FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00HH/LDC/2020/0048 CHI/00HH/LIS/2020/0021
Property	**:**	Waldon Point, Torquay, Devon TQ2 5YE
Applicant	**:**	Waldon Point Management Company Limited
Representative	**:**	Mrs Hazel McArthur
Respondent	**:**	Mr Nigel Haviland
Representative	**:**	
Type of Application	**:**	Determination of service charges and an Application to dispense with the consultation requirements of S.20 Landlord and Tenant Act 1985
Tribunal Members	**:**	D Banfield FRICS, Regional Surveyor Mr P A Gammon MBE BA
Date of Hearing	**:**	8 October 2020 by means of Cloud Video Platform
Date of Decision	**:**	13 October 2020

DECISION

The Tribunal determines that once properly demanded in accordance with S.21B landlord and Tenant Act 1985 all of the outstanding service charges will become payable save that a credit of £871.03 shall be given.

1. The Tribunal have two applications to determine;
    - CHI/00HH/LIS/2020/0021 in respect of service charges for the period 2017 to 2020 (the S.27A application)

    - CHI/00HH/LDC/2020/0048 in respect of dispensation under Section 20ZA of the Landlord and Tenant Act 1985 from the consultation requirements imposed on the landlord by Section 20 of the 1985 Act relating to decorations carried out in 2019. (the S.20ZA application)

2. Various Directions were made for the provision of submissions and evidence and, as the Applicant was unwilling to disclose her email address to the Lessee it was agreed that the Tribunal would act as a "conduit and prepare the hearing bundle.

3. The hearing bundle comprised 173 numbered pages copies of which were provided to the parties. Mr Haviland also provided a series coloured photographs which, due to the file format could not be included in the bundle but were nevertheless seen by the Tribunal. References to pages in this decision are shown as [x]

4. Some of the issues raised by the Respondent were not within the Tribunal's jurisdiction and by the time the matter came to the hearing were reduced to those referred to in Mr Haviland's response to the Tribunal's Directions of 4 June 2020 [114-118] together with his objection to the S.20ZA application.

The Hearing

5. The hearing was held using Cloud Video Platform technology with both parties attending via telephone rather than video links.

6. The case officer explained that the session was being recorded.

7. The Tribunal explained that the S.20ZA application would be dealt with first and then the S.27A application.

S.20ZA

8. The Tribunal said that an application for dispensation of the consultation requirements could be made either before or after the event and the test the Tribunal would apply was whether the lack of opportunity to be consulted had caused the Respondent to suffer materially.

9. The application made was in respect of dispensation for decoration only whereas Mr Haviland had also raised the issue of the replacement screens to the balconies. With the agreement of the parties the Tribunal permitted the addition of the balcony issue to the application upon which it will make its determination.

10. With regard to the balcony screens, an estimate dated 20 January 2018 from Anchor HomeCare gave a price of £57,172.72 without indication as to whether this was with or without VAT. The specification was for Rehau plastic Tritac reinforced frames with toughened laminated glass. [98] Mr Haviland said the cost to each leaseholder at 1/51st was £1,121.03.

11. The Applicant wrote to each lessee on 3 February 2018 indicating that Balcony frames were to be replaced. [97]

12. As to decoration, an estimate dated 31/7/2018 from Perfection Plus Decorators in the sum of £48,880 is exhibited at [100]. Mr Haviland said the cost to each Leaseholder at 1/51st was £958.43.

13. On 1 February 2019 the Applicant wrote to each lessee indicating that re-decoration was to take place and scaffolding would be erected the following month. [99]

The Law

14. The relevant section of the Act reads as follows:

> 20ZA Consultation requirements:
>
> (1) Where an application is made to a Leasehold Valuation Tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long-term agreement, the Tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

15. The matter was examined in some detail by the Supreme Court in the case of Daejan Investments Ltd v Benson. In summary the Supreme Court noted the following
    a. The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA (1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.
    b. The financial consequence to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.
    c. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
    d. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.
    e. The Tribunal has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or legal fees) incurred in connection with the landlord's application under section 20ZA (1).
    f. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some

"relevant" prejudice that they would or might have suffered is on the tenants.

g. The court considered that "relevant" prejudice should be given a narrow definition; it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.
h. The more serious and/or deliberate the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
i. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

Submissions on S.20ZA Application

16. Mr Haviland contends that both sets of works should have been the subject of a S.20 consultation process. He considers that the decorating works could have been carried out to a better standard albeit accepting that this might be at higher cost. He referred to the contractor having run out of paint part way through the job which wouldn't have happened with a larger more organised concern. He considers that the only way of getting best value is by testing the market by seeking competitive tenders. If he had been consulted he would have made that point which may have resulted in a better specified more durable result.

17. With regard to the balconies he referred to an email from the manufacturers of the balcony screen, Rehau, dated 23/9/19 regarding their Skyforce Juliette balcony system [106] in which they state "this has been designed and tested to be fixed to our reinforced window system, it is not designed or intended to be suitable for a balcony designed as additional leisure space. The regulations for these two different products are quite different, and the materials used to meet the current regulations are quite different"

18. Mr Haviland said that Building Control had passed the use of the system for the lower block but not for those at a higher level. The change required a planning application but none was made and in his opinion the material used should have been stainless steel rather than plastic considering its coastal position.

19. If he had been consulted and three quotations obtained the specification and consent issues would have been clarified before the work was undertaken.

20. Mrs McArthur agrees that consultation should have been carried out but says that she was unaware of the requirement. The decorating contractor had been used by them for over 20 years and as such she believed consultation to be unnecessary.

21. She refuted Mr Haviland's suggestion that the paint may have run out during the contract as a result of which it was thinned and said that the work was to a good standard.

22. Regarding the balconies Mrs McArthur said that she had relied on the advice given by the installers, Anchor HomeCare that planning consent was not required. She was told that the planners had indicated that consent was not required as the replacements looked similar to the existing timber framed screens. Mr Haviland's suggestion to use stainless steel had been refused by the shareholders on cost grounds at the AGM of the management company. At the time the existing screens were dangerous and needed to be replaced without delay. If she had employed a managing agent to arrange the work it would have cost an extra £2,000 in fees.

Decision on S 20ZA Application

23. With regard to the decorating contract the Tribunal is not satisfied from the evidence presented that Mr Haviland has suffered the type of prejudice referred to in the Daejan case referred to above. Whilst no doubt seeking competitive tenders would have demonstrated that best value was being obtained evidence has not been provided showing that the cost was excessive for the work carried out. The Tribunal therefore grants dispensation from the consultation requirements of S.20 Landlord and Tenant Act 1985 in respect of the decorating contract.

24. Turning now to the work to the balconies it seems clear from the evidence that whilst defective balcony screens were replaced, the specification of those replacements was inadequate. The email from the manufacturers is unequivocal in that the screens are to the wrong specification and should not have been installed in Mr Haviland's sixth floor flat

25. The Tribunal is satisfied that if consultation had taken place and quotations sought from competing contractors the adequacy of the specification would have been identified and the error entered into would have been avoided.

26. Given the strong likelihood those screens at higher levels will have to be replaced again the Tribunal is satisfied that the Respondent has suffered prejudice to the full extent of the costs incurred and refuses dispensation from the consultation requirements thus limiting the Respondent's liability in respect of balcony screen costs to £250.00.

27. **Given that the lessee's contribution to the balcony screen was £1,121.03 this requires a credit of £871.03 to Mr Haviland's service charge account.**

S.27A

28. Mrs McArthur said that the Mr Haviland's outstanding service charge to date now amounted to £4,849.94 an increase over the amount included in the Application. The increase was explained as the ongoing monthly service charge from the application date to the date of the hearing. Mr Haviland agreed that the Tribunal's determination should include all sums charged to date.

29. At [15] is a table showing the actual expenditure from 2016 to 2018 and the budget for 2019. Pages [16] and [17] detail the monthly service charge demanded together with payments made.

