. Mr Jupp attended and laid tarpaulin on the balcony roof as a temporary remedy (135-136).

- Tenders for the main works were obtained based on a detailed Schedule of Works prepared by Meridian.

- A Stage 3 section 20 notice was issued by the Respondent on 8 April 2013, listing 3 estimates and stating these were available for inspection (105-107). One estimate, and the cheapest, was from Mr Jupp (Southern Roofing), who had been nominated by the Applicants.

- On 22 May the Respondent wrote to the Applicants stating that it was clear that Westoaks were the best contractor to carry out the works for reasons set out in previous correspondence (307).

- Westoaks proceeded to carry out the works, commencing in September 2013. Westoaks charged £13300.80 inc. VAT (292). There is no complaint about the standard of this work.

First set of works by Alan Haldane – Balcony roof, Nov 2011, cost £3700.00

24. The Applicants' case was that these costs were not reasonably incurred, nor carried out to a reasonable standard, with the result that, pursuant to section 19, they should not be recoverable through the service charge.

25. It was argued that the costs had not been reasonably incurred because there had been no proper investigation of what work was needed. There had been no survey. The balcony roof had been renewed only 5 years earlier. As Mr Haldane' work had not resolved the damp problem, it had been shown to be unnecessary. Furthermore Mr Haldane was not a suitably qualified contractor to undertake roof work. His estimates were provided on business stationery which described him as a "Traditional Decorator".

26. The Applicants also submitted that Mr Haldane's work had not been carried out to a reasonable standard. Immediately afterwards, the water ingress problem had got much worse, a fact not in dispute. Both Mr Boles of Meridian and Mr Goddard from ACC criticised aspects of the

work to a greater or lesser extent in their respective reports. Mr Jupp was also very critical.

27. It was also argued that the Respondent had failed to comply with the Section 20 consultation requirements. Specifically, there had been no Stage 4 notice notifying the lessees of the reason for selecting Mr Haldane, who was not the cheapest contractor.

28. The Respondent's case was that the costs had been reasonably incurred and that Mr Haldane was a suitable contractor. Mr Goubel explained that he had located three contractors through a Google search. He had taken them up to the balcony roof and asked them what work was needed. None of the contractors thought that a survey was required. They all said the balcony roof needed to be replaced and pointed out sponginess under the felt which they said indicated water was getting into the building. Mr Haldane was chosen to do the work as he "seemed the best" and "gave me the most comprehensive solution". Mr Goubel denied Mr Haldane was only a decorator and said he had found him through a Google search for "roofing contractors".

29. With respect to the standard of work Mr Goubel told the Tribunal that Mr Haldane's work needed some correction, but that the Respondent had paid for this.

30. On the section 20 issue, the Respondent relied on the Applicants' written agreement that Mr Haldane should start work before the expiration of the second consultation period.

31. Determination. Initially the Applicants' complaint was limited to a damp patch on the wall. The Respondent had no reason at that point to suspect that extensive repair works would be required. The failure to obtain a full report from a surveyor at that stage cannot be considered unreasonable. This would have been expensive and may well have required opening up the roof in any event. That three contractors all recommended the same work indicates that it was a reasonable course of action. The fact that the balcony roof had been renewed only 5 years before does not contradict this, because, as a balcony, it was used by those living in Flat 3, and would be susceptible to damage as a result. Without the benefit of hindsight, the decision to proceed with these works was not unreasonable. In answer to the hypothetical question of whether the landlord would have gone ahead if paying itself, the Tribunal replies in the affirmative.

32. The Tribunal does not accept Mr Goubel's oral evidence that the three contractors were located through a search specifically for roofing contractors, because the documentary evidence shows that the contractors were initially contacted pursuant to a section 20 notice concerned with decorative work to the internal common parts. However it is clear that these same contractors were also asked to consider and provide estimates for the roof works. Mr Haldane may not have been a roofing specialist but neither were the other

contractors. The Tribunal accepts Mr Goubel's evidence that Mr Haldane appeared to be a competent contractor. Therefore the Tribunal does not find it was unreasonable to instruct Mr Haldane for the type of work anticipated, and concludes that the cost of the works was reasonably incurred.

