CHI/00ML/LSC/2007/0073

DECISION OF THE RESIDENTIAL PROPERTY TRIBUNAL ON APPLICATION UNDER SECTIONS 27A & 20ZA OF THE LANDLORD & TENANT ACT 1985

Address:	Flat 11, 42 & 48, 4 Grand Avenue, Hove, East Sussex, BN3 2LE
Applicants:	(1) Dr & Mrs Zweigman (2) Mrs S Steinfeld (3) Ms T Tuffee
Respondent:	4 Grand Avenue (Hove) Management Ltd
Application:	3 August 2007
Inspection:	5 June 2008
Hearing:	5-6 June 2008
Reconvene:	13 June 2008

Appearances:

Tenants

Dr & Mrs Zweigman	Leaseholders (Flat 48)
	For the Applicants

Landlord

Miss Whiteman	Solicitor of Dean Wilson Laing, Solicitors
Mrs Freeman-Owen	Leaseholder
Dr Moss	Leaseholder
Mr Wheeler	Building Surveyor, Austin Rees
Mr Pilbeam	Director, Austin Rees
	For the Respondent

Members of the Tribunal

Mr I Mohabir LLB (Hons)
Mr N I Robinson FRICS
Miss J Dalal

IN THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL

CHI/00ML/LSC/2007/0073

IN THE MATTER OF SECTIONS 20ZA & 27A OF THE LANDLORD & TENANT ACT 1985

AND IN THE MATTER OF FLATS 11, 42 & 48, 4 GRAND AVENUE, HOVE, BRIGHTON, EAST SUSSEX, BN3 2LE

BETWEEN:

(1) DR & MRS ZWEIGMAN (FLAT 48)
(2) MRS A STEINFELD (FLAT 42)
(3) Ms T TUFFEE (FLAT 11)

Applicants

-and-

4 GRAND AVENUE (HOVE) MANAGEMENT LTD

Respondent

THE TRIBUNAL'S DECISION

Introduction

1. Unless stated otherwise, the page references are to the pages appearing within the Applicants' (AB) and Respondent's (RB) bundles respectively.

2. This is an application by the Applicants pursuant to s.27A of the Landlord & Tenant Act 1985 (as amended) ("the Act") for a determination of their liability to pay and/or the reasonableness of various service charges arising in the service charge years ending 31 December of 2005, 2006 and 2007 ("the service charge application").

3. By a cross-application dated 12 June 2008, the Respondent applied, pursuant to s.20ZA of the Act, to dispense with the consultation requirements imposed by s.20 in relation to the cost of boiler works carried out in the years ended 31 December 2005 and 2006 ("the s.20ZA application").

4. Both, the service charge and s.20ZA applications, are considered in turn below.

The Lease Terms

5. The Respondent is the head lessee of the subject property. The sub-lessees hold their respective flats by virtue of underleases granted variously by the Respondent company. It is comprised of an elected Board of Directors who ensure the performance of the Respondent's lease obligations.

6. The Tribunal was provided with a copy of the lease in relation to Flat 48, belonging to Dr and Mrs Zweigman, dated 10 July 1987[1] ("the lease"), as a specimen lease. The Tribunal was not told that the leases held by the other Applicants had been granted in different terms. It is, therefore, to be inferred that the relevant service charge provisions are the same in all of the leases held by the Applicants.

7. The Applicants do not challenge their contractual liability to pay a service charge contribution under the terms of their respective leases. Therefore, it is not necessary to set out the details of the relevant service charge provisions in the lease and this matter can be taken shortly. Where it becomes necessary to give clarification of the Tribunal's decision, reference may be made to the relevant lease term and its effect.

8. By clause 3(7) of the lease, the lessee covenanted to pay to the lessor in respect of each year ending on 31 December ("the maintenance year") by two equal instalments on 1 January and 1 July in each year a service charge contribution for the estimated maintenance charge to be incurred in any

[1] see AB/J/A154

maintenance year. The lessee's service charge contribution is calculated in accordance with the percentage rate set out in Part 5 of the First Schedule of the lease. Part 6 of the First Schedule sets out the computation of the estimated annual maintenance charge including any reserve fund contribution. Clause 4 of the lease provides that any such amounts received by the lessor shall be held in a maintenance fund account.

