FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/29UN/LSC/2019/0091 CHI/29UN/LDC/2020/0011
Property	**:**	Flat 1A St Cuby, Cliff Promenade, North Foreland, Broadstairs, Kent CT10 3QY
Applicant	**:**	Amanda Gunner
Representative	**:**	
Respondent	**:**	St Cuby Management Company Limited
Representative	**:**	Robert Jennings Director
Type of Application	**:**	For the determination of the reasonableness of and the liability to pay a service charge (section 27A of Landlord and Tenant Act 1985) Dispensation of the Consultation Requirements
Tribunal Members	**:**	Judge Tildesley OBE
Date and venue of Hearing		A binding decision on the papers on the same terms as a provisional decision issued 4 May 2020.
Date of Decision	**:**	21 May 2020

DECISION

Decisions of the tribunal

(1) The Tribunal finds that the balcony for Flat 2A was not part of the main structure of the building. The balcony is included in the Demised Premises for Flat 2A. The Tribunal concludes that the Tenant of Flat 2A is liable for the repair and renewal of the balcony under the Tenant's repairing covenant under sub-clause 4(ii) of the lease. Further the Tenant of Flat 2A is responsible for the payment of the costs of the repair undertaken in September 2018. Finally these costs are not a charge on the service charge fund.

(2) In the alternative, the Tribunal decides to refuse the Application for dispensation from consultation, and orders that the Applicant's liability for the cost of works properly charged to the Tenants is limited to £250.

(3) The Tribunal is satisfied that it is just and equitable to make an Order under section 20C in the Applicant's favour preventing the Respondent from recovering the costs of these proceedings through the service charge.

(4) The Tribunal Orders the Respondent to reimburse the Applicant with the application fee of £100 for the Service Charge and the Applicant's share of the hearing fee in the sum of £100 within 28 days.

(5) A provisional decision under paragraph 5 of the Senior President's Pilot Practice Direction: Contingency arrangements in the First-tier Tribunal dated 19 March 2020 was issued on 4 May 2020

(6) The parties were directed to indicate by 18 May 2020 whether they consented to the Tribunal making a binding decision on the papers that was in the same terms as the provisional decision or whether they requested a hearing.

(7) On 4 May 2020 the Applicant consented to the making of binding decision on the same terms as the provisional decision.

(8) On 18 May 2020 the Respondent consented to the making of binding decision on the same terms as the provisional decision.

The Application

1. The Applicant seeks a determination of her liability to pay service charges in respect of balcony repairs to Flat 2A St Cuby, Broadstairs, pursuant to section 27A Landlord and Tenant Act 1985.

2. The amount in dispute is £12,000, of which the Applicant is liable to pay £2,400 (1/5th).

3. At the case management hearing on 19 November 2019 the Tribunal identified the following issues:

    - Whether the cost of repairs to the balcony of Flat 2A is recoverable from the lessee of Flat 1A through the service charge or whether the lessee of Flat 2A is responsible for paying for the costs?

    - Whether recoverability of the cost is in any event limited due to the failure to consult?

    - Whether an order should be made under section 20C of the Act?

4. The Respondent has subsequently applied for dispensation from consultation requirements in respect of the balcony works which has been joined with the application for service charges.

5. The Tribunal has applied the terms used in the lease Tenant for describing Leaseholder and Lessor for Landlord

Chronology

6. This dispute has been on-going since 2017 and concerns works which were carried out on the balcony of Flat 2A which also acts as the roof of the conservatory for Flat 1A situated below.

7. The works were prompted by the findings of a survey report on the building from Mr Heselden of Premium Surveyors Limited in September 2016 which recommended urgent attention to the balcony structure of Flat 2A. The report identified that the balcony structure was affected by wood rot which contributed to water ingress in the conservatory below.

8. The Applicant's complaints were that she was not liable under her lease to contribute to the cost of the works, and that she was entitled to damages arising from the alleged poor quality of works to the balcony structure.

9. The Applicant instructed Marden Duncan solicitors to write to Mr Downes and Mr Jennings, directors of the Respondent company on 17

April 2018 with an offer to resolve the dispute amicably. Mr Downes is also the owner of Flat 2A. The Respondent did not respond to the letter but Mr Downes did.

