FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/42UD/LSC/2020/0030**
HMCTS Code	**:**	**P:PAPERREMOTE**
Property	**:**	**5 Wicklow Road, Ipswich, Suffolk IP1 5NQ**
Applicant	**:**	**Mrs S Foley**
Representative	**:**	
Respondent	**:**	**Ipswich Borough Council**
Representative	**:**	
Type of application	**:**	**Application for a determination of liability to pay and reasonableness of service charges**
Tribunal Member	**:**	**Judge S Brilliant**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**20 November 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was P:PAPERREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined on paper. The documents that I was referred to are in the bundle of 309 pages, the contents of which I have noted. I am grateful for the Respondent for the preparation of the bundle.

Summary of the decision made by the tribunal

The Tribunal determines the sum of £100 is payable by the Applicant in respect of the planned maintenance works consisting of bay cladding sum invoiced to the Applicant on 8 October 2019.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and

Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of planned maintenance works, consisting of bay cladding, invoiced to the Applicant on 8 October 2019. The amount of the invoice was£1,848.36, made up of £1,812.36 for the works and £36 management charges including VAT.

The background

2. The property which is the subject of this application is a two bedroom first floor flat in a block of four flats ("the flat"). The block has the appearance of an attractive and fairly substantial detached house as shown in the photographs provided to me. The block is constructed in load bearing fair–faced brickwork with concrete floors and UPVC double glazed windows under a traditionally constructed, pitched roof, clad in interlocking concrete tiles.

3. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

4. There are two storey splayed front bays to the front of the block (one bay window to each flat). It was constructed in 1947 and formed part of the social housing stock of the Respondent.

5. The long leasehold of the flat was acquired under the right to buy legislation on 14 October 2002. I have been provided with a copy of the lease. The Applicant purchased the residue of the term of the lease on 8 March 2007. She does not live at the flat, but in Southwold.

6. The lease requires the Respondent to provide services (including exterior maintenance, repairs and improvements) and the Applicant to contribute towards the cost by way of a variable service charge.

7. The lease is somewhat unusual in its nature, no doubt because it was granted under the right to buy legislation. For example, the Respondent has the power to charge the Applicant under the service charge provisions for her share of the total expenses and costs incurred by the Respondent at the time the work is carried out.

8. It is also to be noted, and this may be important, that the lease does not include the usual provision for the service of notices under s.196 Law of Property Act 1925.

9. Directions were given on 23 July 2020. The Applicant sent a two-page letter to the Tribunal dated 30 September 2020. This is to be treated as her witness statement. The Respondent's witness is Mr Carragher who made a witness statement on 28 October 2020. He is the Principal Contract Manager of the Respondent and responsible for financial and procurement matters with a budget in excess of £7M.

The dispute

10. The contested invoice arose in the following circumstances. Mr Carragher explains that properties such as the block have bay windows, which have a flat roof covered in a waterproof material. They therefore have poor thermal insulation qualities and the projecting bay walls have low insulation efficiency. This creates cold surfaces internally and dampness and mould growth often occur when moisture inside the property hits cold surface and condenses. The Respondent has received numerous complaints from residents in similar properties over the years in respect of condensation and mould around the bay windows.

11. In 2016 the decision was made to commence work to upgrade 1,097 bay window walls and roofs across the Respondent's estate. The Respondent went through the rigorous procurement procedure necessary for such works. There were two stages to the works. The work to be Applicant's flat was in the second phase of the programme. A quotation of £475,400.84 was accepted for this phase. In fact a slightly lower figure with used as the basis for the charges.

12. Having received the invoice on 8 October 2019, the Applicant took issue with it in the emails exchanged with the Respondent in November 2019. On 15 July 2020, the Applicant issue these proceedings.

13. In panel 9 she says:

I am not disputing a service charge as such but a bill/invoice for work carried out on my property without consultation. It had been mentioned and I contacted Ipswich but heard nothing further so presumed that it wasn't now going ahead. I then received a bill. This bill is for cladding on the bay window carried out in July 2019. This work seems to have been carried out on a whim with no real justification. It seems totally unnecessary, adds no value to the property or saves any money. We received no paperwork and no quotes beforehand. It seems that works can be carried out whether I would like it or not.