9. By clause 5(7), the lessor covenanted to carry out or procure the provisions of the services set out in the Fifth Schedule

The Issues

10. The numerous challenges made by the Applicants are, helpfully, set out in the Directions made by the Tribunal at a pre-trial review held on 18 January 2008[2] and are self-evident. It serves no useful purpose in repeating these here as, they are in any event, considered in turn below. Immediately thereafter, it is followed by the Tribunal's decision.

Inspection

11. The Tribunal inspected the subject property on 5 June 2008. 4 Grand Avenue comprises a purpose built 10 storey (including basement and ground floor) block of 55 flats with stuccoed ground floor and brick upper front elevations (pebbledash render to rear) constructed 1935-38. The block has communal central heating and a caretaker service. The exterior to front and rear were inspected together with the common parts leading to Flat 48. Flat 48 was not inspected as none of the issues related to the interior of the Flat.

Hearing

12. The hearing in this matter also commenced on 5 June 2008. Dr and Mrs Zweigman appeared in person on behalf of the Applicants. The Respondent was represented by Miss Whiteman a solicitor from the firm of Dean Wilson Laing.

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[2] see AB/B/A11

The Service Charge Application

(i) Y/E: 31December 2005 & 2006

(a) Water Rates, Light & Heat

13. At the commencement of the hearing the Applicants conceded that the amounts claimed for both years in respect of water rates (£1,429 and £1,052) and light and heat (£29,841 and £27,173) were no longer in issue.

(b) Buildings Insurance (£24,547 & £23,241)

14. The Applicants contended that, in the estimated budgets for these two service charge years[3], the Respondent had claimed the sum of £26,000 whereas the actual expenditure was in fact less than this figure. The Applicants complained that they had not been charged the actual amount. Somewhat confusingly, the Applicants then sought to argue that this figure had also been repeated for 2007 and this sum was not reasonably incurred. They contended that they had obtained a cheaper alternative quote from insurance broker, Deacon[4], dated 23 October 2007 in the sum of £13,018.76 plus £2,051.44 for additional terrorism cover. They submitted, therefore, that these costs had not been reasonably incurred. The Applicants further submitted that the Respondent had originally insured the subject property with AXA insurance for these years. However, in June 2007, it had placed the insurance with Norwich Union and had failed to consult the lessees before doing so, as was required by s.20 of the Act, because it was a qualifying long term agreement.

15. Miss Whiteman submitted that the Deacon quote obtained by the Applicants was not relevant because it is dated 2007 and had no application to these service charge years. The AXA quote had been competitive in the market for 2005 and 2006. In any event, the Deacon quote exceeded that Norwich Union premium for 2007, which was £14,740.38. Moreover, the Deacon quote did not provide the same level of cover because it did not include plant machinery and directors liability.

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[3] see AB/E/17 & 19

[4] see AB/App5

16. Dealing firstly with the Applicants complaint that they had not been charged the actual amount for the buildings insurance, the Tribunal saw no merit in this complaint. The buildings insurance premium is not collected separately, but as part of the overall maintenance charges expenditure. The Respondent is not obliged to return or credit the service charge account with any unexpended amounts based on the estimated annual budget. Any such amounts can be allocated to any other items of expenditure where insufficient provision had been made in the estimated budget. Indeed, the Tribunal heard evidence from Mrs Freeman-Owen and Dr Moss, both of whom are Directors of the Respondent company, that the total service charge contribution collected for 2005 and 2006 had in fact been spent.

17. Turning to the 2005 and 2006 service charge years, there was no evidence that the actual buildings insurance premiums paid were not reasonably incurred and the Tribunal found in those terms. The actual expenditure incurred by the Respondent was payable by the Applicants.

18. As to the 2007 service charge year, although the buildings insurance premium strictly does not fall to be considered here, it appeared to be specifically challenged by the Applicants and it is perhaps convenient to consider it at this point.

19. The Applicants relied on the Deacon quote in the sum of £13,018.76 to submit that the estimated budget figure of £26,000 was unreasonable. If at the time of the hearing, the actual buildings insurance premium was not known, then this submission may have succeeded. However, the Tribunal was told that the actual premium paid for 2007 to Norwich Union was £14,740.38. The Tribunal accepted the submissions made by Miss Whiteman that the Deacon quote relied on by the Applicants did not include cover for terrorism cover, plant and directors liability. The Deacon quote required an additional premium of £2,051.44 for terrorism cover and was, even on the Applicants own case, more expensive. Accordingly, the Tribunal determined that the actual buildings insurance premium of £14,740.38 paid by the Respondent for

2007 was reasonably incurred. The excess budget amount, if collected by the Respondent, has already been dealt with above.

20. As to the Respondent's failure to consult with the lessees before insuring with Norwich Union in 2007, this submission by the Applicant's was incorrect as a matter of law. The contract of insurance does not exceed 12 months in duration and is, in any event, not a contract for services. There is, therefore, no obligation, legal or otherwise, on the part of the Respondent to consult with the lessees before placing the buildings insurance.

(c) Major Works

21. In the 2005 estimated maintenance budget, a total reserve fund provision for "major works" of £71,525 was made to carry out external painting and repairs (£68,000) and roof overhaul (£3,525). In 2006, the total reserve fund provision was £58,235 for roof and main structure (£22,500), damp proofing (£7,500), boilers (£16,500) and common parts renovations and redecoration (£11,735). The actual expenditure incurred in 2005 and 2006 for repairs was £131,248 and £40,616 respectively[5].

22. The Applicants stated that they did not challenge the estimated or actual expenditure incurred in 2005 and 2006 or the standard of the works that had been carried out. The Applicants simply submitted generally that they had not been consulted in accordance with s.20 of the Act, as the Respondent was obliged to do and, in particular, to the cost of replacing the boiler controls, lift maintenance and external works for both years.

23. Miss Whiteman explained that the actual expenditure for "major works" in the profit and loss accounts for 2005 and 2006[6] was in fact a misnomer. The total figures represented the total sum paid to creditors in each year and had been prepared on an accrual basis by the accountant. Save for the cost of external redecorations and the cost of replacing the boiler controls, there had been no statutory requirement on the Respondent to consult with the lessees in relation

[5] see RB/E/42

to the other expenditure that formed part of the overall "major works" expenditure.

24. Miss Whiteman said that external redecorations had been carried out to the South and West elevations by the appointed contractor, Pembroke, over a period of two years. The expenditure incurred for 2005 and 2006 was £51,150 and £18,997.50 respectively. Before the works had commenced, the lessees had been properly consulted in accordance with s.20 of the Act and she relied on the consultation documentation in her trial bundle[7].

25. As to the lift repairs, Miss Whiteman submitted that it was not necessary for the Respondent to consult with the lessees in relation to this expenditure. In 2005, the expenditure for lift repairs was comprised of two invoices, namely, £9,078.74 and £257.48. The lessees service charge liability for the larger invoice was £249.66 and, therefore, consultation was not required. In 2006, although there was an estimated service charge provision of £10,600, the actual expenditure incurred for that year was £297.68. Again, consultation was not required.

26. As to the boiler works, Miss Whiteman accepted at the hearing that the lessees had not been consulted in relation to these costs that had been incurred and made an application under s. 20ZA of the Act to dispense with the consultation requirements. That application is considered below. It is sufficient to note here that the Applicants do not challenge that these works were reasonably incurred or the standard of works carried out.

27. When considering the issue of the major works, the Tribunal also had the benefit of the nominal ledger accounts for 2005 and 2006.

28. The Tribunal firstly considered the cost of the external decorations carried out by Pembroke. The total costs incurred in 2005 for "major works" was £131,248. Of those costs, approximately £70,000 was paid to Pembroke for

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[6] see RB/e/44

the external decorations. It is clear that a further sum of approximately £30,000 had been incurred in relation to pigeon costs, boiler and lift repairs. The confusing aspect of the profit and loss account for 2005 was that the accountant had prepared the accounts on an accrual basis. The accountant had accrued a further sum of £27,149 for unspecified creditors in 2005. The misunderstanding on the part of the Applicants appears to have occurred because the accountant had allocated these costs under the heading of "major works" in the account.

