

**THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL &
LEASEHOLD VALUATION TRIBUNAL**

In the matter of Applications under Sections 27A and 20C of
the Landlord & Tenant Act 1985

Case No. CHI/00ML/LIS/2007/0013

Property: Flat 2, 23/24 Brunswick Square, Hove, East Sussex, BN3 1EJ

Between:

23/24 Brunswick Square Limited
("the Applicants")

and

Philip Kaheil & Jane Chee
("the Respondents")

Members of the Tribunal: Mr J.B. Tarling, MCMI, Lawyer/Chairman
Mr N.I. Robinson, FRICS
Ms J.K. Morris

Date of the Decision: 16th July 2007

THE DECISION
OF THE LEASEHOLD VALUATION TRIBUNAL

1. **The Tribunal determines that the Respondents are liable to pay to the Applicants by way of Service Charge in respect of the major works carried out in 2006 and the Interim Charges due 25th March 2006 and 29th September 2006 the total sum of £1,870.00 plus interest thereon of £210.50**
2. **The Tribunal makes an Order under Section 20C of the 1985 Act that any costs or expenses incurred by the Landlord in connection with these proceedings shall not be chargeable through the Service Charge Account.**

REASONS FOR THE TRIBUNALS DECISION

1. **Background to the Application**
 - (a) In November 2006 the Applicant made an application to the Brighton County Court under Claim Number 6BN06001 for payment of the sum of £15,137.30 which represented arrears of Service Charge and interest due from the Respondents under the terms of their Lease.
 - (b) The Respondents filed at the Brighton County Court a Defence dated 28th November 2006 in which they denied liability to pay the amounts claimed for the reasons set out therein.
 - (c) On 12th January 2007 the Brighton County Court in accordance with its powers under section 31C of the Landlord and Tenant Act 1985 ordered that the proceedings should be transferred in its entirety to the Leasehold Valuation Tribunal for its determination.

2. On 25th April 2007 the Tribunal gave Directions requesting the parties to prepare bundles of documents and made arrangements for the matter to be determined at an oral Hearing. In accordance with those Directions both parties submitted Bundles of documents in preparation for an oral Hearing.

3. INSPECTION

The Tribunal carried out an Inspection of the Property on the morning of 5th July 2007. The Building, which is a Grade I Listed Building, comprises two adjoining terraced houses near the Seafront at Hove and overlooking Brunswick Square. The two houses have been divided into twelve self-contained flats of differing types and sizes. The front of the Building appeared to have been recently redecorated and appeared to be in a good decorative condition. The Tribunal members inspected the rear of both houses which had also been decorated and repairs carried out. The exterior of the houses, both at the front and the back, appeared to be in a generally good state of repair and decoration following the recent major works. The Tribunal members also visited the inside of Flats 1 and 2 in No. 23, and the Ground Floor Flat in No. 24 accompanied by the Respondent Mr. Kaheil (Flat 2), Mr Nugent (Ground Floor No.24) and Mrs Grant (Flat 1). The Managing Agent Mr Stephen Howlett also attended the inspection. The Respondent Mr Kaheil pointed out to the Tribunal areas in his Flat, being in the storeroom off a bedroom and in his Kitchen, where he said he has experienced damp penetration in previous years. At the time of the inspection some old traces of damp staining were visible, but the ceilings and walls did not appear to be damp, nor did there appear to be any obvious water ingress. Mr Kaheil also complained about some of the windows sticking, following the painting. One of the windows in the kitchen was opened, and although it was stiff, it could be opened.

4. Hearing

A Hearing took place at Hove Town Hall on 5th July 2007. The Tribunal had before it Hearing Bundles from both parties. The Applicant was represented by Mr Stephen Howlett, the Managing Agent and he was accompanied by Mr Nugent and Mrs Grant who were Directors of the Applicant Company. The Respondents both attended and represented themselves.

5. Agreed matters

As part of the Applicants Bundle was a Service Charge Demand dated 5th March 2007. This listed the balance of Service Charges payable by the Respondents as follows:

Balance Service Charge due 29.9.05	£152.30
Major Works funds due 24.2.06	£14,175.00
Service Charge due 25.3.06	£810.00
	£15,137.30
Service Charge due 29.9.06	£810.00
	£15,947.30
Less payment received 25.9.06	<u>£152.30</u>
Total now payable	£15,795.00

Both parties agreed that it was this Invoice on which the Tribunal was being asked to make a determination. The Respondents agreed that they were liable to pay to the Applicant the Interim Service Charge payments of £810.00 per half year. As the question of liability to pay these half-yearly amounts had been agreed, in accordance with the provisions of Section 27A(4)(a) of the Landlord and Tenant Act 1985, the Tribunal has no jurisdiction to make a determination on these amounts. There remains the matter of interest thereon which is calculated later on in this Decision.