14. The first issue to be decided is whether or not, in her own words, the Applicant had received any paperwork or quotes before the work was commenced.

15. Mr Carragher says in paragraph 10 of his witness statement that notice of intention to enter in to a qualifying long term agreement dated 10 November 2017 was served on the Applicant. He exhibits a copy of the notice. He goes on to say that subsequently on 31 October 2018 a notice of proposal to enter in to a qualifying long term agreement was served on the Applicant. Again, he exhibits a copy[1]. It is these notices which the Applicant denies having received.

The law on consultation

16. Service Charges and Management 4th Edition paragraph 13.35 states as follows:

The consequence of a failure either to comply with the consultation requirements, or to obtain a dispensation, is set out in Landlord and Tenant Act 1985 ss.20(1), (6) and (7): the relevant contributions of the tenants are limited to the "appropriate amount" fixed by regulations made under Landlord and Tenant Act 1985 s.20(5). Under the Consultation Regulations, Landlord and Tenant Act 1985 s.20 applies to qualifying works when the relevant costs incurred on carrying out the works exceed an amount which results in the service charge contribution by any tenant to the cost of the works being more than £250, and applies to QLTAs when the relevant costs incurred under the agreement in a 12 month period exceed an amount which results in the service charge contribution of any tenant, in respect of that period, being more than £100. Unless the consultation requirements have either been

[1] There appears to be some confusion over the notices. Mr Carragher in paragraphs 10 and 14 of his witness statement says that the notices were made in accordance with schedule 2 of the 2003 Regulations, but the notice on the face of it refers to schedule 4. However, the Applicant only takes issue with the giving of the notices and not their content so I say nothing more about this.

complied with or dispensed with the statutory maximum the landlord can recover in respect of relevant costs is limited to these amounts.

17. These proceedings concern a qualifying long term agreement. Accordingly, if the consultation requirements have not been complied with the Respondent is limited to recovering £100.

Service: the facts

18. I have already set out in outline Mr Carragher's evidence about service. Now I must look at what he said more closely. In paragraph 10 of his witness statement Mr Carragher says:

*The first step was service of notice of intention to enter into a qualifying long term agreement, which was **served** (my emphasis) in November 2017 on all leaseholders and invited comments until 15 December 2017…*

19. In paragraph 14 of his witness statement Mr Carragher says:

*The Respondent then **issued** (my emphasis) to the leaseholders, including the Applicant, a Notice of Proposal to enter into a qualifying long term agreement…*

20. In paragraph 15 of his witness statement Mr Carragher says:

*All notices for the Applicant were **served** (my emphasis) on her at both the Property, and an alternative address she provided for this purpose of 17 Hillfield Court, Reydon, Suffolk IP18 6RU.*

21. This is the address on the invoice relied upon by the Respondent.

22. In paragraph 21 of his witness statement Mr Carragher says:

*The Respondent **served** (my emphasis) the following notices on the Applicant by sending them to both the Property and alternative address provided by her: a. Notice of Intention b. Notice of Proposal*

23. In paragraph 21 of his witness statement Mr Carragher says:

I am aware that the Respondent responded to earlier correspondence sent in the same way as she indicated that she had no intention of paying for any upgrade works – as exhibited marked DC 5.

24. This is a reference to an email sent by the Applicant's husband on 19 September 2016, the material part which reads:

We have received another notice of intention letter regarding our flat and once again we have no interest in having or paying for any works that we see [as] unnecessary and not economically viable. We feel that the costs of works would far exceed the potential saving.

25. Earlier in his witness statement at paragraph 11, Mr Carragher said that this email followed an aborted s.20 notice of intention.

26. In paragraph 21 of his witness statement Mr Carragher says:

*As set out above, the Respondent complied with the statutory provisions in respect of the **service** (my emphasis) of notices on all leaseholders, including the Applicant. It is my **understanding** (my emphasis) that the Respondent complies with the obligation to serve notices by delivering the notice to the Property by hand and posting it to the last known address. Further, the Applicant indicated previously that she did not intend to pay for improvements to the property.*

27. The suggestion in the final sentence appears to be that the Applicant's failure to respond to the notices we are concerned with is likely to have been that she had already had her final say, and did not need to respond to the subsequent notices she had received.

28. I do not agree. The conclusion I draw from the evidence is that the Applicant is someone who has very strong views about the necessity (or rather the lack of necessity) for insulation works to be done to the flat. In my view it is highly unlikely that if the Applicant had received either notice she would have held her peace.

Service: the law

29. Service Charges and Management 4th Edition paragraph 13.35 states as follows (I have broken this down into paragraphs to make it easier to read):

30. *There are no specific statutory provisions relating to the service of notices under the Consultation Regulations. Consequently the ordinary rules governing the service of documents applies to the giving of the various consultation notices.*

31. *In the event that service is disputed by a tenant, it will be for the landlord to establish as a fact in issue good service or deemed service (if applicable) of the notice in question. Essentially this will involve proving: (1) that a notice addressed to the tenant has been delivered to a particular address; and (2) that this address was a good address for service/deemed service; alternatively, that the notice otherwise came to the actual attention of the tenant.*

32. *Particular problems can arise where the tenant is not resident in the flat. This was illustrated in Akorita v 36 Gensing Road Ltd LRX/16/2008 Lands Tribunal in which a non-resident tenant argued that there had been a failure to consult on building works. Her lease included a deemed service provision which provided that notices could be served on the tenant by leaving them at her last known business or residential address, or by affixing them to or leaving them on the demised premises and that, in either case, notices were to be treated as served even though the tenant might not receive them. The lease further provided that notices could be sent by ordinary post in a prepaid envelope addressed to the tenant at her last known business or residential address and that such notices were to be treated as served unless the Post Office returned them undelivered.*

33. *Although it was known to the landlord (through its previous managing agents) that the tenant no longer lived in the flat, the current managing agents were unaware of this and posted the consultation notice to the tenant at the flat. In the result it was left by the Royal Mail in the entrance hall of the building and did not come to the actual attention of the tenant. The Lands Tribunal held that this did not amount to good service: the landlord had agreed to use the tenant's last known business or residential address when effecting service, or to affix notices to, or to leave them at, the flat.*

34. *As the notice was posted to the flat, which was not the tenant's last known address it was not an address that the tenant had agreed could be used for postal service. However, the Lands Tribunal accepted that the landlord could have duly served the notice by affixing it to, or leaving it in the flat (even though the flat was empty) as the lease provided that this was a permissible means of service provided for by the lease.*

35. *In Trafford Housing Trust v Rubenstein [2013] UKUT 581 (LC) the Tribunal assumed, but expressly said that it did not decide, that a notice given pursuant to s.20 was a notice required to be served by the lease for the purposes of s.196 Law of Property Act 1925.*

36. *In Southwark LBC v Akhtar [2017] UKUT 0150 (LC) the Tribunal held that a contractual incorporation of s.196 in a lease applied to notice under Landlord and Tenant Act 1985 s.20B because it enabled the landlord to do something prescribed by the lease, namely to recover service charges. The point may be important because, in such circumstances, the landlord may rely on the presumption of service in Interpretation Act 1978 s.7.*

37. s.196 Law of Property Act 1925, as relevant and to which reference will be made below, provides as follows:

(1) Any notice required or authorised to be served or given by this Act shall be in writing.

(2) Any notice required or authorised by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

(3) Any notice required or authorised by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorised to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4) Any notice required or authorised by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned by the postal operator (within the meaning of Part 3 of the Postal Services Act 2011 concerned undelivered; and that service shall be deemed to be

made at the time at which the registered letter would in the ordinary course be delivered.

(5) The provisions of this section shall extend to notices required to be served by any instrument affecting property executed or coming into operation after the commencement of this Act unless a contrary intention appears.

Discussion

38. I shall first deal with my findings of facts, before turning to my analysis of the law and how it applies to the facts.

39. I have come to the conclusion that I accept the evidence of Applicant that she was not aware of the notices. She may be regarded as a difficult lessee by the Respondent, but I can find absolutely no evidence of dishonesty on her part. Given her very prompt, pithy and forceful objection to the earlier consultation notice, I regard it is highly unlikely that she would not have responded in like terms and she had been aware of the notices.

40. I find the Respondent's evidence on the question of service very thin. Mr Carragher is clearly a highly qualified employee of the Respondent who carries considerable responsibilities. But he does not appear to have anything to do with the administrative task of giving notices.