29. As to the primary submission made by the Applicants that the lessees had not been consulted, it is clear that the total sum paid to Pembroke for the cost of the external decorations was £51,150 in 2005 and £18,997.50 in 2006 making a total of £70,147.50. It is also clear is that Pembroke carried out the works under a single contract although the works had been carried out over a two year period. Having regard to the consultation documentation before it, the Tribunal found that the lessees had been properly consulted in accordance with s.20 of the Act before Pembroke had commenced the works. Even though Pembroke had not been the cheapest tender, there is no statutory requirement by the Respondent to access the cheapest tender. In this instance, the Respondent had in fact accepted the second cheapest tender provided by Pembroke.

30. Although it was not strictly part of the Applicant's case, they asserted that the costs paid to Pembroke in 2005 had exceeded the tender figure by £30,000. The Tribunal found this assertion to be incorrect. As stated above, this misunderstanding arose simply because the accountant, when preparing the accounts for this year, had allocated all of the cost of repairs under the single heading of "major works".

31. The Applicants also submitted, in terms, that the Respondent had also failed to consult the lessees in relation to the balance of the "major works" expenditure in 2005. The Tribunal's analysis of the accounts for 2005 revealed the

[7] see RB/E/160 onwards

following. Of the total expenditure incurred for this year, £94,181 was spent on "major works". Of this sum, £51,150 was paid to Pembroke in relation to the external decorations. The remaining balance of £43,031 also appears to have been paid to Pembroke for carrying out additional responsive repairs to the building during 2005 and the Tribunal was satisfied that there was no statutory requirement on the part of the Respondent to consult in relation to this additional expenditure because it was based on individual invoices and not on a single item of expenditure. Accordingly, there was no requirement on the part of the Respondent to consult with the lessees in accordance with s.20 of the Act.

32. As to the lift maintenance costs of £9,330 incurred in 2005, the Tribunal also found that the Respondent had not been required to consult with the lessees in accordance with s.20. From the documentary evidence, it was clear that this global figure is comprised of a number of separate invoices, the largest of which was dated 16 May 2005 in the sum of £3748.25, which did not breach the consultation threshold.

33. The Tribunal then turned to consider the 2006 service charge year. It is clear that the sum of £39,939 was spent on "major works". Of this sum, £18,997.50 was paid to Pembroke under the major works contract for the external decorations. This leaves the balance of approximately £20,000 that was spent on additional responsive repairs. Of this balance, the Tribunal was satisfied, having regard to the invoices provided, that none of the expenditure incurred by the Respondent required consultation in accordance with s.20 of the Act.

34. As to the boiler repair costs, this is considered below as part of the Respondent's s.20ZA application.

(d) Telephone (£2,413 & £2,534)

35. The Applicants submitted that these costs were not reasonably incurred because they appeared to be excessive when compared to their own telephone bills of approximately £800 per annum. However, in cross-examination, Miss Whiteman demonstrated that these costs also included the costs of the

communal entrance system[8] as well as the telephone costs attributable to the porter's flat. Miss Whiteman asserted that the porter paid his own proportion of the telephone bill and, therefore, it could not be said that these costs have not been reasonably incurred.

36. The Applicants appeared to misunderstand that these costs also included the cost of maintaining the communal door entry system under a long term contract. The Applicants challenge was limited to the telephone costs *per se* and not the cost of maintaining the entry phone system. They accepted that the porter paid his proportion of the telephone bill. When this figure was deducted from the overall telephone costs, the remaining balance was in fact lower than the figure proposed by the Applicants as being reasonable. The Tribunal, therefore, had little difficulty in concluding that these costs had been reasonably incurred.

(e) Accountancy & Audit Fees (£2,148 + £500 & £3,367 + £500)

37. The Applicant contended that these costs had not been reasonably incurred, especially having regard to the fact that an additional audit fee of £500 had been paid to the accountant for both 2005 and 2006. They submitted that £2,000 in total for each year was a reasonable amount.