33. However, the Tribunal finds that the work was not carried to a reasonable standard as required by section 19(1)(b). The stark fact is that not only did the work fail to resolve the problem of the damp patch, but immediately after the work was completed, there was serious water ingress through the balcony roof. There is no evidence to suggest a lack of causal connection between the work and the water ingress. The experts did not inspect the balcony roof until after Mr Jupp had carried out some remedial work in April 2012, but the reports include the following:

Mr Boles' report dated 1 May 2012:

"6.2. ... The recently felted areas of the flat roof appear in reasonable condition although some of the detailing is basic and inadequate and the workmanship in places poor... clear that the detailing to the adjacent areas and parapets was not fully addressed and may [*sic*] problems remain... there are lots of weak areas which were not attended to when the felt was replaced. The works required were far more extensive than have been undertaken".

"6.4. The general detailing to the flat roof to the abutments is poor and needs improving. There are gaps and holes which will allow water to penetrate beneath the felt and track through internally".

Mr Goddard's report dated 1 May 2014:

"In my opinion there were more extensive problems with the flat roof covering than was stated by Mark Boles in his report".

Mr Judd's evidence was that the quality of work was "extremely poor".

34. In fairness to Mr Haldane and the Respondent, the experts agree that there were also issues with both the parapets and external walls that may have been contributing to the water ingress problems. Mr Goubel also made extensive reference in his evidence to the poor standard of the original conversion works at the property and to historic neglect. However none of these factors can negate the reality that Mr Haldane's work on the balcony roof made the situation worse. His estimate had included a significant contingency for what he described as "unidentified problems" but there is no evidence that he subsequently identified or addressed any such problems (although he charged the full amount of the estimate).

35. The eventual net result of Mr Haldane's work on the balcony roof is that it all had to be completely re-done by Westoaks. The Applicants are

being asked to pay for the vast majority of Westoaks' work. It therefore cannot be right that they are also asked to pay for substandard work which has turned out to have no value at all. **The entire cost of £3700.00 is accordingly disallowed.**

36. With respect to section 20 consultation, it is plain that no Stage 4 notice was served. That is not a major omission in the context of the regulations, but there is no doctrine of substantial compliance, and therefore the Tribunal finds there has been a breach of the consultation requirements. Had the Tribunal found any sum was payable by the Applicants, the effect (in the absence of a successful application for dispensation) would have been to limit payability to £250.00 per lessee.

Second set of works by Alan Haldane- Top flat roof, Dec 11/Jan 12, cost £3600.00

37. The Applicants' case was again that the cost of these works was not recoverable as they had not been reasonably incurred and the work had not been done to a reasonable standard. In addition there had been no section 20 consultation.

38. Mr Haldane had been instructed to carry out work on the top flat roof after the water ingress into the Applicants' flat had worsened. There had been no survey of the top flat roof. The work undertaken had made no difference to the water ingress. It had therefore been pointless.

39. The Respondent's case was that the work was reasonably undertaken. Mr Goubel said he went up to the top flat roof with Mr Haldane and saw that the roof was at the end of its life. He thought the roof had been there since the 1980s. There were holes in it and it was necessary to replace it. Mr Haldane thought that problems with the top flat roof could be causing the problems in the Applicants' flat, as water could run along the lintel and down the roof. The Respondent accepted there was no section 20 consultation but said the Applicants had been frustrated and wanted their problem solved without delay. They had agreed in writing that the work should go ahead.

40. The Bundle included a witness statement from Tracey Snooks, the lessee of Flat 3. In it she stated that Mr Haldane replaced the flat roof "as a few damp patches were slowly coming through the lounge ceiling. They repaired a few little holes...".