6. Section 20 Landlord and Tenant Act 1985 – Consultation

- (a) The reasons why the Respondents said that they were not liable to pay the amount of Service Charge being claimed are fully set out in the papers before the Tribunal. In particular, in the Defence document dated 28th November 2006 in paragraph 5 the Respondents said "...the Claimant chose not to follow the procedures under the Landlord and Tenant Act 1985 as amended by the Commonhold and Leasehold Reform Act 2002. In paragraph 4 of the Witness Statement also dated 28th November 2006, the Respondents said "The Claimant has not complied with the Landlord and Tenant Act 1985 in particular those procedures concerning consultation and the reasonableness of the service charges."
- (b) As the issue of failure to comply with the statutory requirements relating to consultation had been raised by the Respondents, at the beginning of the Hearing the Tribunal enquired if the Applicant wished to consider making an Application to the Tribunal under Section 20ZA of the Landlord and Tenant Act 1985 for an Order dispensing with all or any of the consultation requirements. In reply, Mr Howlett said that the Applicant did not wish to make an Application under Section 20ZA as he took the view that the consultation requirements had been fully met. He agreed that no formal Section 20 Notice had been served, but he did not wish to make an Application for dispensation under Section 20ZA. He was warned by the Tribunal at the beginning of the Hearing that if the Tribunal decided that the Consultation Regulations had not been fully complied with, and no application for dispensation was made, the Tenants contribution would be capped at £250. Despite this warning Mr Howlett confirmed again that he did not wish to make a Section 20ZA Application.

7. **The Respondents Case**

The parties agreed that it seemed convenient and appropriate if the Respondents presented their case first so that the Applicants could be clear as to the reasons why the Respondents were denying liability to pay. Ms Chee addressed the Tribunal on behalf of both Respondents and referred the Tribunal to the Respondents Bundle. This contained a full Statement outlining the history of the matter as well as documentary evidence in support. By way of oral representations Ms Chee said there were three main reasons why the Respondents refused to agree liability. These were (a) the failure of the Applicants to follow the Statutory Consultation procedures (b) the unreasonableness of the amounts being claimed and (c) the legal undertaking that had been given by the former freeholder, which the Applicant had

accepted liability for, that the cost of any repairs to the flat roof at the rear of the Building would be paid by the former freeholder (and subsequently the Applicant) rather than by the Respondents. She addressed the Tribunal on these three items.

8. Failure to follow Statutory consultation procedures.

- (c) Ms Chee referred to the facts outlined in the Bundles of documents which were before the Tribunal. There seemed to be little dispute between the parties as to the facts. The Freehold had been transferred to the Applicant Company in 2002 after Leases of all the 12 Flats had been granted. It was a Company limited by guarantee and eleven out of the twelve Lessees had become members of the Company. The Respondents were the only lessees who had decided not to become members of the Company. The Company had elected its own Directors and had appointed Mr Howlett to continue as the Managing Agent. Various Meetings were arranged to discuss the proposed major works, but because the Respondents were not members of the Company they were not always given details of what discussions had taken place and what decisions had been made. There was evidence of a letter dated 18th May 2005 sent to the Respondents telling them that a “a full residents meeting is shortly to be called in order to discuss the content of the Specification and to approve the various items prior to the formal tendering stage.” The letter did not tell them what time or where the meeting would take place. The copy of the same letter included in the Applicants Bundle (AB5) differed from the copy of the same letter contained in the Respondents Bundle (RB6). The one which the Applicants supplied had details of the meeting “scheduled for Saturday 4th June. The venue will be his Ground Floor Flat. Exact time to be advised – likely to be afternoon.” This appeared to be a deliberate attempt to keep the Respondents in the dark as to the details of the Meeting so they would be unable to attend. This evidence was not challenged by the Applicant, except to say that as the Respondents were not members of the Company they were not entitled to attend.
- (d) The main complaint by the Respondents was that they were not informed about what decisions were being made as to the extent of the works being carried out, the costs involved, the breakdown of such costs and fees and they were not given an opportunity to nominate their own contractor as required by the Consultation Regulations.
- (e) The first that the Respondents knew that a contractor had finally been chosen was when they received a letter dated 10th October 2005 (RB18) enclosing a Demand for payment of £15,525.00.

9. Reasonableness of the cost of the major works

Ms Chee outlined 3 examples of items of unreasonable amounts.

