

12706



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

Case Reference : **CHI/21UD/LSC/2017/0072
CHI/21UD/LDC/2018/0001**

Property : **28 Magdalen Road, St. Leonards on Sea, East
Sussex TN37 6EP**

Applicant : **Mr. Barry Markham**

Represented by: : **HAS Property Management**

Respondents : **Mr. S. Lilley (First Floor Flat) and Mr. & Mrs.
Bailey (Top Floor Flat)**

Type of Application : **Liability to pay service charges (First
Application No. 0072)**
**Dispensation from the consultation
requirements under Section 20ZA of the
Landlord and Tenant Act 1985 (as amended)
(Second Application No. 0001)**

Tribunal Member : **Mr. R. A. Wilkey FRICS (Surveyor/Chairman)**

Date of Consideration : **Thursday 8th March 2018
Paper determination**

Date of Decision : **Thursday 8th March 2018**

DECISION

DECISION IN SUMMARY

1. In respect of the First Application, The Tribunal is satisfied that the correct s20 procedure has been followed and that the stated sums will be payable by the lessees following services of the proper demands
2. In respect of the Second Application, the Tribunal determines to dispense with the consultation requirements contained in Sch.4 Part 2 paragraphs 8-13 of the Service Charges (Consultation Requirements) (England) Regulations 2003 and the Section 20 procedure in relation to the qualifying works described in the Application as “emergency works”

INTRODUCTION

3. There are two applications before the Tribunal.
4. The first is an application dated 29 June 2017 by the Freeholder. It is to determine the liability to pay and reasonableness of service charges.
5. The second is an application dated 8 January 2018 by the Freeholder. It is to dispense with the consultation requirements contained in Sch.4 Part 2 paragraphs 8-13 of the Service Charges (Consultation Requirements) (England) Regulations 2003 and the Section 20 procedure in relation to qualifying works
6. Directions for the conduct of the first matter were issued by the Tribunal on 13th October 2017. Directions for the conduct of the second matter were issued by the Tribunal on 11th January 2018

THE LAW AND JURISDICTION

7. The relevant parts of the provisions in the Act are as follows:
19. Limitation of service charges: reasonableness.
(1) 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.

27A. Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for 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

S.20 of the Act, and regulations made thereunder, provides that where there are qualifying works, the relevant contributions of tenants are limited unless the consultation requirements have been either complied with or dispensed with by the determination of a First Tier Tribunal. In the absence of any required consultation, the limit on recovery is £250 per lessee in respect of qualifying works.

- 8. The definitions of the various terms used within S.20 e.g. consultation reports, qualifying works etc., are set out in that Section and in S. 20ZA.
- 9. In order for the specified consultation requirements to be necessary, the relevant costs of the qualifying works have to exceed an appropriate amount which is set by Regulation and at the date of the application is £250 per lessee.
- 10. Details of the consultation requirements are contained within a statutory instrument entitled Service Charges (Consultation Requirements) (England) Regulations 2003, SI2003/1987. These requirements include amongst other things a formal notice procedure, obtaining estimates and provisions whereby a lessee may make comments about the proposed work and nominate a contractor.
- 11. S.20ZA provides that a First Tier Tribunal may dispense with all or any of the consultation requirements if it is satisfied that it is reasonable to dispense with them. There is no specific requirement for the work to be identified as urgent

or special in any way. It is simply the test of reasonableness for dispensation that has to be applied (subsection (1)).

12. The Supreme Court has given guidance on how the Tribunal should approach the exercise of its discretion to grant dispensation: *Daejan Investments Ltd. v Benson et al* [2013] UKSC 14. The Tribunal should focus on the extent, if any, to which the lessee has been prejudiced in either paying for inappropriate works or paying more than would be appropriate as a result of the failure by the lessor to comply with the regulations. No distinction should be drawn between serious or minor failings save in relation to the prejudice caused. Dispensation may be granted on terms. Lessees must show a credible case on prejudice, and what they would have said if the consultation requirements had been met, but their arguments will be viewed sympathetically, and once a credible case for prejudice is shown, it will be for the Lessor to rebut it.