41. Determination. Mr Goubel's oral evidence as to the condition of the top flat roof was not challenged by the Applicants.[1] The Tribunal therefore accepts this evidence and finds that the top flat roof required repair. As

[1] It is also corroborated by the statement of Tracey Snooks, although little weight can be afforded to this statement as Ms Snooks did not attend the hearing.

a general rule, the landlord may choose the method of repair, and in this case there is no evidence that replacement of the roof was unreasonable. It makes no difference that the repair had no effect on the water ingress into the Applicants' flat, as the work was justified regardless of that issue. Nor is there any evidence that this work was not done to a reasonable standard. The price of the works has not been queried. The section 19 test of reasonableness is therefore met, subject only to section 20 considerations. Had section 20 been complied with, the costs would be recoverable in full. However, the Applicants' consent for the work to proceed without consultation does not operate as a legal waiver of the statutory requirements. Accordingly, **the amount recoverable is presently limited to £750.00, or £250.00 per lessee.**

First set of works by Westoaks- Balcony roof and surrounding areas, Autumn 12, cost (after credit) £1758.00

42. The Applicants' case was that Westoaks had carried out some work after the scaffolding was erected in October 2012 but they did not know what had actually been done. If it was work to remedy Mr Haldane's defective work they should not have to pay for it. Their surveyor Mr Goddard had already written to Mr Goubel on 24 September 2012 stating that further patch repairs were unlikely to be successful. Around Christmas 2012, water came into their flat through a new point. The cost was therefore not reasonably incurred. Furthermore there was no section 20 consultation.

43. The Respondent's case was that the repairs were suggested by Meridian as a possible solution to the water ingress problem. Some but not all of this work was remedial work to Mr Haldane's work. The Applicants were not being asked to pay for the remedial work. Once Westoaks had started work on the roof, they realised that much more extensive work was needed (which led to the second set of Westoaks works). Mr Powell told the Tribunal that he thought that no section 20 consultation had been done because it was first that Westoaks would only be carrying out remedial work that the lessees would not be charged for.

44. Determination. Unfortunately no-one was able to explain clearly to the Tribunal what work was done. However the estimates and invoices in the Bundle provide some indication and it is at least clear that work was carried out to the render which went beyond the scope of any remedial work. Westoaks invoiced for £3192.00 but later provided a separate invoice for £1434.00 described as "For the works correcting the original contractors work". The Applicants were asked to pay £1064.00 but then given a credit for £478.00, which figures equate to 1/3rd of the Westoaks invoices. In effect then, the Applicants are only being asked to pay for that element of the work which was not remedial. It was supervised at least to some extent by Meridian (see para. 63 below). There is no evidence that the work to the render was not required. To

the contrary, both surveyors agree that such work was needed. Nor is there any evidence that this work was re-done in the second set of Westoaks work or that it was not done to a reasonable standard. By this time, all agreed that the water ingress into the Applicants' flat could not be definitely attributed to any single cause, as there were so many matters requiring attention.

45. The Tribunal therefore finds that, subject to section 20, these costs are recoverable in full. However as there was no section 20 consultation, **recoverability is presently limited to £750.00, or £250.00 per lessee.**

Second set of works by Westoaks - Balcony roof and surrounding areas, Sep/Oct 2013, cost £13300.80 plus 10% surveyors fees of £1330.08

46. The Applicants' case was that some or all of these costs were not reasonably incurred because they related to re-doing Mr Haldane's work that the Applicants had already paid for. The cost was also queried. In November 2012 an email from Mr Boles referred to an estimate of £7290.00 + VAT. The actual estimate prepared in response to the formal Schedule of Works was £11,556.00 + VAT. The Applicants said there was no explanation for this increase.

47. The Applicants also complained that Mr Jupp's firm Southern Roofing, who had put in an estimate of £9860.00 + VAT had not been awarded the contract. They suggested it was a foregone conclusion that the Respondent would appoint Westoaks. The section 20 consultation was defective because there was no Stage 4 notice explaining why Westoaks had been awarded the contract.