- (f) In a document from Mr T.C. Lewis, the contractor who carried out the work, dated 20th February 2006 (AB17) an item of 13.5% “Project Management fee” amounting to £10,818.23 had been included in addition to a Tender for the work of £80,135. Ms Chee queried why the contractor was charging a project management fee when he was the contractor doing the work and Stuart Radley, the Surveyor, and Mr

Howlett, the Managing Agent, were also charging fees to manage the project. In reply Mr Howlett said this was the way in which Mr Lewis had set out his Tender and could not explain why there was a separate project management fee.

- (g) In document numbered RB25 there was a discrepancy about provisional works. It was not clear what works were included in the Tenders and what was to be charged extra. The Respondents alleged that the Applicant had failed to explain what items had been paid for under provisional works and what had been included in the contract price.
- (h) In respect of scaffolding costs there appeared to be a discrepancy between what was included in the contract price and what was an extra. Ms Chee maintained that it was not necessary to hire a hoist for 16 weeks when it would only be used to erect the scaffolding at the start and remove it at the end of the contract. She thought there had been insufficient control on the costs and no satisfactory explanation of these items had been given.

10. Legal Undertaking from former Freeholder

The Respondents point here was that when the Freehold had been transferred to the current Freehold Company, it had taken over responsibility from the former freeholder to rectify damp problems at the rear of the Building affecting Flat 2. It seemed to be common ground that this was liability had been agreed, but no-one could produce a copy of any such Undertaking. The Respondents claimed that as there was already a liability by the Landlord to repair this area, the Respondents should not be asked to pay for this. As the document containing the Legal Undertaking by the previous Freeholders was not available to the Tribunal, it was unable to make any determination as to the effect of such an Undertaking or make any determination as to any liability to pay for such repairs to the roof. The Applicants had carried out repairs to the roof and it no longer appeared to be damp. There was a clear covenant in the Lease by the Applicants to carry out repairs to the exterior and the costs of this work had been included in the amount being claimed. There appeared to be no reason why the Applicants should not be entitled to claim the cost of the repairs from the Service Charge account.

11. The Applicants Case

(a) After Ms Chee had concluded her oral representations, Mr Howlett addressed the Tribunal on behalf of the Applicant. He explained the background to the matter and that he believed that he had done his best to satisfy the Respondents requests for information. He agreed that the Landlord had agreed to indemnify the Respondents in respect of the damp to the rear of the Flat. However the major works contract had not yet been concluded and he was unwilling to negotiate with the Respondents all the time they failed to pay what they owed. No-one had quantified the cost of the repairs to the rear of the Building affecting Flat 2.

(b) In answer to questions from the Tribunal Mr Howlett said he had had one telephone conversation with Mr Kaheil but no other attempts had been made to resolve the matter. His Clients had instructed him to pursue the matter

through the courts as payment of the outstanding balance was seriously affecting the cash flow for future repairs to the building.

(c) Mrs Grant, one of the Directors of the Applicant Company said she had been offended by the remarks made by Mr Kaheil in his letter dated 27th October 2005 (AB11) in which he had referred to “rip-off prices quoted by the three builders”, “the surveyor was up to no good” and “it was unlawful for the company to vote on a sham.” For these reasons she did not believe any attempts to resolve the matter would be possible.

12. Section 20C Application

The Respondents had made an Application under Section 20C of the 1985 Act for an order that any costs incurred by the Landlord in connection with these proceedings should not be regarded as relevant costs in determining the amount of any service charge payable by the Tenants. Both parties were invited to make oral representations.

- (i) Ms Chee for the Respondents said that the matter had got completely out of hand through the failure of the Applicant to consult in accordance with the statutory procedures and its failure to supply information which the Respondents were entitled to. Accordingly she objected to the Applicants charging its costs of the proceedings through the Service Charge Account.
- (j) Mr Howlett for the Applicant said that he intended to make a charge for the time he had spent on the case. He could see no reason why the landlord should not make a charge through the Service Charge Account as it was the Respondents who had caused the problems by not paying their Bills. He took the view that the proceedings were inevitable and the Applicant had to collect the amount that was due to it.

13. Interest

The Applicant confirmed that it wished to charge interest on all amounts that were outstanding. They agreed to limit all such amounts of interest to a period for 12 months, even though some of the amounts had been outstanding for much longer. The Interest Rate in Clause 7(5) of the Lease (Page 15) was “4% per annum over Barclays Bank Plc’s Minimum Lending Rate from time to time or 12% per annum whichever shall be the greater.” The applicable rate was 12% per annum. Mr Kaheil agreed to pay interest on such sum as the Tribunal decided was payable. Mr Kaheil had also agreed to pay the two Interim Service Charge Demands of £810.00 each demanded on 25.03.06 and 29.09.06 and interest thereon. As such items were agreed, it was not necessary for the Tribunal to make any determination thereon other than to record that they were agreed to be payable.