INSPECTION

13. The Tribunal inspected the property on Thursday 8th March 2018 accompanied by the Freeholder, Barry Markham. Neither of the Lessees attended and they did not send a representative.
14. The building is a mid-terrace, Victorian house on five floors (including rooms within the roof space) and it has been converted into five self-contained flats. The Respondents are Lessees of two of the Flats and the other three are owned by the Freeholder.
15. The Tribunal walked the internal common parts and the outside of the building. A brief examination was also made of the lower ground floor flat which is in course of refurbishment. Maintenance of the building as a whole has generally been neglected and paint is flaking and deteriorating to many timber and rendered surfaces
16. Problems have been experienced with water penetration due to external defects. In particular, the Tribunal noted that timber laths are exposed to the underside of the top staircase following a leak. Dampness has also affected the rear walls in the lower ground floor flat. Repairs have been completed and the plastered areas are drying out.

17. Scaffolding is in place to part of the rear of the building. The Freeholder advised that work has recently been completed to replace all guttering at the rear of the main building and replace the fascia in plastic. Further work is necessary to repair two defective windows. Rendering at the rear of the building is in poor order.

CIRCUMSTANCES AND BACKGROUND TO THE FIRST APPLICATION

18. The Freeholder decided to carry out repairs and redecoration to the exterior and the communal areas of the internal parts of the building.
19. A specification was prepared by Overill Associates, Chartered Building Surveyors, and this, together with tender documents, was sent to nine firms of builders. It is noted that this specification was prepared for Mr. Lilley (First Floor Flat)
20. The section 1 Notice (Notice of Intention to carry out qualifying works) was sent to the lessees on 20 February 2017. It invited written observations on the proposals and the name of any person from whom an estimate should be obtained.
21. The second stage notice was sent to the lessees on 21 April 2017. It attached a statement of estimates received and invited observations.
22. On 21 April 2018, the Freeholder sent to the Lessees the third stage notice comprising the landlord's statement of estimates received in respect of qualifying works. An appendix included a summary of the observations previously received and the landlord's response.

CIRCUMSTANCES AND BACKGROUND TO THE SECOND APPLICATION

23. The following is extracted from the Statement of Case provided by the Freeholder with the second application
24. "Mr.(Lessee of the First Floor Flat) contacted the Freeholder to say that water was running down the rear elevation from the guttering. The water had entered the boiler flue and damaged the circuitry. Quite rightly, Mr. Lilley did not want to repair the boiler until the water penetration had been stopped. It was therefore imperative that emergency repairs were undertaken to remedy the problem. Emergency scaffolding was erected, which enabled a closer inspection of the rear elevation and guttering. It was identified that the guttering was

insufficient to catch all the rainwater, and the downpipes were also arranged poorly. Furthermore, the fascia holding the guttering was beyond repair.

25. At the same time, windows in the basement were so rotten that they had fallen out. Windows on the second floor were also rotten and allowing water penetration.
26. There is a Section 27A application with the First Tier Tribunal, relating to major repair works to the building. In the meantime, the emergency work could not wait for the outcome of the Section 27A or a new section 20 Consultation.
27. The freeholder is therefore making application to undertake emergency work to the guttering, downpipes, fascia and windows
28. Emergency works application has been made with full cooperation of Mr. Lilley. To date, Mr. Bailey has failed to engage in any communication”

THE LEASES

29. The bundles contains a copy of extracts from the leases of all flats in the building together with Deeds of Variation etc. The copy of the lease of First Floor Flat (Mr. Lilley) is incomplete.
30. The Tribunal has perused the lease of the Top Floor flat (Mr. and Mrs. Bailey) It is subject to a Deed of Variation which varies the wording of the Seventh Schedule (see below)
31. The Tribunal has not examined the other leases in detail. It is assumed that they are all in similar form so far as is relevant to these applications. None of the parties have raised any issues regarding the leases.
32. The following is extracted from the copy lease of Top Floor Flat:

Clause 4 states “The lessor relying on the covenants on the part of the Lessee herein contained **HEREBY COVENANTS** with the Lessee to observe and perform the covenants and obligations on the part of the Lessor set out in the Seventh Schedule hereto”

Clause 3 of the Seventh Schedule states “The lessor shall keep all parts of the

Maintained Property and all fixtures and fittings therein and additions thereto in a good and tenantable state of repair decoration and condition including the renewal and replacement of all worn or damaged parts... ”

The Second Schedule was amended by a Deed of Variation dated 21st October 1993 and defines the “Maintained Property” as:

“First ALL THOSE halls staircases landings and other parts of the building forming part of the Property which are used in common by the owners or occupiers of any two or more of the floors SECONDLY ALL THOSE the main structural parts of the building forming part of the Property including the roofs foundations floors (other than wooden floors) all walls bounding flats or apartments therein and external parts of the buildings (but not including the glass in the windows non-structural walls within the flats or apartments wooden floors in the flats or apartments the interior primary plasterwork tiling and other surfaces of floors ceilings and walls and the cisterns tanks drainpipes wires ducts and conduits whether or not below the surface of floors behind the surface of walls or above the surface of ceilings and which exclusively serve individual flats or apartments or the exterior doors of flats or apartments (except the external surfaces of them) and all cisterns tanks sewers drainpipes wires ducts and conduits and aerials not used solely for the purpose of any one flat or apartment and the joists or beams to which are attached any ceilings”

Clause 19 of the Sixth Schedule states “The lessee shall in equal proportion floor by floor with the lessees or owners of the other flats or apartments comprised in the Property pay to the Lessor a fair and reasonable share of the costs charges and expenses incurred by the Lessor in carrying out the obligations under the Seventh Schedule hereto”

33. The Tribunal has not interpreted the leases to determine whether or in what proportion a service charge may be levied on the tenant.

CONSIDERATION

34. Item 5 of the Directions in respect of the first application and item 1 of the directions in respect of the second application state that the Applications are to be determined on the basis of written representations unless any party makes a

request for an oral hearing by 22 March 2017 and 29 January 2018 respectively. No such request has been made.

PRELIMINARY MATTERS

35. The Tribunal had received copies of various documents. Regrettably, the contents are not in accordance with the Directions. In particular, the bundles are not paginated and some of the information specified in the Directions is missing.
36. In summary, the bundles contain copies of the following:

As to the first application:

- The Tribunal's Directions
- First and Second Stage Notices under S.20 together with associated notes and correspondence
- Third stage Notice under s.20 together with covering letter and notice of reasons for awarding a contract to carry out qualifying works
- Extracts from Leases of the flats in the building
- Completed tender documents
- The Application to the Tribunal under 27a

As to the second application:

- The Application to the Tribunal
- Directions issued by the Tribunal on 11 January 2018
- Applicant's statement of case
- Black and white photographs of parts of the building which relate to "emergency works"
- The lease of the First Floor Flat

CONSIDERATION

37. The Tribunal confirms that the SECOND Application under consideration is solely to dispense with the consultation requirements that would otherwise

exist to carry out the procedures in accordance with S.20 of the Act. It does not prevent an application being made by the landlord or any of the tenants under S.27A of the Act to deal with the liability to pay the resultant service charges. It simply removes the cap on the recoverable service charges that S.20 would otherwise have placed upon them. The landlord or the tenant can make a subsequent application under S.27A of the Act to deal with the liability to pay the resultant service charges

THE TENDER PROCESS

38. The circumstances that lead to the first application are summarised under items 18 – 22 above.
39. In the event, only six quotations were received and summary details were sent to the lessees with the Notice
40. One of the firms who provided a quotation, Coles and Sons, is owned by the freeholder and the lessees were advised accordingly.
41. Several of the firms did not provide a quotation in accordance with the tender documents, with particular regard to the amount of the contingency sum. Adjustments were made to establish a like for like basis and this resulted in the following quotations including the contingency sum of £3,000 but excluding VAT and surveyors' fees at 11% plus VAT:
42. (a) Original Completed tender Documents
 (b) Figures given to Lessees with second notice
 (c) The Notice of Reasons made reference to changes to the original quotations and these are assumed to be the final figures

	(a)	(b)	(c)
Coles & Sons	£61,636	£64,500	£61,636
1066 Homes	£61,516	£70,516	£61,516
Domsalla Ltd	£83,880	£83,880	£83,880
Orchard Construction	£91,000	£91,000	£91,000
JBC Construction	£73,883	£73,833	£73,833
Bishop & Levitt	£79,803	£79,803	£79,803

43. Other observations relevant to the consultation process are as follows:

The “Notice of Reasons for awarding a contract to carry out qualifying works”, which accompanied the letter dated 12 June 2017 from the freeholder to the lessees stated “It was agreed between all lessees (other than Mr. and Mrs. Bailey who declined to take part in the meeting to appoint a contractor) that Coles & Sons would be appointed