48. Although it was accepted that the works cured the water ingress problem, the original damp patch on the wall which had set in train the repairs in the first place was still there.

49. The Respondent's case was that following Westoaks' first set of works, it had become clear that much more extensive repair work was required, involving not just replacing, again, the balcony roof but also attending to numerous other defects in the parapets, upstands and gulleys. The November estimate was not based on a full Schedule of Works. The Schedule required more work and thus the cost went up.

50. In his witness statement Mr Goubel stated "I found Westoaks to be professional and helpful, this in no way distracted from the section 20 process". Mr Powell said that Westoaks had been selected because Meridian had recommended them. He relied on a letter from the Respondent to the Applicants dated 22 May 2013 as the Stage 4 Notice. This stated "We have carefully considered all the input from leaseholders and the surveyors and it is clear that the best contractor to carry out the work is Westoaks Ltd. We understand their quote was a

little higher than Southern Roofing but the reasons for our decision have been sent out in previous correspondence sent to you".

51. Determination The Tribunal finds the costs were reasonably incurred. There is no evidence to suggest any of the work was not required. As the Applicants are not going to have to pay for Mr Haldane's first set of works, the issue of double-payment for the same work simply does not arise. It is accepted the work was done to a reasonable standard. The fact that there is still a damp patch on the Applicants' wall simply indicates that, as the Respondent admits, there is yet further work to be done on this building which has indeed suffered from long term lack of maintenance and repair[2]. As to cost, the Westoaks estimate, while higher than Mr Jupp's estimate, was considerably lower than that of the third contractor. Westoaks' final bill was in a sum slightly lower than the estimate. The Respondent does not have to appoint the cheapest contractor. There is no evidence that the Westoaks costs were unreasonably high. There has been no challenge to the surveyors' fees @ 10% of cost. Subject to section 20, the Tribunal finds that the costs are all recoverable through the service charge

52. However there has again been a failure fully to comply with consultation requirements. The Tribunal rejects the Applicants' argument that the procedure was defective because the Respondent always intended to appoint Westoaks. The Applicants put forward a nominated contractor and an estimate was obtained from him as required. It is noted that although the Applicants wrote to the Respondent at length after receiving the Stage 3 notice and demand for payment, their letter did not address the choice of contractor. The Respondent was entitled to appoint Westoaks, who had already carried out work at the property. But unfortunately the Respondent's letter of 22 May 2013, while clearly intended as a Stage 4 notice, fails to set out the reasons for appointing Westoaks as is required. The Tribunal has been unable to locate within the Bundle any "previous correspondence" setting out these reasons. Accordingly there has been a breach, albeit a very minor one, of the consultation requirements. This Tribunal finds it difficult to see how the Applicants can have suffered any prejudice as a result, but nonetheless unless and until the Respondent obtains an order for dispensation under section 20ZA **recoverability must be presently limited to £750.00, or £250.00 per lessee.**

Insurance

53. The Respondent acquired the freehold in early 2011. The buildings insurance premium for the year commencing 30 April 2011 was £1002.16. In the following two years the premiums were £651.90, followed by £683.70. (In 2013 the total sum charged to the lessees for insurance was actually £692.06 as it included a proportion of premium due as a result of a change in renewal date). Prior to 2011, the

[2] A Stage 1 Section 20 Notice in respect of further external works was issued on 13 November 2013

premiums arranged through the previous freeholder had been £764.44 (2005), £640.57 (2006), no information for 2007, £664.91 (2008), and £716.98 (2009 and 2010).

54. The Applicants said the increased premium in 2011 was unexplained and did not appear to be reasonable.

55. Mr Powell said he had used one firm of brokers in 2011, and another firm in 2012 which had obtained a better deal. He suggested that, rather than complaining, the Applicants should be pleased that the cost had reduced. In any event £1000.00 was not excessive.

56. The freeholder's obligation is not to get the cheapest possible premium, but to obtain a rate representative of market rates. There were no comparative quotations in evidence. The Tribunal finds that the Applicants have raised a concern sufficient to require the Respondent to provide some evidence of reasonableness. There was no evidence that the premium for 2011 was a market rate. Doing the best it can on the evidence, a comparison of the 2011 premium with the premiums in five previous and two subsequent years indicates it is clearly out of line, and the Tribunal therefore infers it is not a reasonable rate. The sum allowed is reduced to £764.44, being the highest rate charges in the other 7 years.

Reserve provision

57. The lease permits a reserve fund. The reserve is currently £2469.51, including the two payments of £600.00 that are subject to challenge. The Applicants objected to monies being allocated to reserve when there was already money in the fund that was not being used towards the cost of works. Instead the Respondent was demanding that the lessees pay for all expenses in advance.

58. The Respondent's case was that the reserve fund was "tiny" given the amount of work that still needed to be carried out at the property.

59. The Tribunal agrees with the Respondent. Requiring each lessee to contribute £200.00 p.a. towards a reserve is a reasonable and indeed sensible practice. This is an old property likely to require ongoing repair and maintenance beyond the level that a newer property might demand. Funding even the first set of roof-works from the reserve would have immediately exhausted it while also requiring additional funds from the lessees.

Surveyors fees

60. The fee of £450.00 paid to the Respondent's surveyors Meridian for the initial survey on the roof dated1 May 2012 is not challenged. However two further payments are disputed.

61. The sum of £540.00 was paid to Meridian in payment of an invoice dated 8.3.13. No copy of the invoice was in evidence. The Applicants submitted that if it was payment for the Schedule of Works prepared by Meridian for the second Westoaks major works, this should have been paid for as part of Meridian's 10% charge for management and supervision of those works, for which they were paid £1,330.08.

62. The sum of £270.00 was paid to Meridian in payment of an invoice dated 28.3.13. No copy of the invoice was in evidence. The Applicants did not know what it was payment for.

63. Mr Powell confirmed that £540.00 had been paid for the Schedule of Works. He then read out the narrative on the 28.3.13 invoice for £270.00: "taking instructions to arrange repairs and monitoring on site, meeting with the parties", and said this referred to the first Westoaks works carried out in late 2012. He said both sums were reasonable.

64. The Tribunal determines that the invoice for £540.00 for preparing the Schedule of Works is not recoverable through the service charge. It is common practice for this type of cost to be included in the surveyors' overall fee for supervision of the major works. In this case the surveyors' fee for supervision was 10%, a rate high enough to absorb the costs for preparing the Schedule.

65. The Tribunal finds it was reasonable to employ Meridian to supervise the first set of Westoaks works, where there was no separate percentage fee. The amount of £270.00 does not appear unreasonable, but only 55% of the Westoaks costs for these works were charged to the lessees. In the same way only 45% of Meridian's fee should be allowed, producing a recoverable sum of £148.70.

Management Fees

66. In each of the three years in dispute, the Respondent has charged £900.00 for management. This equates to £250.00 + VAT per lessee. The Respondent has not employed managing agents. The directors have personally dealt with the management. The lease permits the lessor to recover through the service charge "the costs and expenses incurred in management and administration of the building".

67. The Applicants' case was that these costs were unreasonably high. The lease did not provide for the Respondent to make a profit. It was said that the Respondent had not been particularly effective or diligent. The disrepair had not been dealt with effectively. The Tribunal was referred to a tribunal decision *Housden v Allen* Case Ref. CAM/12UD/LSC/2010/0052, where £200.00+ VAT per unit for a converted property in Wisbech, Cambs. was held to be an acceptable management fee "if the job were well done".

68. The Respondents said the charge was reasonable. In response to the Tribunal's comment that, in their experience, they would not expect local managing agents in St Leonards/Hastings to charge that much, Mr Goubel said the management was very "hands on". He had personally attended at the property, travelling from London, on numerous occasions. The charge was for normal management, and would remain the same for busy and not-so-busy years. So far every year had been busy.

69. The Applicants also challenged an additional fee of £1330.08 raised by the Respondent in 2013-14, being 10% of the value of the second Westoaks major works. Meridian had also been paid 10% to manage the project.

70. The Respondent submitted that it was not unusual to charge for a major project because of the additional attention needed. Although Meridian had been instructed "to give peace of mind ... lots more work was needed". MrGoubel said he had been in attendance "throughout".

71. The Tribunal derives no assistance from the *Housden* case, which relates to the fees of managing agents in another part of the country. Here the freeholder is managing directly. The lease does not provide for recovery of a profit element. However, due to the significant repair issues and ongoing works since 2011, and accepting Mr Goubel's evidence that he has had to travel from London to attend at the property on numerous occasions (for which some managing agents would have made an additional charge), the Tribunal accepts that for these three years the Respondent's costs are likely to have exceeded the amount charged and therefore the fees of £250.00 + VAT in each year are allowed in full. This does not mean that the same level of fees will necessarily be reasonable in future years, when less work is required.

72. The Tribunal does not allow the additional 10% charge for managing the second set of Westoaks works. Firstly, the wording in the lease refers to the costs of "management and administration of the building". These words are not apt to describe management or supervision of major building works. Secondly, Meridian was appointed to supervise the works. It is not reasonable to charge lessees for two sets of professionals to do work which one may do. Thirdly, the Respondent is not a professional and cannot expect to recover costs at a professional level. Fourthly, the Respondent provided no evidence of any costs it had incurred over and above those covered by the annual management fee.

Calculation of service charge

2011-12

Insurance	764.44
Management fee	900.00
Second set of Haldane works (as limited to £250.00 per lessee)	750.00
	2414.44
Applicants' share	**804.81**

2012-13

Insurance	651.90
Management fee	900.00
Meridian fee	450.00
Reserve fund	600.00
	2601.90
Applicants' share	**867.30**

2013-14

Insurance	689.06
Management fee	900.00
Meridian fee	148.70
Reserve	600.00
First set of Westoaks works (as limited to £250.00 per lessee)	750.00
Second set of Westoaks works (as limited to £250.00 per lessee)	750.00
	3837.76
Applicants' share	**1279.25**

The service charges determined for 2011-12 and 2013-14 are provisional insofar as they are subject to variation in the event that the Respondent makes an application under section 20ZA which is successful to any extent. To avoid any further delay in the final determination of these service charges, any such application must be received by the tribunal by 4pm on 5 August 2014.

Section 20C Application

73. In deciding whether to make an order under section 20C a Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. At the hearing Mr Ostrowski requested an order for the benefit of all the lessees at 4 De Cham Avenue. He referred to the expense of the past years and submitted it would not be just for them to have to pay further costs. Mr Powell said there would be no attempt to recoup costs anyway and he did not object to an order.

74. The Applicants were justified in making this application and the outcome of these proceedings has been largely favourable to the Applicants. They have themselves incurred substantial legal costs which they cannot recover. In the view of the Tribunal it would be unjust if they had to pay the Respondent's costs, and in any event the Respondent does not object to an order. For these reasons the Tribunal determines it is just and equitable for an order to be made that to such extent as they may otherwise be recoverable, the Respondent's costs, if any, in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants or other lessees at 4 De Cham Avenue.

Concluding Remarks

75. The Tribunal does not doubt that the Respondent, through its directors Mr Powell and Mr Goubel, has acted in good faith throughout and has done what it thought best to assist the Applicants. Unfortunately this is a problematic building and the Respondent has chosen to manage it directly, perhaps without having all the necessary professional expertise to do so.

76. It remains open to the Respondent to make an application for dispensation under section 20ZA of the Act. The Supreme Court decision of *Daejan Investments Ltd v Benson* [2013] UKSC 14 sets out the principles which guide the Tribunal in deciding whether to grant dispensation.

Dated: 10 July 2014

Judge E Morrison (Chairman)

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.