14. **THE TRIBUNAL’S CONSIDERATION**

Following the conclusion of the Hearing the Tribunal retired to consider its decision. First of all it reviewed all the evidence it had seen, read and heard. This had been a sad history of a breakdown of relationships between a Landlord and these Tenants. The evidence about the Respondents being excluded from certain meetings at which the proposed major works were being discussed appeared to be deliberate and the Tribunal took a very poor

view of this type of behaviour. The question of whether the Landlord had complied with the Section 20 Consultation requirements seemed critical to the Landlords claim. If there had been failure to comply, then the statutory provisions allowed only £250 to be recovered.

15. The Tribunal then reviewed the Regulations relating to the Consultation Requirements which are set out in the Service Charges (Consultation Requirements)(England) Regulations 2003 (“the 2003 Regulations”). Schedule 4 of those Regulations relates to the consultation requirements for qualifying works and applies to these Applications. That Schedule contains the details of what a Landlord should do to serve a Notice under Section 20 of the 1985 Act.

16. Section 20 of the 1985 Act reads as follows:

(1) Where this section applies to any qualifying works ... the relevant contributions of tenants are limited ... unless the consultation requirements have been either: (a) complied with in relation to the works, or (b) dispensed with in relation to the works by ... a leasehold valuation tribunal.

The Applicant had already conceded that the consultation requirements have not been complied with and no formal Section 20 Notice had been served. The Applicant had decided not to make an application for the Tribunal to grant dispensation under Section 20ZA of the 1985 Act.

17. The Applicant seemed to be relying on the fact that it had complied with the spirit of the consultation requirements even though no formal Section 20 notice had been served. The Tribunal decided to test the facts against the statutory requirements contained in the Consultation Regulations. They went through the chronological events and attempted to reconcile them against the Consultation Regulations.

18. Regulation 8 – Notice of Intention

(i) Document AB2 a letter dated 1st November 2004 from the Managing Agent to the Lessees certainly describes in general terms the works proposed, but fails to comply with this regulation because it fails to comply with Regulation 8 (d) (ii) or (iii) as it does not specify that the observations must be delivered within the relevant period (30 days) or state the date on which the relevant period ends. For this reason it is not a valid Notice of Intention under the Consultation Regulations.

(ii) Document AB3 a letter dated 8th April 2005 from the Managing Agent to the Lessees merely informs the Lessees about the proposed visit of the Surveyor to prepare the Specification. It fails to describe the works proposed, the reasons for considering it necessary to carry out the proposed works and does not give any relevant period for observations. For these reasons it is not a valid Notice of Intention under the Consultation Regulations.

(iii) Document AB5 a letter dated 18th May 2005 from the Managing Agent to the Lessees encloses a copy of the Specification, but it has no prices on it, nor any details of which Contractor has been chosen, nor does it refer to any relevant period for observations. For these reasons it is not a valid Notice of Intention under the Consultation Regulations.

(iv) Document AB8 a letter dated 20th September 2005 from the Managing Agent to the Lessees refers to a proposed meeting with the Surveyor Mr Radley. It does not give the name of any proposed Contractor and does not give any relevant period for observations. For these reasons it is not a valid Notice of Intention under the Consultation Regulations.

(v) Document AB10 a letter dated 10th October 2005 from the Managing Agents to the Lessees confirms that Packham Construction is the chosen contractor and appears to confirm that a contract is about to be made with this contractor. This appears to claim to be a notice in writing under Regulation 13. However it does not refer to T.C. Lewis which was the eventual contractor who carried out the work and to whom the Landlord proposes to make payment under the contract. For this reason it is certainly not a Notice of Intention, nor a Notice under Regulation 13.

19. In conclusion the Tribunal was unable to find any letter or notice in writing which complies fully with Regulation 8. This means that the Applicant is in breach of the Consultation Regulations. More importantly there appears to be very little consultation with these Respondents about the choice of T.C. Lewis at all. The complaints by the Respondents were that the Applicant had not followed the Consultation Regulations and from the Tribunal's reconciliation of the facts with the Regulations as set out above it appears that the Respondents are correct.

20. The effect of this breach of the Consultation Regulations is set out in Section 20 (6) and (7) of the Landlord and Tenant Act 1985. This establishes a prescribed amount and provides a "cap" on the amount which a tenant is liable to pay instead of the amount demanded. Regulation 6 of the Consultation Regulations provides that the appropriate amount is the sum of £250. It appears to the Tribunal that it has no discretion in applying the law. Having found that there has been a breach of the Consultation Regulations and the Applicant having failed to apply for any dispensation under Section 20ZA of the 1985 Act, the Tribunal is left with no alternative than to limit the amount payable by the Respondents to the Applicant to £250.00

21. Interest

The parties had already agreed that any interest should be limited to 12 months from 25th March 2006 and that the interest payable shall be 12% per annum. The Respondents had agreed to pay any such interest on any amount which the Tribunal decided was payable. The Tribunal calculates the interest as follows:

		<u>Interest</u>
Service Charge due 25.3.06	£810.00	
Agreed to be paid by Respondents, but not yet paid		
Period 25.3.06 to 24.3.07 (365 days) @ 12% pa =		£97.20
Major Works due 25.3.06	£250.00	
Determined by the Tribunal, but not yet paid		
Period 25.3.06 to 24.3.07 (365 days) @ 12%=		£30.00
Service Charge due 29.9.06	£810.00	
Agreed to be paid by Respondents, but not yet paid		
Period 25.3.06 to 5.7.07 (279 days) @ 12%=		£74.30*
TOTALS	<u>£1,870.00</u>	<u>£201.50</u>

*In addition Interest at 26p per day (until 28.9.07)
Continues to accrue until payment of this amount

22. Section 20C Application

Following conclusion of the Tribunal's determination the Tribunal then turned to the Respondents Application under Section 20C of the Landlord and Tenant Act 1985 for an Order that all or any of the costs of the LVT proceedings incurred by the Landlord should not be payable through the Service Charge Account. The Tribunal reviewed the representations made by the parties. Clearly the Applicant had failed to recover the amount it had claimed. To that extent it had lost its case. The Tribunal reviewed the evidence and decided that the Applicant and its Managing Agents could have done more to resolve the matter by supplying much of the information the Respondents had requested. The deliberate failure to notify the Respondent of a meeting was an example to behaviour which did not show a willingness to demonstrate transparency and openness in decision-making. The issuing of County Court proceedings rather than applying direct to the LVT could be interpreted as an attempt to bring unnecessary pressure on the Respondents. The RICS Service Charge Residential Management Code (being an approved Code under section 87 of the Leasehold Reform Housing and Urban Development Act 1993) provides a Code of Advice to all Landlords and their Managing Agents on how property management should be carried out. This case includes many examples of behaviour by the Landlords and their Managing Agents which the Tribunal considers to fall short of good management. The breach of the Consultation Regulations was a serious matter and the Applicant should not be rewarded for its failure to comply with the law. In all the circumstances the Tribunal decided for the reasons given above that it was fair and reasonable to make an Order under Section 20C as requested by the Respondents.

23. Sections 19(1) and 27A of the 1985 Act.

(i) For the avoidance of doubt, in coming to its decision the Tribunal applied the law under the above Sections of the 1985 Act.

(ii) Section 19 (1) of the 1985 Act provides that relevant *service charge* costs shall be taken into account (a) only to the extent that they are reasonably incurred and (b) only if the works are of a reasonable standard.

(iii) Section 27A of the 1985 Act provides that the Tribunal may make a determination whether a service charge is payable, and if it is, as to (a) the person by whom it is payable (b) the person to whom it is payable (c) the amount which is payable (d) the date at or by which it is payable and (e) the manner in which it is payable.

(iv) The Tribunal has found that the works carried out by the Applicant were of a reasonable standard and reasonably incurred. The Tribunal had carried out an Inspection of the Building and found no evidence to persuade it that the work that had obviously been carried out was not of a reasonable standard. No documentary evidence, such as an expert's report, had been submitted by the respondents to show that the work done was of a poor standard. However because of the effect of the failure of the Applicant to comply with the Consultation Regulations the amount legally payable by the Respondent to the Applicant is capped at £250 as described above.

24. As a final comment the Tribunal wishes to say that whilst it understands why the Respondents have opposed this Application, the Tribunal comments in passing that the Respondents were probably expecting more detail than they are entitled to. There are limits to which a Landlord should have to supply information regarding large major work contracts. To some extent Lessees should expect to rely on the expertise of professionals who are employed to supervise a major works contract and in the absence of any evidence of manifest negligence or incompetence they should rely on the judgement of such professionals.

Dated this 16th day of July 2007

J.B. Tarling 

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John B. Tarling, MCMI Lawyer/Chairman
A member of the Panel appointed by the Lord Chancellor