The building is subject to a “Poor Condition Notice” served May 2014 by Hastings Borough Council. In 2015/16 a section 20 consultation procedure was completed and a Section 20ZA application was made but unsuccessful

It is not clear from the papers whether Overill studied and reported upon the quotations received but, in addition to the amount of the quotation, there will be surveyor’s fees of 11% plus VAT

Mr. Bailey has made no observations

THE DECISION

44. The decision is made on the basis of a paper determination and the Tribunal has carefully considered the documents supplied.

First Application - to determine the liability to pay and reasonableness of service charges

45. The Freeholder has an obligation to carry out the work in accordance with the lease. The consultation process has been carried out correctly and none of the lessees have made any objection to the appointment of the nominated contractor.

Clause 4 of the Tribunal’s Directions identified the following issues to be determined though these may be amplified by the parties in their statements of case:

- Reasonableness of service charges proposed in respect of major external redecoration and other works

- Whether the Landlord has complied with the consultation requirements under Section 20 of the 1985 Act
46. The Tribunal has based its decision on the papers supplied in the bundle.
47. The Tribunal is satisfied that the proposed service charges in respect of the works as set out above are reasonable and that the landlord has complied with the consultation requirements
48. Each of the Respondents is responsible for 20% of the total cost of the work which comprises the final tender sum plus VAT plus surveyor's fees @ 11% plus VAT on surveyor's fees

Second Application - to dispense with the consultation requirements

49. As indicated earlier, the primary consideration for the Tribunal is whether or not the Lessees will suffer prejudice if dispensation is granted.
50. The Application is solely to dispense with the consultation requirements that would otherwise exist to carry out the procedures in accordance with S.20 of the Act. It does not prevent an application being made by the landlord or any of the tenants under S.27A of the Act to deal with the liability to pay the resultant service charges. It simply removes the cap on the recoverable service charges that S.20 would otherwise have placed upon them.
51. The work required under the second application is distinct from the work incorporated in the specification which forms the basis of the first application. The information provided with the second application is sparse
52. In particular, there is no confirmation that the Lessees have been advised of the work required or the likely cost. Although it has been stated that Mr. Lilley is in agreement with the proposed works, there is no written confirmation that this is the case. However, neither of the lessees have completed the form mentioned in the directions to indicate that they oppose the application. No Notices under S. 20 Landlord and Tenant Act 1985 (as amended) have been served upon the Lessees.
53. It is accepted that the extent and cost of the works will not be known with certainty without a closer inspection with the aid of scaffolding. In addition,

Mr. Lilley is affected by the external defects and contacted the Freeholder in the first place. Nevertheless, we would have expected to see correspondence advising the Lessees of what was proposed. This is a paper determination and the decision must be based on information provided in the bundle.

54. The Freeholder responded to the water penetration caused by external defects and erected scaffolding so that work can be carried out without delay. It was established that the work required is to the guttering, downpipes, fascia and some windows at the rear of the building.
55. Both Lessees have had the opportunity to comment on the application and neither has done so. Some two months has elapsed since the application was made and the Tribunal considers that there has been sufficient time for any objections to be made. Both Lessees will have seen a copy of the statement of case supplied by the Freeholder and neither has raised any issues.
56. Taking all the circumstance into account and for the reasons stated above, the Tribunal is satisfied that it is reasonable in all the circumstances for it to grant dispensation from the requirements of Section 20(1) of the Act in respect of the proposed works in the second application.

Dated: Thursday, 8 March 2018

Roger A. Wilkey FRICS (Surveyor/Chairman)

Appeals

38. 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.
39. 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.
40. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend the time limit, or not to allow the application for permission to appeal to proceed.
41. 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.
42. If the First-tier Tribunal refuses permission to appeal, in accordance with section 11 of the Tribunals, Courts and Enforcement Act 2007, and Rule 21 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, the Applicant/Respondent may make a further application for permission to appeal to the Upper Tribunal (Lands Chamber). Such application must be made in writing and received by the Upper Tribunal (Lands Chamber) no later than 14 days after the date on which the First-tier Tribunal sent notice of this refusal to the party applying for permission.