41. The Respondent knew fell that an issue regarding the giving of notices was one of the issues in this case. It was not a matter that took them by surprise.

42. The critical part of the Respondent's evidence has already been set out above, and I repeat it:

*It is my **understanding** (my emphasis) that the Respondent complies with the obligation to serve notice by delivering the notice to the Property by hand and posting it to the last known address.*

43. I am afraid that in the context of this case, where an articulate and credible lessee has said in no uncertain terms that she has not been given the requisite documents, an "understanding" is not good enough.

44. Of course, hearsay evidence is permitted. In fact the strict rules of evidence do not apply at all in the Tribunal. Nevertheless, the weight which a judge gives to such hearsay evidence is a matter for him or her. Mr Carragher does not condescend to reveal the source of his understanding. It is quite impossible to draw the conclusion that the notices were given to the Applicant on this particular occasion from such a generalised and unattributed assertion. There is no reason why in general terms much better information about the giving of notices in respect of the second phase of the cladding works could not have been provided by the appropriate witness or witnesses.

45. It may well be the case that the job of giving the notices had been outsourced (I

observe that notices emanated from an Industrial Estate). If so, a manager or supervisor at that operation could have provided a witness statement setting out in broad terms the systems in place for the mass sending out of notices both by post and by hand delivery. Equally, if the sending out of the notices had been done in-house then the same applies. I would not have expected the actual person whom it is said delivered the notice flat to be identified. But the system could have been properly clarified.

46. In any event, the Respondent knew that the Applicant was not living at the flat. Unless the Respondent can rely upon s.196 of the 1925 Act , it seems to me delivering a notice to a property at which the Respondent knew the Applicant was not resident would not amount to good service.

47. I shall assume in favour of the Respondent, as did the Upper Tribunal in Trafford Housing Trust v Rubenstein [2013] UKUT 581 (LC), that a notice given pursuant to s.20 of the 1985 Act is a notice required to be served by the lease for the purposes of s.196.

48. Subsections (1) and (2) of s.196 are not engaged. If notices were served by the Respondent, they must have been in writing and would have had the Applicant's name on the face of them. Subsection (4) is not engaged because there is no suggestion the notices were sent by registered post.

49. Subsection (3) has two limbs. Unlike subsection (4), it is not a deeming provision about the physical arrival of a notice. It is only engaged when the Tribunal is satisfied that physical arrival has taken place. The first limb relates to a notice being left at the last known place of abode of the lessee. My conclusion on the facts is that no notice was received at that address. The second limb relates to a notice affixed or left for the lessee on the building comprised in the lease. Again, I am not satisfied that the Respondent has proved that a notice was left for the Applicant at that address.

50. It is doubtful that subsection (5) is engaged: Wandsworth LBC v Atwell [1996] 1 EGLR 57. But this does not take matters any further than the assumption I have made in paragraph 47 above.

51. Finally, and for the sake of completeness, reference should be meant to s.7 Interpretation Act 1978, which provides:

Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

52. I am not satisfied on the balance of probabilities on the very scant evidence before me that a properly addressed prepaid letters were posted to the Applicant's home containing the notices.

53. I therefore find that the consultation requirements were not carried out and that the Respondent is limited to recover £100.

Reasonableness and payability

54. In view of my findings above, I can take it shortly.

55. In this respect the evidence of Mr Carragher is meticulous and compelling.

56. The works fall within the Respondent's maintaining/repairing/improving obligations. There was a clear need to have this work done. The Applicant's contentions otherwise are plainly wrong. Paragraph 31 of Mr Carragher's witness statement demonstrates that the Applicant's efforts to investigate the cost of similar works does not appear to have taken into account the full specifications and preliminaries for the cladding that was part of the tender.

57. In the penultimate paragraph of her statement Applicant said: *Should the ruling being awarded in my favour, I will be seeking reimbursement of the cost of the fees only*. I therefore order that the Applicant be reimbursed for her expenditure on fees. The Applicant should notify the Respondent of the sum involved. After deduction of £100 this sum should be paid to the Applicant.

Name: Judge Brilliant: Date: 20 November 2020

Rights of appeal

A written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).