30. Mrs McArthur said that the balcony works were included in the 2018 service charge and the cost of decorations was reflected in the 2019 budget. Mrs McArthur said that the accounts for 2019 were in preparation but were not yet complete.

The Law

31. See Appendix

The Lease

32. Clause 4 (ii) Requires the Lessee to pay 2% of the estimated monthly costs of matters mentioned in the Fifth Schedule plus a % charge for heating and hot water

33. Clause 5(iv) Requires the Lessor to maintain repair and renew the main structure including the external walls, roof and foundations

34. Clause 5 (vi) requires the Lessor to decorate the exterior

35. Clause 5 (vii) Requires the Lessor to ensure an adequate supply of hot water and central heating unless unavoidably prevented from doing so.

36. The Fifth Schedule sets out the items that the Lessor may recover from the Lessee by way of service charge;

- Insurance
- Maintenance and repair per Clause 5(iv)
- Cleaning and lighting
- Decorating per Clause 5(vi)
- Expenses of refuse chutes
- Rates and taxes
- The fees and disbursements paid to any workmen, servants and others (including Managing Agents and other professionals employed in connection with the proper and convenient management and running of the Estate
- All other expenses of maintenance and management
- VAT

37. The Tribunal noted that somewhat unusually the lease contained no requirement on the Lessor to produce annual service charge accounts.

Submissions

38. Mr Haviland set out his objections at [114] to [118] as;
    - Failure to consult under S.20 Landlord and Tenant Act 1985. (dealt with above)
    - Charges not properly demanded under S.21B of the Act in that they have not been accompanied by a Summary of Tenants Rights and Obligations. The Applicant's letter of 30 January 2020 which enclosed a copy of the Summary was of no effect and all demands to date have been invalid. No service charges are therefore due and he wished to reclaim all service charges paid since the commencement of his ownership.
    - The Lessor is in breach of the repairing obligations in that the roof is defective and still leaks in bad weather. In order to carry out repairs the flat roof should be cleared of all telecoms equipment following which competitive quotations should be obtained. At the hearing Mr Haviland said that at present the roof appeared not to be leaking although in 2019 moisture meter readings were "in the red"
    - A professional managing agent (RICS) at an estimated annual cost of £15,000 should be appointed following competitive tender as the current regime does not have the professional knowledge and expertise required to manage a block with 51 flats.
    - A full breakdown of service charge budget should be provided
    - A cavity wall issue which has now been satisfactorily resolved and no longer an issue
    - Failure to consult on balconies (dealt with above)
    - Refusal to provide documentation reasonably requested

39. With regard to S.21B the Tribunal explained that each and every service charge demand had to be accompanied by a Summary of Tenants Rights and Obligations without which the demand was invalid. The Applicant's letter of 30 January 2020 [107] enclosing the appropriate summary but without a service charge demand could not of itself regularise the position and until properly demanded service charges demanded were not due to be paid.

40. In answer to Mr Haviland's query it was explained that service charges which were not properly demanded at the time nevertheless could be demanded at a later date and if complying with S.21B became payable.

41. In respect of the salary of £17,200 paid to Mrs McArthur as Chairman she explained that when she took over from her husband she also took over the salary that the board had agreed he should be paid. She changed the light bulbs, was on call for emergencies and carried out

repairs herself when able to do so. Although she did not have an employment contract she considered that she was an employee, was not self-employed and was paid PAYE.

42. Mr Haviland said he was not against internal management but if they had had professional management the problems that had now arisen would not have occurred and money would have been spent more wisely. He said that he appreciated the work that Mrs McArthur carried out but that was not the same as the services of a professional and experience manager providing an "overseeing" role.

43. In answer to the Tribunal's question of how much he considered the Chairman's salary should be he said that £15,000 was appropriate.

44. Mrs McArthur responded that if such a reduced salary was decided she would reduce her working hours accordingly and not provide attendance for emergency call outs.

45. Mr Haviland said that whilst there had been problems caused by poorly installed cavity wall insulation this had now been rectified by the installers.

46. With regard to reports of leaks to the roof above his flat Mr Haviland said that he was not aware of a current issue. In 2019 however, the moisture readings were in the red zone. In the report he commissioned from Academy Property Consultants dated 11 October 2018 [50] reference was made to water penetration through a light fitting in July 2017 and that on testing on 11 October 2018 he recorded damp meter readings in both search and measure mode in the red zone especially in the areas of the external roof beams. Although he was unable to conduct an external inspection of the roof he concluded from the internal evidence that there must be a leak.

47. Mrs McArthur had submitted a copy of a report from Croft Surveyors [149] dated 8 November 2018 which concluded that the problem was one of lack of insulation causing condensation resulting in the formation of mould. Their own damp meter readings did not indicate the presence of a high level of damp.

48. Mrs McArthur said that despite the lack of evidence of a leak the Applicant carried out roof works as a "goodwill gesture". In the bundle are invoices from Anchor Home Care dated 10th January 2019 [128] for £85 with work described as "Paint a section of roof above Flat 27 with a non-bituminous Draylon fibre-reinforced compound" and from Rowe Roofing dated 20/12/19 [126] for £780 with the work carried out described as "To clean off area. Supply and fit liquid rubber roof solution to all affected areas, 15m"

49. Mr Haviland said that the communal heating was inadequate and his tenants had complained. Although he had no complaint over the provision of hot water the heating was inefficient and needed the fitting

of TRVs. Heating was erratic and when work carried out elsewhere in the block his radiators had not then been bled.

50. Mrs McArthur said Mr Haviland's tenants were elderly, had returned from overseas and were always cold even in summer. The communal heating was controlled by an external thermostat. Mr Haviland's present tenant is very happy.

51. In answer to a question from the Tribunal Mrs McArthur said that reserves amounted to £53,000 but had not been used to fund either of the major works as it was considered prudent to keep £30,000 in hand for possible boiler replacement and £10,000 for expenses such as lifts.

52. Mrs McArthur said that the income from the use of the roof space by aerial companies was used to fund building works and thereby subsidise the service charge.

Determination

53. The Tribunal has already indicated that service charges are not due until demanded in accordance with Section 21B of the Landlord and Tenant Act 1985.

54. With regard to the salary of £17,200 p.a. paid to the Chairman the Tribunal is satisfied that Mrs McArthur may be considered as an employee of the Applicant and that the Fifth Schedule therefore permits such a payment. Mr Haviland suggested that the appropriate remuneration should be £15,000 as against the £17,200 currently paid. The difference is relatively modest and from the description of Mrs McArthur's duties the Tribunal determines that £17,200 p.a. is acceptable.

55. Whilst determining that the Chairman may be paid a salary and not reducing that salary the Tribunal is far from convinced that the current management structure should continue. Managing a block of 51 flats with commercial tenants of the roof space together with significant maintenance issues would, in the Tribunal's opinion benefit from some professional input. Whether this is by appointing a Managing Agent to administer the property with the Applicant as its client or to commission a report giving guidance as to the future management options is a matter for the Applicant, it should nevertheless be seriously considered.

56. Regarding the problem with damp/mould, both survey reports refer to the lack of insulation in the roof. The Academy report also refers to the likelihood of a roof leak whereas that from Croft does not. Somewhat surprisingly given that both surveys were carried out within a few weeks of each other the damp meter readings taken are at considerable variance.

57. The Tribunal does not attempt to determine whether in 2018 there was a roof leak, since then two albeit modest repairs have been carried out and indeed Mr Haviland has said that there are no current problems. Although the provision of insulation to the roof and the installation of TRVs may well be desirable they do not fall within the Landlord's repairing obligations set out in the lease.

58. For the above reasons **the Tribunal determines that once properly demanded all of the outstanding service charges will become payable save that a credit of £871.03 shall be given as referred to in paragraph 27 above.**

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. 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.

2. 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 time or not to allow the application for permission to appeal to proceed.

3. 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.

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means 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.

(2) The relevant costs are 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.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(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 provisions 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.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate 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.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.