38. Miss Whiteman submitted that there was no evidence from the Applicants to show that the accountancy and audit fees had not been reasonably incurred. The accountant's duties involved more than simply bookkeeping. As the Respondent was a limited company, company accounts had to be prepared on an accrual basis showing the creditors. Moreover, the accountants were required to prepare an auditors report as a statutory requirement. The audit fee has only been separately stated because it is a requirement under the Companies Regulations 2005 to disclose this, but it was part and parcel of the same task performed by the accountant.

[8] see RB/E/258

39. The Tribunal had no difficulty in rejecting the Applicant's submission in relation to these costs. They had adduced no evidence that the costs had not been reasonably incurred. A mere assertion otherwise is not evidence to discharge the burden of proof placed upon them as Applicants. The Tribunal considered that the requirement for an audit was in the interests of the lessees to ensure that service charge monies are subject to proper scrutiny by the accountants. In any event, the Tribunal also considered the Applicant's individual liability of £13.75 per annum for these costs to be *de minimis*.

(f) Management Fees (all 3 years)

40. In 2005 and 2006, the managing agent with responsibility for the day-to-day management of the property was a Mr Basley. For those years, the total management fee charged by was £9,870 per annum. It seems that in or about June or July 2006 accounting discrepancies with the service charge account were discovered and in or about September 2006 Mr Basley resigned as the managing agent. It seems that, subsequently, County Court proceedings were commenced against Mr Basley in relation to these accounting discrepancies. In December 2006, the present managing agent, Austin Rees were appointed under a management agreement with effect from 1 January 2007[9].

41. The Applicants made two separate challenges in relation to this issue. Firstly, that the management fees paid to Mr Basley had not been reasonably incurred. The Applicants asserted that for 2005 and 2006 he had provided inferior management services. He had sought to "look after himself" and seek to make a profit from his management fees. For example, he had been difficult to contact, he had not maintained a separate client account and had failed to ensure that the internal parts of the building were maintained. Furthermore, by using the same contractor, Pembroke, Mr Basley had ensured that the property had been a "cash cow" for him and the Applicants were supported in this new by the fact that the same budget estimates had been repeated for both years.

[9] see RB/E/142

42. Secondly, the Applicant submitted that the management agreement under which Austin Rees were appointed was a qualifying long-term agreement because it was for an indefinite term and that the Respondent had failed to consult the lessees in accordance with S.20 of the Act before entering into this agreement. The Applicants did not challenge the reasonableness of the management fees charged by Austin Rees.

43. In relation to the management fees charged by Mr Basley, the Respondent called Mr Pilbeam, a Director from Austin Rees, to give evidence. He said that he was not in a position to comment on the estimated budgets for 2005 and 2006 prepared by Mr Basley. It appeared that Mr Basley had charged a flat fee of £150 per flat as a management fee for each of those years. Mr Pilbeam said that the management fee could range from £140-170 per flat for a block of this kind.

44. Miss Whiteman submitted that there was no basis upon which it could be said that Mr Basley's management fees were unreasonable. Mr Pilbeam's evidence was that he had charged the going rate. The allegation of a failure on Mr Basley's part to keep a separate service charge account had not been borne out. She submitted that he did review the annual budget and to perform his management duties adequately. The criticisms made of his management practice by the Applicants were a different matter.

45. As to whether the management agreement entered into between the Respondent and Austin Rees was a qualifying long-term agreement, it is a matter of common ground that the agreement does not expressly set out the term. Mr Pilbeam's evidence was that the agreement was for a term of 12 months. His understanding at the time the agreement was entered into was that his firm would be employed for an initial period of 12 months and would then be informed by the Respondent if it was to be retained as the managing agent. The agreement has not been converted into a long term contract and his view was that his firm was appointed on a year to year basis.

46. Mr Pilbeam's evidence was corroborated by that of Mr Wheeler, the Building Surveyor employed by Austin Rees with responsibility for overseeing any major works at the property. In cross-examination, he said that the RICS management contract used by his firm had no fixed term and could be terminated by each party giving three months notice to the other.

47. Mr Pilbeam's evidence was further corroborated by that of Mrs Freeman-Owen and Dr Moss, both Directors of the Respondent company, in their respective witness statements that Austin Rees were only initially appointed for a year under the management agreement. In the circumstances, Miss Whiteman submitted that there was no obligation on the part of the Respondent to consult the lessees before appointing Austin Rees.

48. Dealing firstly with the management fees charged by Mr Basley in 2005 at 2006, the Tribunal did not consider the Applicants assertions of the various management failures on the part of Mr Basley to be a sufficient basis upon which to make a finding that his management fees had not been reasonably incurred. Their assertions had not been supported by any other evidence. The Applicants did not dispute that Mr Basley had prepared annual budgets, ensured that major works and reactive repairs have been carried out and buildings insurance effected. The Tribunal accepted Miss Whiteman's submission that the Applicants criticisms of Mr Basley's management practice was an entirely different matter. The Tribunal placed no emphasis on the fact that Mr Basley was being sued by the Respondent for various accounting discrepancies because at the time of the hearing there had been no finding in the County Court against him of negligence and/or dishonesty.

49. Turning to the issue of whether the Respondent should have consulted the lessees before entering into the management agreement with Austin Rees, it is clear that this was an agreement for the provision of services within the meaning of the consultation regulations. This issue turns up on whether or not that agreement was for a term exceeding 12 months. Although the agreement itself contained no express provision setting out the term, the Tribunal was entitled to have regard to what was intended by the contracting parties. The

clear and unambiguous evidence given by Mr Pilbeam, Mr Wheeler, Mrs Freeman-Owen and Dr Moss was that at the initial term for which Austin Rees would be appointed as managing agent was 12 months from 1 January 2007. What also appears to have been intended by the contracting parties was that the management agreement will effectively continue on the same terms on an annual basis unless and until it was determined by either party giving three months notice to the other. Having regard to this evidence, the Tribunal found that the management agreement was not a qualifying long-term agreement and, therefore, the Respondent had not been obliged to consult other lessees before entering into it.

(ii) Y/E: 31December 2007

50. As at the date of the hearing, the service charge accounts for the actual expenditure incurred in 2007 had not been prepared. Nevertheless, it appears that the estimated budget for this year had been repeated the budget figures for 2005 and 2006. The specific head of expenditure expressly challenged for this year have already been dealt with above. The general complaint made by the Applicants for this service charge year effectively flow from the challenges made by them in relation to 2005 and 2006. It follows that if the same budget figures had been duplicated in 2007, then the inference to be drawn was that the estimated costs were also unreasonably incurred. In particular, the Applicants drew attention to the £58,235 reserve fund provision for major works and £10,600 for professional fees.

51. The Tribunal heard evidence from Mrs Freeman-Owen and Dr Moss regarding the preparation of the estimated maintenance budgets for 2005, 2006 and 2007. In general terms, their evidence was that, since their appointment as Directors of the Respondent company in May 2005, the Board has adopted the budget estimates prepared by the preceding Directors, especially in view of the fact that the service charge account had been allowed to run into deficit over previous years and the need to carry out major works to the building. It seems that until the present year, the service charge account had never been in credit. At paragraph 12 of his witness statement, Mr Wheeler confirms that the

budget for 2007, in his experience, appears to be reasonable for a property of this size and type.

52. The Tribunal saw no merit in the Applicant's admission that the estimated maintenance budget for 2007 was unreasonable given their perceived shortcomings of the 2005 and 2006 budgets. The challenges made by the Applicants in relation to those years were based merely on their assertions and nothing else. Those assertions had been rejected by the Tribunal. It was never the case that specific provision had been made for specific items of expenditure and not incurred and no explanation given about surplus funds. The simple explanation given by Mrs Freeman-Owen and Dr Moss is that the entire maintenance budget had been spent for 2005 at 2006. Indeed, until the present year, the service charge account was in deficit. It cannot, therefore, follow that of the 2007 budget estimate is also unreasonably incurred, especially given the works required to be carried out to the building as indicated by Mr Wheeler. Moreover, both Mrs Freeman-Owen and Dr Moss had a financial interest, as leaseholders, in keeping the maintenance budget to a reasonable minimum for each year.

(iii) Reserve Fund Contribution - all years

52. Essentially, the Applicants contended that the works for which the reserve fund contributions had been collected for 2005, 2006 and 2007 were not carried out, save for the external decorations carried out by Pembroke and minor roof works. Therefore, they submitted that for 2005 only the sum of £68,000 should be allowed is reasonable and £16,500 in 2006. Nothing should be allowed for 2007, as these costs had been duplicated from the preceding years.

53. The Tribunal agreed with Miss Whiteman's submission that the estimated reserve fund provision for each of the years concerned was reasonable for a block of this size. It was not the case that these funds had been somehow misappropriated. They had in fact been reallocated to other heads of expenditure. The difficulty here appears to be caused by the way the budget estimate is prepared. On the face of it, it appears that these funds are being

ring fenced to deal with specific items of work. In reality, they were being used as the overheads in maintaining the property. The Tribunal was satisfied that this did not amount to any misconduct on the part of the Respondent or a breach of the statutory trust on which these funds are held. The Tribunal was supported in his view by the evidence of Mr Pilbeam who said that, since his firm's appointment, each item of expenditure has to be approved by the Board of Directors before a cheque is issued. Accordingly, the Tribunal determined that the reserve fund provision in the maintenance budget for 2005, 2006 and 2007 were reasonably incurred.

The Section 20ZA Application

54. As stated above, this application is made by the Respondent in relation to various boiler works carried out to the central heating system. At the pre-trial review, the cost of the boiler works was placed at £22,889 in 2005. However, this appears to be incorrect. The boiler costs arose in the following way.

55. On 23 November 2005, the previous managing agent, Mr Basley, wrote to the lessees advising them that essential works to upgrade the boiler control systems had been identified and scheduled for completion during the second half of that year. The lessees were informed that the management company had taken the decision to accept an (enclosed) estimate dated 8 September 2005 supplied by a Mr Dunkerton. The estimate provided by Mr Dunkerton included, *inter alia*, the installation of a new three-way valve to the central heating circuit in the sum of £3948.70 plus VAT and at the installation of a new control panel in the sum of £9,988.90 plus VAT. It seems that a new three-way valve had been fitted to the central heating circuit as an essential prerequisite to the new control system. The letter to the lessees also informed them that tenders had been sought from two other contractors without success.

56. It seems that he subsequently installed this valve because on 5 October 2005 he rendered an invoice to Mr Basley in the sum of £5,875 inclusive of VAT. This amount appeared as a creditor in the 2005 accounts. It also seems that the sum of £11,977.48 was paid to Mr Dunkerton in 2006 for the installation of the new boiler control systems and this appears in the 2006 accounts as part

of the "major works" sums. It is in respect of the latter amount that the application to dispense is made.

57. In the course of the hearing, Miss Whiteman conceded that the works carried out by Mr Dunkerton should have been consulted upon by the Respondent and that this had not taken place. It is for this reason that the application to dispense with this consultation requirements was made. At the conclusion of the hearing, the Tribunal gave directions that the Respondent formally issue an application to dispense and the parties file brief statements of case. The application would then be considered as a paper application by the Tribunal along with the substantive service charge application.

58. It is submitted on behalf of the Respondent that it is apparent from the various invoices submitted by Mr Dunkerton in or about October 2005 that he had carried out a number of ongoing repairs to the valves in an attempt to improve the efficiency of the central heating system and that these works were not part of the same contract but separate items of work and did not require consultation.

59. In support of the application, it was submitted generally on behalf of the Respondent that the failure to consult the lessees had not significantly prejudiced them; that the breach of s.20 was unintentional and that is no alternative contractors had been proposed by either the Applicants or any of the other lessees.

60. In their statement of case, Dr and Mrs Zweigman effectively rely on the technical breach of s.20 by the Respondent and place reliance on the fact that Mr Dunkerton appears to be the only plumber to be employed by it thereby providing him with a monopoly on prices.

61. Section 20ZA of the Act provides the Tribunal with discretion to dispense with the consultation requirements imposed by s.20 of the Act where it is reasonable to do so. The Tribunal grants the present application to dispense with the consultation requirements in relation to the boiler works carried out

by Mr Dunkerton in 2006 for the sum of £11,977.48. The Tribunal does so for the following main reasons:

(a) That this is a "tenant owned" block of flats run by and for the benefit of the tenants.

(b) The Board of Directors are themselves lessees and have a financial interest in ensuring that service charge expenditure is reasonably incurred.

(c) Not to grant the application would, in effect, financially penalise all of the lessees through the service charge account. This, inevitably, would result in future estimated service charge budgets having to increase to meet any shortfall in the service charge account.

(d) The application was not opposed by the vast majority of leaseholders who played no part in these proceedings.

(e) The Tribunal accepted the evidence of Mrs Freeman-Owen at the hearing that it difficult to get another contractor to provide an estimate for the boiler.

(f) The Tribunal accepted the submission made behalf of the Respondent that the failure to consult had not been intentional.

(g) That the Applicants had not demonstrated that they had been financially prejudiced by having Mr Dunkerton carry out the works, despite their assertion that he had a monopoly on prices. Indeed, neither the Applicants nor any of the other lessees at the relevant time proposed their own contractor to obtain an alternative estimate for the works.

62. In granting the application to dispense, the Tribunal makes it clear that it should not be construed as having created a precedent either in relation to future boiler/central heating or the works. This application has been granted on its own particular facts. In the event that the Respondent finds itself unable to properly consult with the lessees in relation to future proposed works, then a further application to dispense will have to be made to the Tribunal with reasons.

Section 20C & Fees

63. As part of the substantive service charge application, the Applicants made a further application under s.20C of the Act that the Respondent the distentitled from recovering all or part of the costs it had incurred in these proceedings.

64. Section 20C of the Act provides the Tribunal with a discretion to make such an order where it is just and equitable having regard to all the circumstances of the case. In the instant case, the Applicants had not succeeded on any of the issues. Applying the principle that costs should "follow the event", it would not, therefore, be just and equitable to deprive the Respondent of its costs. In any event, to make such an order would be of little practical consequence because the Respondent is a "tenant owned" company. For the same reasons, the Tribunal does not direct the Respondent to reimburse the Applicants any of the fees paid by them in bringing the service charge application.

Schedule 12 Paragraph 10 Costs

65. The Respondent made a further application at the conclusion of the hearing that the Applicants pay costs contribution of £500 to eight on the basis that they had acted either frivolously, vexatiously or and abuse of process by their conduct.

66. Miss Whiteman stated that the Tribunal had directed the Applicants to prepare the trial bundles by no later than 9 May 2008 and they had failed to do so. Miss Whiteman relied on the bundle of *inter partes* copy correspondence. She said that she had only been served with a copy of the Applicants statement of case but that they had made no disclosure at all. She had only received the Applicant's bundle on the day before the hearing. The Respondent had, therefore, been put to the cost of having to prepare the trial bundles at short notice. She submitted that, by their conduct, the Applicants had acted unreasonably.

67. In reply, Mrs Zweigman said that the reason for the delay in preparing the trial bundles was because her husband had been admitted to hospital for a few

days. However, she was unable to provide the Tribunal with any specific details about this matter.

68. The Tribunal took into account that the Applicants were lay persons and had acted in person in this matter. Nevertheless, the Tribunal was satisfied, on balance, that the Applicants had failed to comply with the Tribunal's direction as to the serving of the trial bundle on the Respondent without good reason. The Respondent had been placed in the position of having to prepare trial bundles at its own cost when it had not been obliged to do so. In the Tribunal's view, this conduct amounted to an abuse of process. Furthermore, the Applicants had pursued an application without merit, which was bound to fail. In so doing, the Applicants had acted frivolously and/or vexatiously. Taking all these matters into account, the Tribunal concluded that the Applicant's conduct ought to be properly reflected in an award of costs of £500 against them. For the avoidance of doubt, the Applicants are jointly and severally liable for these costs, which are payable to the Respondent within 28 days from his Decision being served upon them.

Dated the 3 day of September 2008

CHAIRMAN.....

Mr I Mohabir LLB (Hons)