10. The Respondent held a meeting on 22 April 2018 which decided to obtain quotations for the proposed works to the balcony. Mr and Mrs Holm, Mr Jennings and Mr Downes attended the meeting. The Applicant did not.

11. In May 2018 Mr Downes obtained a quotation of £12,578 excluding VAT from Mida Loft Conversion for the works which were carried out in and around September 2018. There were problems with signing off the works by Building Control of Thanet District Council which delayed the payment of the final instalment of £3,000 until the spring of 2019. The eventual cost of the works was £12,000.

12. On 2 November 2018 the Applicant's solicitors wrote to the shareholders of the Respondent stating it was their understanding that the Respondent had approved and paid for works to the balcony. The solicitors pointed out that they had obtained a copy of the relevant lease for Flat 2A which showed that the balcony was part of its demise, and its upkeep was therefore the responsibility of the Tenant for Flat 2A. The solicitors indicated that their client, the Applicant, had no liability to contribute towards the costs of those works, which applied equally to the other Tenants apart from Flat 2A. The solicitors stated that if and when a service charge was delivered including a sum for this cost of the repairs they would be challenged and if necessary an application would be made to the First-tier Tribunal. The solicitors also pointed out that the Applicant had a private dispute with Mr Downes regarding the alleged damage to the conservatory below.

13. On 24 February 2019 the Respondent held a Residents Meeting at which the Applicant did not attend. The minutes recorded that the cost of the works to the balcony was more expensive than the original estimate owing to the requirement to erect scaffolding. The minutes also said that the final outstanding balance of £3,000 would be paid from reserves.

14. The Application was made on 5 September 2019. Directions were issued on 17 October 2019 for a case management hearing which was held on 19 November 2019. The Respondent did not participate in the case management hearing because the address provided by the Applicant for service was the general address of the block. The Tribunal determined that the Application would be dealt with on the papers and directed the parties to exchange sequentially their statements of case. The Application and the directions were served on the Respondent at its registered address on 25 November 2019.

15. On 14 January 2020 Mr Downes for the Respondent applied for a variation of the directions namely: (1) an unspecified extension of time based on the unavailability of some members of the Company in

December (2) permission to rely on expert witness and (3) the right to address the Tribunal on costs. The Tribunal extended the Respondent time to provide its statement of case until 28 January 2020 and gave permission to rely on written evidence from Mr Heselden.

16. The Tribunal received the hearing bundle on 11 February 2020. The Respondent's statement of case was signed by Mr Robert Jennings, a director. In the meantime Mr Downes made an application to dispense with the consultation requirements pursuant to section 20ZA of the Landlord and Tenant Act 1985 on behalf of the Respondent. The Applicant sought permission to add a second statement of truth regarding alleged breaches of the lease by the Respondent.

17. On 12 February 2020 the Tribunal directed that the Application for dispensation be heard at the same time as the section 27A application. Each leaseholder was invited to complete a pro-forma indicating whether they agreed with the application, and if a leaseholder disagreed to put her reasons for so doing. The Respondent was given the right of response. The Applicant (Mrs Gunner) objected, Mr Jennings on behalf of the Respondent supplied a hearing bundle on 10 March 2020.

18. Also on 12 February 2020 the Tribunal refused to give the Applicant permission to make a second statement of truth. The Tribunal did not consider evidence of additional breaches of the lease relevant to the issues before the Tribunal. The Tribunal listed the Applications for hearing in the two weeks commencing 18 March 2020.

19. On 13 February 2020 the Tribunal received an application from Mr Jennings on behalf of the Respondent to stay the proceedings for a period of 4 to 6 months to obtain legal advice.

20. On the 17 February 2020 the Tribunal refused the Application for stay and confirmed the directions issued on 12 February 2020.

21. The Tribunal's reasons for refusing the stay were as follows:

- The issues involved in the Applications were relatively narrow and straight forward.
- Mr Jennings gave no persuasive reasons for a stay of four to six months.
- It appeared to the Tribunal that Mr Jennings was widening the scope of the Application to deal with the Applicant's alleged failure to pay the service charges due. If that was the case, Mr Jennings was at liberty to make a fresh application for the new issues raised.

- The Tribunal was satisfied that a delay to the hearing of these applications was contrary to the overriding objective of dealing with matters fairly and justly.

22. On 23 March 2020 the Tribunal directed that in view of the Coronavirus it intended to deal with the Applications on the papers without an oral hearing unless a party objected within 7 days from the date of these directions. If a party objected the Tribunal would then decide whether to proceed under the Senior President of Tribunals' Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and The Upper Tribunals issued 19 March 2020 ("PPD") which gives the Tribunal the power to make provisional decisions on the papers during the emergency or to offer a hearing by telephone or video conferencing.

23. On 27 March 2020 Mr Downes on behalf of the Respondents objected to a determination on the papers. The Tribunal advised the parties that it would issue a provisional decision under paragraph 5 of PPD.

Property and Leases

24. The property comprises a former detached Edwardian Villa built between 1920 and 1930 and located within the North Foreland Estate close to the shopping and transport facilities of Broadstairs. The property is situated on the corner of Cliff Promenade and Annes Road, set back from a steep cliff and facing the sea.

25. The property is built over three floors and now comprises five flats with the conversion taking place in the 1980s. Access to the ground floor Flats 1A and 1B is through private external entrances. Access to 2A is also through a private external entrance on the first floor. Flats 2B and 3A are approached through a communal door on the first floor. Flat 1A has the benefit of front and side gardens, whilst Flat 1B has a rear garden. There are off street parking areas either side of the building.

26. The Tribunal had before it the lease of Flat 1A made between Mr and Mrs H.O. Davies and W.G McDonald dated 11 November 1983, and the lease of Flat 2A made between Mr and Mrs H.O. Davies and Miss Gisela Willging dated in 1984[1]. The leases are for terms of 99 years from 1 January 1983. The Tribunal understands that the leases for the five flats are in similar form.

27. Clauses 3 and 4 detail the Tenant's covenants with the Lessor and with the other tenants. Sub clauses 4(ii) and 4(iv) sets out the Tenant's repairing and decorating liabilities in respect of the demised premises. Clause 5 deals with the Lessors' covenants with the Tenant including the repairing and insuring responsibilities.

[1] The actual date is illegible on the copy of the lease provided.

28. Sub clause 6(i) requires the Tenant to contribute and pay one fifth of the costs and expenses of the Lessor as defined by the Fifth Schedule. Clauses 6(ii) to 6(v) provide the machinery for the collection of service charges. Essentially the Tenant is liable to pay an estimated contribution by two equal instalments on 1 January and 1 July and a balancing payment or credit at the end of the accounting year.

29. The Second Schedule defines the Demised Premises. The Fifth Schedule lists the various matters for which the Lessor can recover its costs from the Tenants.

30. The Respondent holds the freehold of the property. The Respondent's share capital is £5 divided into five shares of £1 with each Tenant having one share.

31. Mr Jennings described the Respondent's role as to manage and oversee the building in its entirety. Mr Jennings stated that the Company met regularly to deal with such matters as communal services to the building and the communal repairs. According to Mr Jennings, the costs associated with the above responsibilities are paid from the monthly fees paid by each Tenant. The current monthly fee as at 13 February 2020 was £120. Mr Jennings stated that the dispute has highlighted the issue that the Respondent was not being run in accordance with the Housing Act but as a co-operative collective to the benefit of all owners.

Reasons

32. Despite attempts by the parties to widen the dispute the Tribunal is concerned solely with the three issues identified in [3] above. The Tribunal found that the Respondent sought to justify the position it had taken rather than address the specific issues raised by Mrs Gunner's application. This meant that its evidence was voluminous and at times unfocussed which made it difficult to identify the documents pertinent to the dispute. The Tribunal was also unclear who was representing the Respondent which alternated between Mr Downes and Mr Jennings. Arguably Mr Downes should not have been representing the Respondent because of conflict of the interest arising from his separate dispute with Mrs Gunner. The Tribunal is not suggesting that Mr Downes acted improperly in so doing, and recognise that it is a feature of residents' management companies. In fairness Mr Jennings authored the Respondent's statements of case in respect of the Application and the cross Application. The Tribunal has treated Mr Jennings as the Respondent's representative

33. The Tribunal deals with each of the issues in the turn starting with whether the Tenant of Flat 1A was liable to contribute to the cost of repairs to the balcony of Flat 2A through the service charge or whether the Tenant of Flat 2A was responsible for the whole costs of repair.

34. The Applicant's position was that the balcony formed part of the Demise for Flat 2A, and, therefore, its repair fell within the Tenant's repairing and decorating responsibilities under sub clauses 4(ii) and 4(iv) of the lease.

35. The Respondent's position was that the responsibility for repairing such things as roof timbers within balcony areas could properly be regarded as part of the structure of the building. According to the Respondent, this would fall within the Lessor's repairing obligations for which the Lessor could recover costs from the Tenants under the service charge.

36. Before considering the terms of the lease it is necessary for the Tribunal to establish the precise scope of the works undertaken by the Respondent in respect of the balcony for Flat 2A. In this regard the Respondent's evidence is unsatisfactory. It would appear that Mr Jennings is relying on the Building Survey Report undertaken by Mr Heselden in September 2016, and the Builder's final invoice dated 1 April 2019. Mr Jennings then confusingly asserted that the service charge yet for the works had not been calculated and that an invoice for the costs had not been issued. The Tribunal assumes that the reference to an invoice means the demand for payment from the Applicant. The Tribunal understands from other documents submitted by the Respondent that the builder has been paid from reserves which presumably comprises service charge monies.

37. The Tribunal considers that Mr Heselden's report is helpful in describing the structure of the balcony but is not determinative of the actual works carried out. Mr Heselden reported that the balcony had been covered with roofing felt and was sealed to adjacent brickwork with lead flashing. Further that the structure functions as a roof over the conservatory beneath and disperses rainwater into eaves gutters. Timber decking was built over the roof and timbers between the decking and roof may be causing damage to the felt and balcony timbers. Mr Heselden identified that the balcony railings wobbled excessively in places and should be strengthened and or replaced to improve rigidity and safety. Mr Heselden recommended urgent attention to be given to the first floor balcony structure.

38. The hearing bundle included an estimate of the works dated 24 May 2018 carried out by Mida Loft Conversions the contractors to the balcony structure. The costings were as follows:

- Building Regulation approval £228:
- Remove railings, strip existing roof coverings and dispose of any waste materials £1,000;
- Remove and replace defective timber joists (assuming all timbers need replacing) £3,000;

- Remove and replace defective timber and communal decking for access to Flats 2a, 2b and 3 £1,200;
- Fibreglass roof surfacing to veranda of 2a (recommended) £2,500;
- Tying stairs/balcony back to building near communal entrance £400;
- Option to fix railings to the masonry of the building (£750);
- Remove 1a false ceiling below veranda and refit upon completion of works (£1,000);
- Allow contingency fund for unforeseen works required upon removal of Flat roof £2,500;
- The Total costs excluding VAT at 20 per cent £12,578.

39. The minutes of the Respondent's AGM of 22 April 2018 revealed that there was an optional quotation for new decking across Flat 2A's private terrace which would be paid for by Mr Downes.

40. The works started towards the end of August 2018. Mr Downes reported that the contractors had found that the original roof covering had been laid over multiple times. In February 2019 Mr Downes said that the "roof" works were a little more invasive than first hoped. According to Mr Downes, the majority of the original timber joists and framework for the balcony structure were replaced due to rot whilst the remaining joists were treated with preservative. Further a new lighter fibreglass surface had been relayed and the railings had been replaced with stronger fittings.

41. The final invoice from Mida Loft Conversions dated 1 April 2019 was for £12,000. The invoice did not identify the works completed.

42. The Tribunal doing the best it can with the evidence supplied decides that the preponderance of the works and the costs were expended on replacing and repairing the supporting structure which included the railings for the balcony at the front and side of Flat 2A. This part of the building belonged exclusively to the Demise for Flat 2A and did not form part of the communal areas of the building. For the purpose of its analysis against the terms of the lease, the Tribunal will regard this description as the "scope of the works".

43. The Tribunal acknowledges that there may have been works to the communal access to Flats 2a, 2b and 3 but it would appear that it did not constitute a significant part of the costs. Equally time and costs would have been expended on removing the decking to get access to the

supporting structure. The Tribunal notes that Mr Downes accepted that as Tenant of Flat 2A he would have to bear the costs of the replacement of the decking.

44. The Tribunal notes that the Respondent's evidence consistently describes these works as "flat roof works" which was not accurate. The Tribunal prefers Mr Heselden's description as a balcony which also functions as a roof over the conservatory for Flat 1A.

45. The Second Schedule for the lease for Flat 2A defines

> "the Demised Premises are firstly all those several rooms on the First floor of the building known as Flat Number 2A St Cuby St Anne's Road North Foreland Broadstairs in the County of Kent up to and including the ceiling plaster and including the floor covering and floors and including the plaster of the external walls and further one half of the internal walls dividing the demised premises from other parts in the building (severed vertically) the position of which Demised Premises is shown for the purpose of identification only on the plan annexed hereto and thereon edged red and SECONDLY ALL THAT the garage parking space the position of which is shown for the purpose of identification only on the plan annexed hereto and thereon hatched red TOGETHER WITH a right of access to the Demised premises over the communal pathway coloured brown on the plan annexed hereto".

46. The plan attached included the open balcony to Flat 2A on the front and the side facing the communal drive within the red hatching.

47. Before examining the Tenant's repairing covenant it is instructive to compare the definition of the Demise premises for Flat 2A with that for Flat 1A, namely:

> "the Demised Premises are firstly all those several rooms on the ground floor of the building known as Flat Number 1A St Cuby St Anne's Road North Foreland Broadstairs in the County of Kent up to and including the ceiling plaster and including the floor covering and floors and including the plaster of the external walls and further one half of the internal walls dividing the demised premises from other parts in the building (severed vertically) and including the basement of the Building the position of which Demised premises is shown for the purpose of identification only on the plan annexed hereto and thereon edged red on"

48. The plan attached included the conservatory and the paved entrance (also referred to as veranda) as well as the garden within the red hatching.

49. The Tribunal now turns to the Tenant's repairing covenant under Clause 4(ii) which is the same in both leases:

> "From time to time and at all times during the said term well and substantially to repair maintain cleanse amend and renew and keep in good and substantial repair and condition the

> Demised Premises (other than the parts hereof referred to in paragraphs (v) and (vi) of Clause 5 hereof) and all walls party walls sewers drains pipes cables wires and appurtenances and all landlord's fixtures and fittings and water apparatus thereto excluding belonging of whatsoever nature and in particular (but without prejudice to the generality of the foregoing) so as to support shelter and protect the parts of the building other than the demised Premises".

50. The Applicant relied on Clause 4(ii) for her contention that the Tenant of Flat 2(A) was responsible for the repair and maintenance of the balcony structure because it was included within the Demised Premises. It follows from the Applicant's proposition, that under the terms of her lease the Tenant of Flat 1(A) would be liable for the repair of the conservatory and the paved area (the veranda) which was subsequently infilled in 2006 to provide an extension to the conservatory.

51. The Tenant's repairing covenant, however, does not extend to those parts referred to in paragraphs (v) and (vi) of Clause 5 of the lease which deals with the Lessor's repairing covenant.

52. Clause 5(v)(a) is the pertinent sub-clause for this dispute which states:

> "That (subject to contribution and payment as herein provided) the lessors will keep clean and well lit the entrances passages and staircase and other common parts of the Building and will maintain repair decorate and renew:
>
> (a) the main structure (but excluding the window frames and glass therein in each of the Flats) and common parts and in particular the roof chimney stack gutters rainwater pipes and the foundations of the building".

53. The Respondent contended that the balcony at the front and side of Flat 2(a) formed part of the main structure of the building, in which case it fell upon the Lessor to repair it. The Lessor in turn was entitled to recover the costs of those works from the Tenants under the service charge provisions.

54. The terms "structure", and "main structure" as set out in a lease have received judicial attention. In *Irvine v Moran* [1991] 1EGLR 261, Mr Recorder Thayne Forbes QC decided that the structure of the dwelling-house consisted of those elements of the overall dwelling-house which gave it its essential appearance, stability and shape and that it was not limited to those aspects of the dwelling house which were load bearing. The term "main structure" however, has a more restrictive meaning than structure. "Main structure", it is said, is not a term of art but must be given a meaning special to the lease. That meaning must be more restrictive than the word 'structure' *simpliciter* where that term is used without being qualified by the word 'main' in the lease. It is

also said that the lease should be construed so as to avoid shared liability, in particular for repairs, unless such a construction is forced on the court by the express words used in the lease

55. The decided cases on whether roof terraces/balconies formed part of the "main structure" have reached different conclusions. In *Ibrahim v Dovecorn Reversions Ltd [2001] 30 E.G. 116, