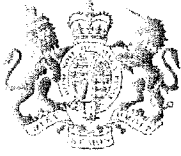


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**FIRST - TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case Reference** : CHI/00HP/LSC/2016/0069

**Property** : Flats 3, 8 and 10 Kenilworth Court, 3  
Western Road, Canford Cliffs, Poole  
Dorset, BH13 7BB

**Applicant** : Mehson Property Company  
Limited

**Represented by** : Mr S. Mehson and Miss. N  
Mehson

**Respondent** : Kenilworth Freehold Limited

**Represented by** : Rebbeck Brothers, Chartered  
Surveyors and Property Managers

**Type of Applications** : Landlord and Tenant Act 1985,  
section 27A(1)  
  
Landlord and Tenant Act 1985,  
section 20C

**Tribunal Members** : Judge M Davey  
Mrs J. Coupe FRICS

**Date and venue of  
Hearing** : 19 October 2016  
Sandbanks Hotel, Poole

**Date of Decision** : 27 April 2017

## DECISION

1. That, subject to the Landlord having complied with the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007, the sums claimed by way of service charge for 2016 are payable by the Applicant, without prejudice to any future application, under section 27A of the Landlord and Tenant Act 1985, that might be made after the works are completed.
2. No order is made under section 20C of the Landlord and Tenant Act 1985.
3. No order is made for reimbursement of the Applicant's fees.

## REASONS

### Background

1. The Tribunal first gave a reasoned decision in respect of this Application on 19 January 2017. On 8 February 2017 the Applicant sought permission to appeal that decision. After receiving clarification from the Applicant as to its grounds of appeal the Tribunal wrote to the parties stating that it was minded to review its decision under Rules 53 and 55 of the Tribunal Procedure (First-tier Tribunal (Property Chamber) Rules 2013 ("the 2013 Rules") and invited representations with regard to its proposal. Following receipt of representations from both parties the Tribunal reviewed and, under section 9(4) of the Tribunals Courts and Enforcement Act 2007, set aside part of its decision of 19 January 2017 in the light of further information, which it did not have before it at the time of its earlier decision. The Tribunal has remade its decision and these are the reasons for that decision and to remake that decision. With regard to that part of the decision of 19 January 2017 in respect of which it decided to take no action, the Tribunal then considered, in accordance with Rule 55(2) of the 2013 Rules, whether to give permission to appeal in relation to that part of the decision. That decision on the appeal application accompanies these reasons.
2. In this redetermination of the Application the Tribunal has also dealt with the Applicant's request for reimbursement by the Respondent of the Applicant's tribunal fees. The Tribunal's earlier decision, which it

decided not to set aside is include in this later decision for the sake of completeness.

### **The Application**

3. By an Application dated 20 June 2016, ("the Application") Mehson Property Company Limited, Argyll House, 158 Richmond Park Road, Bournemouth, Dorset BH8 8TW, ("the Applicant"), being the leaseholder of flats 3, 8 and 10 Kenilworth Court, 3 Western Road, Poole, Dorset, BH13 7BB ("the subject properties") sought a determination by the First-tier Tribunal (Property Chamber) ("the Tribunal") under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act"). The Application related to the service charge for 2016 in respect of the leases of the subject properties now held by the Applicant and the freehold of which is held by the Respondent, Kenilworth Freehold Limited ("the Landlord") of 16 Pilsdon Drive, Canford Heath, Poole, Dorset, BH17 9EL. The Landlord Company's members own 12 of the 16 leasehold flats. The leases of the subject properties ("the Leases") were granted on 11 September 1959 (flat 3), 15 May 2009 (flat 8) and 12 May 1960 (flat 10). Each Lease was granted for a term of 999 years from 25 December 1958. The Tribunal was supplied with a copy of the Leases of all three flats. Judge D. Agnew issued Directions to the parties on 2 August 2016 setting out a timetable leading to the hearing of the Application.

### **The Inspection**

4. The Tribunal inspected the exterior of Kenilworth Court on the morning of 19 October 2016. Kenilworth Court was constructed towards the end of the 1950s as a three-storey purpose built block of 12 self-contained two-bedroom flats. A third floor, with lift access, containing four penthouse flats was added in 2011. All the subject properties are in the original part of the building. Flats 3 and 10 are on the first floor and flat 6 is on the second floor. The first and second floor flats have balconies to the front. The block is surrounded by communal gardens laid to lawn with shrubs and hedges and enclosed by a boundary fence. The Tribunal inspected internally flats 3 (on the first floor) and 6 (on the second floor) with the permission of the leasehold owners. Following the inspection the Tribunal conducted a hearing at the Sandbanks Hotel at which both parties were represented.
5. At the hearing the Applicant Company was represented by its directors, Miss Nadia Mehson and Mr S. Mehson. For the sake of ease they will be referred to hereafter as the Applicants. Mr Anthony Mellery-Pratt of Rebbeck Brothers, Chartered Surveyors and Property Managers ("Rebbeck") represented the Respondent. Rebbeck manage Kenilworth Court under the terms of a Management Agency Agreement with the Respondent dated 25 December 2014. Also present at the hearing were Ms Vanda Skonieczna (flat 4), Mr Roderick Watt (flat 14) and Mr Richard Rose (flat 12) who were all Directors of the Respondent

freehold owner and Ms Rosie-May Flamson who is the Residential Property Manager of Rebbeck.

6. Having deliberated the matter after the closure of the hearing, the Tribunal subsequently invited written representations from the parties on a High Court decision, copied to the parties, concerning the scope of section 20 of the Landlord and Tenant Act 1985 with regard to pre-works professional fees. The Applicants submitted those further representations on 13 December 2016 and the Landlord made its submissions on 22 December 2016. The parties also made further submissions in connection with the application for permission to appeal the decision of 19 January 2017.

### **The Leases**

7. The Leases are in all material respects in identical terms. Clause 6 of the Leases contains a covenant by the Lessor to “(1) Maintain repair redecorate and renew (a) the main structure and in particular the roofs chimneys stacks gutters and rainwater pipes of Kenilworth Court (b) the gas and water pipes drains and electric cables and wires in under or upon Kenilworth Court and enjoyed or used by the lessee with the owners and lessees of other flats in Kenilworth Court (c) the main entrances passages landings and staircases of Kenilworth Court so enjoyed or used by the Lessees in common as aforesaid and (d) the boundary walls and fences and roadways of Kenilworth Court (2) so far as practicable keep clean and reasonably lighted the passage landings staircases and other parts of Kenilworth Court so enjoyed or used by the Lessee in common as aforesaid and (so far as aforesaid) keep the grounds of Kenilworth Court tidy (3) will so often as reasonably required decorate the exterior of Kenilworth Court in such manner as shall be agreed by a majority of the owners or lessees of the other Flats comprised in Kenilworth Court or failing agreement in the manner in which the same was previously decorated or as near thereto as circumstances permit and without prejudice to the generality of the foregoing provisions of this Clause will paint the exterior parts of Kenilworth Court usually painted with two coats at least of paint of good quality at least once every three years.”
8. By clause 1(c) of the Leases the Lessee covenants to pay “by equal half yearly instalments in advance on the 24<sup>th</sup> date of June and the 25<sup>th</sup> day of December in each year (the first of such payments or a proportionate part thereof to be made on the execution hereof) the annual service charge (as hereinafter defined) as a contribution towards the expenditure incurred or to be incurred by the Lessors incidental to the performance of the covenants on the part of the Lessors contained in clause 6.

## The Law

9. A "service charge" is defined in **section 18(1) of the 1985 Act** as:

"an amount payable by a tenant of a dwelling as part of or in addition to the rent:-

- (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
- (b) the whole or part of which varies or may vary according to the relevant costs."

**Section 19(1) of the 1985 Act**, provides that:

"Relevant costs shall be taken into account in determining the amount of a service charge payable for a period-

- (a) only to the extent that they are reasonably incurred, and
- (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly".

"Relevant costs" are defined for these purposes by **section 18(2)** of the 1985 Act as "the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

**Section 20** provides that

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either--

- (a) complied with in relation to the works or agreement, or
- (b) dispensed with in relation to the works or agreement by (or on appeal from) [the tribunal].

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this

section applies to a qualifying long term agreement—

- (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
- (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

- (a) an amount prescribed by, or determined in accordance with, the regulations, and
- (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

The appropriate amount is set at £250. Thus if the landlord fails to comply with the consultation requirements the amount that a tenant is liable to pay is limited to £250 unless on application to the Tribunal under section 20ZA the need to consult is dispensed with.

**Section 20ZA (2)** defines “qualifying works” as “works to a building or any other premises.”

**Section 20ZA(1)** permits the Tribunal to dispense with all or any of the consultation requirements in relation to any qualifying works where it is satisfied that it is reasonable to dispense with the requirements.

**Schedule 4 Part 2 of the Regulations** sets out the consultation requirements in the case of qualifying works where no public notice is required. The present case is such a case.

**Section 20C(1) of the Landlord and Tenant Act 1985** provides in so far as relevant ‘that a tenant may make an application for an order that all or any of the costs incurred by the landlord in connection with proceedings before a court or 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.” **Section 20C(3)** provides that “The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.”

### **The material facts**

10. Both Applicants and Respondent made written and oral submissions to the Tribunal from which the Tribunal made the following findings of fact.
11. Rebbeck took over management of Kenilworth Court from the previous agents, Castlefords, in December 2014. They were soon made aware of a possible issue with balcony cracking at the property. In March 2015, Rebbeck were advised by Graham Garner and Partners Limited, Structural Engineers (“GGP”), that the balconies might be unsafe. Rebbeck then wrote to inform leaseholders of this advice and arranged for the balconies to be supported with metal props. The work was carried out by C&D Builders (“C&D”).
12. By a letter and enclosed notice, dated 1 May 2015, Rebbeck, on behalf of the Landlord, gave the Lessees “Part 1 Notices”, under section 20 of the 1985 Act, and Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 (“the 2003 Regulations”), of intention to carry out qualifying works to flats at Kenilworth Court, including the subject properties. The specified works, which the Landlord intended to carry out, were (a) “remedial works to the eight original balconies on the front elevation of the building” and (b) “remedial works to the front elevation of the building to include replacement of lintels and renewal of cavity trays and associated works” respectively. The consultation period was stated to end on 8 June 2015.
13. The covering letter, which accompanied the section 20 Notice, referred to “an initial report” from GGP, which was stated to be enclosed. The letter also stated that a “final report in relation to the lintels is now enclosed.” With regard to the balconies the letter referred to further investigations and stated that, “When these investigations are complete we will provide a copy of the full report and our findings.”
14. By a letter dated 19 May 2015, Rebbeck invoiced the Lessees including the Applicants for a levy of £1,250 per flat to cover “the ongoing works”, payable by 5 June 2015. On the same date Bennington Green Ltd, Chartered Surveyors, (“BG”) set out the terms of a contract whereby they would provide professional services in connection with the works to the lintels and balconies at Kenilworth Court. They subsequently produced a specification for all required works and sent this out to four local contractors inviting tenders. On 10 September 2015 GGP reported that they had carried out concrete testing on 6 of the 8 balconies being those to which they had access. They found that the concrete was in an

acceptable condition relative to its age but that the reinforcement in the concrete is not correctly positioned and is not adequate to fulfil its intended function with a cantilevered member. The deflections of the balconies and associated cracking and movement of the masonry was considered to be due to the long-term loading effects and the incorrectly placed reinforcements. GGP opined that the most cost effective and expedient solution was to retain the existing balconies and provide a new support system of post and beams towards the outer edges.

15. By a letter and enclosed notices, dated 23 March 2016, the Landlord's agent gave a "Part 2 Notice" notice under section 20 of the 1985 Act, and Schedule 4 of the 2003 Regulations. The notice stated that the Landlord had now obtained estimates in respect of the works to the lintels and balconies to be carried out. The notice stated that of the three specified estimates it proposed to accept that of C&D Roofing Ltd in the sum of £80,191 being the lowest of the estimates. The sum included a contingency sum of £7,000. The notice stated that in addition to the contractors (sic) charges "the following fees also apply"

"Surveyors contract administration to prepare a specification of works, tender process and oversee these works at a rate of 9.5% at the contract total. This does not include any allowance for contingencies or variations to the contract.

The cost of the qualifying works to be carried out under the agreement will be subject to a Section 20 administration charge at a fixed fee of £4000 plus VAT. If the works do not proceed then the managing agents will be charged on a time cost basis."

The consultation period was stated to end on 28 April 2016.

16. The notice concluded that, "The cost of these works will be covered by a levy, the details of which are attached." An attached sheet set out (1) a number of costs incurred (i.e. paid for) as at 23 March 2016 (2) a number of outstanding costs (invoiced for but not yet paid) and (3) costs to be incurred. They were:

(1) Costs incurred and paid

C&D (for the investigative works, temporary propping and lintel repair to flat 9)	£8,394.00
GGP	£1,944.32
Testing & Consultancy	£3,679.20
MC Plan	£270.00
Planning Application	£339.00
<b>Total</b>	<b>£19,227.46</b>



(2) Invoices awaiting payment

BG	£3,927.82
GGP	£4,419.35
<b>Total</b>	<b>£8,347.17</b>

(3) Estimated costs of remaining works

C&D	£80,191.00
BG	£4,000.00
Rebbeck	£4,800.00
<b>Total</b>	<b>£88,991.00</b>

**Total outstanding** **£97,338.17**

**Minus funds of £772.54**  
**remaining from £20,000.00 levy**

**£96,565.63**

**Amount payable per flat** **£6.035.63**

17. The covering letter stated that, "Your invoice for the first part of the levy and breakdown of all costs is also included. We would be grateful to receive payment of the first £1000 by 15 April."
18. Neither the notice, nor the covering letter referred to any costs incurred in obtaining professional services from GGP.
19. By a further invoice dated 31 May 2016 and sent to all Lessees the Landlord's agent demanded the sum of £5,035.32 from each Lessee being 6.25% of £80,565.
20. At the Management Company AGM on 10 August 2016, the major works were discussed and it was agreed that until works could be scheduled the charge of £5,035.32 per flat would be removed from all Lessees' accounts. It was agreed that the most urgent work, to the lintel of flat 9, would be carried out as a matter of urgency.

**The Applicants' case**

21. The Applicants challenge the validity of the section 20 notice consultation procedure. They make the following assertions.

- (1) That the breakdown of costs attached to the Part 2 notice included fees (to be paid) totalling £8,347.17 paid to Bennington Green Chartered Surveyors (£3,927.82) and GGP Structural Engineers (£4,419.35) for services rendered before the notice was issued and that the fees are therefore not recoverable from the Applicant because there was no consultation on this matter.
  - (2) That the fee of £4,419.35 payable to GGP Structural Engineers was not referred to in the Notice and Statement of estimates and is therefore not payable for that reason.
  - (3) That the invoice of 23 March 2016 for a levy of £1,000 payable by 15 April 2016 was not payable because it was issued before the end of the section 20 Consultation period which ended on 28 April 2016.
22. The Applicants also challenge the breakdown of the costs of the post-section 20 Notice works by asserting as follows:
- (1) That the “administration charge” of £4,000 plus VAT is not payable because there is already an administration charge of 9.5% specified in the notice and there is nothing in the lease that permits fees of a managing agent to be charged as a service charge cost.
  - (2) That the surveyor’s contract administration fee of 9.5% is excessively high. The notice says that is 9.5% of the contract total but does not specify that total.
  - (3) It would appear that the 9.5% is charged also on the surveyor’s own fees and on other professional fees.
23. The Applicants further submit that some of the proposed works to the balconies and replacement of windows and doors go beyond repair and constitute improvements that are not permitted by the terms of the lease.
24. The Applicants challenge specific components of the costs of the proposed works as being unnecessary or unreasonable. These relate to (a) removal of contractor’s equipment, rubbish and surplus materials and (b) gardening.

### **The Respondent’s case**

25. Mr Mellery-Pratt submitted that the Landlord’s stage 2 notice complied with section 20 of the 1985 Act, but if the Tribunal found otherwise he would request dispensation under section 20ZA of the 1985 Act. He said that the first two sections of the summary of costs that accompanied the Stage 2 notice related to work already done and the rest related to costs to be incurred. Mr Mellery-Pratt explained that the matter of works to the balconies and lintels had been ongoing since early 2015 and had necessitated considerable investigation works, expert reports and other enabling costs. He said that during the whole period all the leaseholders at the block have been fully informed of all the steps that were being taken and have been given access via the Rebbeck Bros website to all the reports that have been received.

Furthermore, there had been a meeting with the leaseholders, on 17 December 2015, between issue of the stage 1 and Part 2 notices. Both engineers and surveyors were present at that meeting, the minutes of which were prepared and circulated to all leaseholders.

26. Mr Mellery-Pratt said that with regard to the £4,000 plus VAT administration charge, this is not a management fee. It is a Landlord's agent's charge in relation to the works contract. It is a contract between Rebeck Brothers and the freeholder. As to the matter of whether the charge is unreasonable, Mr Mellery-Pratt said that his firm had expended 67.5 hours of work even before the works have been instructed. He said that £75 plus VAT per hour would be a reasonable rate and if that were the case they had run up £6000 worth of work. Therefore £4,000 was a reasonable charge. He relies on clause 1(c) of the lease as authority for the charging of a management fee in respect of services.
27. The Applicants referred to the management fee in Bennington Green's tender analysis suggesting a duplication of management charges, but Mr Mellery-Pratt pointed out that that charge was simply the contractor's fee for management of the works specified in the tender analysis.
28. The Applicants also challenged as unreasonable, the surveyor's contract administration charge of 9.5% of the contract total. They said that from their knowledge of another major works project involving 6 flats a fee of 7% had been charged. The Respondent said that the rate of 9.5% of the contract price, which they had negotiated down from 10.5%, was for the surveyor to draw up specifications for the required works, putting them out to tender, analysing the tenders and reporting thereon as well as instructing the chosen contractor and overseeing and signing off the completed works. The costs of the work carried out by the surveyor, prior to issue of the section 20 notice was £3,927.82 and the balance of £4,000 would be for the overseeing of the works when carried out and for any further disbursements. They said that this was a reasonable charge, 10-12% being the normal rate for a project of this nature.
29. The Applicants challenged the inclusion of a provisional sum of £4,000 in the contractor's tender and said that surely the building surveyor would have seen beforehand whether this was necessary and included it in their report. Mr Mellery-Pratt said that it is perfectly normal when removing windows that damage can occur and that if the sum were not used in whole or in part it would be returned. He said that there were no improvements within the proposed works. With regard to the waterproofing of the balconies this will involve removal of the existing balcony surfaces and replacement with a wearing surface as part of the works. If any windows are replaced this will be done in UPVC with double glazing as the most cost-effective option.

30. With regard to removal of equipment rubbish and surplus materials, Mr Mellery-Pratt says that the item at 3.1.7 of the tender document allows for debris removal. This is material which will have arisen as a result of the building works. The item at 3.7.4 covers remaining equipment rubbish and surplus materials. These are different to the debris.
31. Mr Mellery-Pratt said that the item in the tender document relating to gardening simply refers to dealing with the grounds after the works are completed.

### **Section 20C**

32. The Applicants seek an order under section 20C of the 1985 Act but says that this is without prejudice to their contention that the lease does not permit the Landlord's costs incurred in connection with the proceedings to be added to the service charge.
33. The Respondent opposes the application because it believes that none of the points raised by the Applicants have been sustained. It accepts that the addition of the penthouse flats means that there is a question as to how the service charge should be apportioned. The 12 original leases provide for payment according to rateable proportion whilst the new flat owners pay 1/16 of the cost. However, this is the subject of a separate application to the Tribunal for variation of the lease and therefore the parties ask that this matter not be dealt with on the present occasion.

### **Discussion and decision**

34. The dispute is simply stated. It concerns the payability and reasonableness of the service charge for 2016 in so far as it relates to works carried out, or proposed to be carried out, on the balconies and lintels of a number of the flats at Kenilworth Court. The solution to that dispute is less simply stated.
35. It is clear that the works to the balconies and lintels at Kenilworth Court are necessary. The dispute relates to the scope and cost of the project and specifically the extent of the contribution recoverable from the Applicant leaseholders. By the time of the hearing the actual and estimated costs of the repair scheme had reached a total of £115,793.09 of which £88,585.00 was attributable to the physical works. The remaining £27,208.09, being 23.5% of the total, was attributable to management and consultancy fees.
36. It is relevant to recall that the freeholder Landlord is a Company whose members comprise most of the leaseholders of flats (12 out of 16) at Kenilworth Court. Three of the remaining flats are however owned by the Applicants (themselves a Company) who disagree with the actions taken by the Landlord. It follows that in practice most of the

leaseholders are their own Landlord and were therefore in agreement with the need for the works and the charges being levied by the Company's agent. The Landlord has appointed Rebbeck as its agent to manage the property and therefore references in this decision to the actions of the Landlord are for the most part actions by Rebbeck on behalf of the Landlord.

37. The works, both completed and proposed, to the balconies and lintels of flats at Kenilworth Court are clearly within the Landlord's repairing obligation, under clause 6 of the lease, and therefore the costs of those works, including associated costs, are recoverable by way of service charge under the terms of clause 1(c) of the Lease as being "expenditure incurred by the Lessors incidental to the performance of the Covenants on the part of the Lessors contained in Clause 6" of the Lease.
38. As stated in paragraph 11 above, the history of the matter is that the Landlord's agent, Rebbeck Brothers, took over management of Kenilworth Court in December 2014 and soon thereafter became aware of potential problems with regard to the safety of the lintels and balconies at the property. In March 2015, Rebbeck were advised by Graham Garner and Partners Limited, Structural Engineers ("GGP"), following investigations by them, that the balconies may be unsafe.
39. Rebbeck wrote to inform leaseholders of this advice and arranged for the balconies to be supported with metal props. The work was carried out by C&D Builders ("C&D"). The total costs incurred in this process amounted to £19,227.46. This sum included fees of the consulting engineers GGP, amounting to £5,623.52, and charges of C&D for their work, amounting to £8,394.00. We were not told when these payments were made, but we do know that by a letter of 19 May 2015 Rebbeck imposed a levy of £1,250 per flat (i.e. £20,000) payable by 5 June to cover the cost of these preliminary works.
40. It became clear, when the Applicant sought to appeal this Tribunal's original decision of 19 January 2017, that the Applicant was not disputing this levy before the Tribunal because it was the subject of an ongoing court application. Both parties told the Tribunal that the court had refused to transfer the matter of the payability of that levy to the Tribunal. This means that unfortunately the court will deal with the payability of part of the costs for the works at Kenilworth Court and the Tribunal will have dealt with the remaining costs. Furthermore, as Mr Mellery-Pratt, for the Respondent, submitted, the court has no power under section 20ZA of the 1985 Act to grant dispensation from compliance with the consultation requirements should the court find that the Respondent had failed to comply with section 20 of the 1985 Act and the 2003 Consultation Regulations with regard to the levy of 19 May 2015. Mr Mellery-Pratt invited the Tribunal to grant such dispensation. However, the Tribunal declines to do so because the court has not yet issued its decision and it will be for the Respondent to apply

to the Tribunal if necessary after that event. Such a determination would not require an oral hearing if both parties are in agreement that a paper determination can be made.

41. The next stage in the history of the matter was that on May 1 2015, Rebbeck served consultation stage 1 notices on the leaseholders in respect of the proposed remedial works to the balconies, the consultation ending on June 8 2015. Nothing then happened by way of consultation until a stage 2 notice was issued on 23 March 2016, the consultation period ending on 28 April 2016. By 23 March 2016, Bennington Green had produced a specification for all required works, which was sent to four contractors inviting tenders. Three responded and, as notified in the stage 2 notice, the tender of C& D, which was the lowest tender, was accepted. At that point Rebbeck had incurred further costs of £8,347.17 relating to the preliminary works carried out by C&D Roofing `Ltd. This sum comprised BG's charges of £3,927.82 for their work up to that stage and fees of £4,419.35 in respect of further investigations and reports by GGP.
42. The Applicants argue (1) that because the fees of £4,419.35 payable to GGP and £3,927.82 payable to BG were for services provided for Rebbeck *before* the stage 2 section 20 notice was issued they are not recoverable from the Applicants and (2) that GGP's fee was not referred to in the section 20 stage 2 notice and is therefore not payable for that reason also. The Tribunal would also note that these fees related to the preliminary works and not the remaining works to be carried out.
43. The validity of the Applicants' assertion depends on an analysis of the relevant statutory provisions. Section 20 of the 1985 Act applies to "qualifying works" if "relevant costs" incurred on "carrying out the works" exceed an appropriate amount. By section 20ZA(2) of the 1985 Act "qualifying works" means "works to a building or any other premises". Section 18(2) defines "relevant costs" as "the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable." The "appropriate amount" is where a tenant's share of the relevant costs exceeds £250 (regulation 6 of the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the Regulations")).
44. Schedule 4, Part 2 paragraph 8 of the Regulations provides that  
" (1) The landlord shall give notice in writing of his intention to carry out qualifying works  
(a) to each tenant; and  
(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall—

(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;

(b) state the landlord's reasons for considering it necessary to carry out the proposed works;

(c) invite the making, in writing, of observations in relation to the proposed works; and

(d) specify—

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.”

45. The issue therefore is whether the relevant statutory provisions required the Landlord to consult on the professional services provided by GGP and BG services prior to the decision to award the works contract to C&D. The statutory provisions are not well drafted. The consulting fees are certainly relevant costs for the purposes of section 18(2) of the 1985 Act, being costs incurred by or on behalf of the landlord, “in connection with” the matters for which the service charge is payable.” It is however, less obvious, that those costs were incurred on carrying out “the works” for the purposes of section 20 of the 1985 Act. Furthermore, by regulation 8 of schedule 4 of the Regulations the Notice must describe “the works” for which tenders are to be invited. This would appear to exclude the services provided by GGP and BG.
46. In *Marionette Limited v Visible Information Packaged Systems Limited* [2002 EWHC 2546 (Ch), (a decision on section 20 before the changes introduced by the Commonhold and Leasehold Reform Act 2002), Mr Justice Warren stated (at paragraph 95) that “ ‘works’ are, in my judgment, restricted to the physical works involved in repair or maintenance and the cost of those works is the charge made by the contractor carrying out those works for doing so. This is also very much the flavour given by subsection (4)(c) requiring a description of the works to be carried out to be given in the notice which has to be served on the tenants: that provision seems to me to be inapposite to cover professional services provided by an independent person as part of the

- works which need to be described.” (The reference to ‘subsection 4(c)’ is now to regulation 8 since the changes made by the 2002 Act).
47. The Tribunal finds therefore, that the professional services provided in this case by GGP and BG before service of a section 20 notice were not ‘works’ that were subject to the statutory consultation process. It follows that section 20 does not limit the recoverable fees in respect of those services, which are undoubtedly relevant costs for the purposes of a service charge demand. The leaseholders do however have the protection of section 19 of the 1985 Act whereby the fees have to be properly incurred and be reasonable in amount. In the present case there was no challenge to the amount of the fees on those grounds.
  48. The Applicants further argue (3) that Rebbeck’s administration charge of £4,000 plus VAT (£4,800) in connection with the building works is not payable (a) because there is already an administration charge of 9.5% in the section 20 notice and (b) there is nothing in the lease that permits fees of a managing agent to be charged as a service charge cost. The Tribunal agrees with the Landlord that with regard to (a) the Applicant is confusing two charges. The fee of £4,000 plus VAT is Rebbeck’s fee in connection with its administration of the works project. The charge of 9.5% is Bennington Green’s charge for their pre and post contract administration of the works project. The Tribunal accepts the Landlord’s argument that both charges fall within clause 1(c) of the Lease being “expenditure incurred by the Lessors incidental to the performance of the Covenants on the part of the Lessors contained in Clause 6.” Clause 6 is the Landlord’s repairing covenant.
  49. The administration work carried out by Rebbeck in connection with the works is a cost incidental to the repairing covenant and is therefore properly chargeable. A works contract of this kind inevitably requires organising by an agent or other professional person. In this case Rebbeck have clearly incurred charges. Mr Mellery-Pratt said that his firm had expended 67.5 hours of work even before the works have been instructed. He said that £75 plus VAT per hour would be a reasonable rate and if that were the case they had run up £6,000 worth of work. Therefore £4,000 was a reasonable charge. The Tribunal does not find these costs to be unreasonable but in the interests of good estate management it suggests that in future leaseholders be kept informed on a regular basis of the sums being incurred by way of administration costs as part of an on going project.
  50. The Applicants also argue (4) that the Notice specifies the surveyor’s contract administration fee to be 9.5% of the contract total but does not specify that total. They suggest that it includes the surveyor’s own fee and the fees of other professionals/professions. The Tribunal agrees with the Landlord that the reference to the contract total is to the contractor’s fee for carrying out the works and that the surveyor’s charge of 9.5% does not apply to any other charges. The Tribunal also agrees, in the light of its own expert knowledge, that the contract administration charge of 9.5% is reasonable for a project of this kind.



- The Applicants' contention that 7% would be reasonable was not supported by any specific evidence to that effect.
51. The Applicants took issue with a number of specific items in C&D's tender, stating that the sums included were unnecessary. However, these heads were included in the tender documentation by the surveyor who drew up the specifications and the Tribunal does not find that their inclusion was unreasonable. One might quibble with some individual items such as whether sums should be included for mowing the grass areas to the front of the building after the works are completed, but somebody would have to do the work in question and it would have to be paid for. Furthermore, the sums in question are very small compared with the global cost of the contract.
  52. The Applicants also argued that some of the proposed works to the balconies – levelling screed and water membrane system - amounted to improvements and that as such the cost would be irrecoverable under the terms of the lease. However, the Tribunal considers it to be tolerably clear that none of the balcony works would constitute improvements and therefore the issue of whether the works are covered by the Landlord's repairing covenant does not arise. It is clear that they are works of repair. Works of repair to a modern standard often involves a degree of betterment but that does not necessarily take the works out of the ambit of a repair.
  53. The Application raises the payability and reasonableness of the service charge for 2016 in so far as it relates to the works to the balconies and lintels and associated costs. Mr Mellery-Pratt stated at the end of the hearing that the main works contract has not yet been placed. As noted above the expenses incurred (that is to say paid for by 23 March 2016) amounted to £19,227.46 and these were clearly paid for from the £20,000 levy demanded by June 5 2015. As also noted above that levy is the subject of an application to the court and has therefore not been considered by this Tribunal in the present redetermination. On 23 March 2016 the Landlord demanded a levy of £1,000 per flat by 15 April 2016 and by a further invoice dated 31 May 2016, an additional £5,035.32 per flat payable by 24 June 2016. Once again the first of these demands was not made in accordance with the terms of the service charge mechanism in the Lease, which make no provision for levies outside those terms. The second demand was however made in accordance with the Lease.
  54. It is clear that the levy of £16,000 (£1000 per flat) of 23 March 2016 was intended to enable payment of the invoices from BG and GGP, totaling £8,347.17, which were outstanding on 23 March 2016. The balance of that levy along with the levy of 31 May 2016 of £5,035.32 per flat, to be paid by 24 June 2016, was for the estimated remaining costs of the outstanding works and services, which had not yet been incurred.
  55. The Tribunal finds that the costs incurred by the Landlord were

undoubtedly incidental to the performance of the repairing covenant in clause 6 of the Lease. They are thus service charge costs properly recoverable under clause 1(c) of the Lease. Unfortunately the Landlord did not so demand them, at least initially. The Landlord clearly believed misguidedly that charges for section 20 works can be made outside the terms of the Lease. However, in the cases of flats 3, 8 and 10, the demand of 31 May 2016 does require payment by 24 June 2016 of the levy of £5,035.32 and of arrears from previous demands. It follows that those earlier charges are now demanded (again) from 24 June 2016 and thus are properly demanded in accordance with the Lease.

56. The Tribunal finds therefore that the sums demanded are payable although it notes that in August 2016 the Landlord removed the sum of £5,035.32 from the accounts of all lessees until the works are scheduled. This decision does not preclude an application by any leaseholder as to the reasonableness of the sums demanded once the works are completed. The Applicants also raised the issue of whether the sums demanded were payable because, as they alleged, the Landlord had not complied with the requirements of section 21B of the 1985 Act by sending with the demand a summary of the rights and obligations of tenants of dwellings in relation to charges as specified in the Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007 SI No 1257). The Landlord said that it did not send these notices with all demands but only with arrears demands. This is clearly wrong, but in the present case the Applicants were served with arrears demands. If the summary of rights notice accompanied those demands then the sums demanded would be payable. If they did not then the sums would not be payable until the Landlord complied.
57. The Tribunal notes that all parties agree that the matter of the apportionment of the service charge cost is in dispute and is the subject of a separate application, which has been made to the First-tier Tribunal, for variation of the Leases at Kenilworth Court. The present decision therefore does not deal with this aspect of the Applicant's claim.

#### **The Section 20C Application.**

58. Section 20C of the 1985 Act is concerned with the Landlord's costs incurred in connection with the tribunal proceedings. The Tribunal does not consider it appropriate to make an order under section 20C, the Landlord having substantially succeeded in the matter of the Application. However, the Tribunal agrees with the Applicants, and as was apparently conceded by Mr Mellery-Pratt, that the Lease does not authorise recovery of the Landlord's costs incurred in connection with the present proceedings as a service charge cost. The Landlord was unable to identify any provision that permitted such costs to be included in a service charge demand. If that is the case the costs could

not be added to a future service charge, irrespective of whether a section 20C order were to be granted or not.

### **Reimbursement of fees**

59. The Applicants sought reimbursement of their tribunal fees from the Respondent. Rule 13(2) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 provides that “The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not being remitted by the Lord Chancellor. In the present case the Applicants paid fees of £450. They claim that the Respondent should be ordered to reimburse those fees because (1) the initial demand for the £1,000 levy was not made in accordance with the service charge provisions of the Lease (2) the Landlord had failed to send the Summary of Rights Notice with the initial demand. The Applicants state that they only incurred tribunal fees because of the Respondent’s non-compliance with section 20 and their incorrect invoicing for the £1,000 levy. The Applicants assert that at the hearing Mr Mellery-Pratt did not object to the Applicant’s “claim for costs”. However, the Applicant’s claim is not for “costs” which is a quite different matter. It is a claim for reimbursement of tribunal *fees*. Furthermore, Mr Mellery-Pratt was referring to the fact that he doubted whether the Lease permitted his client’s costs incurred in connection with the proceedings to be added to a future service charge. Indeed in his most recent submissions Mr Mellery-Pratt strenuously opposed an order for reimbursement of fees.
60. The Tribunal finds it impossible to reconcile the Applicants’ claim, that they have substantially succeeded and that they had only brought the application because of the Landlord’s failure to comply with section 20 and to correctly invoice for the £1,000 levy, with the fact that the Tribunal has found (1) that section 20 was correctly complied with by the Landlord in relation to the proposed works covered 2016 service charge demand and (2) that the sums demanded were reasonable in amount. It is true that the initial demand for the £1,000 levy was not made in accordance with the terms of the Lease. However, it is also clear that the second demand included that £1,000 and this demand was made in accordance with the terms of the Lease (see paragraph 56 above). The Applicants brought their claim also for a number of other reasons (see paragraphs 22-24 above), in respect of which the Tribunal has found in favour of the Respondent.
66. The Tribunal accordingly decides that an order for reimbursement of fees should not be made.

Martin Davey  
Chairman

27 April 2017

### **RIGHTS OF APPEAL**

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, that 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.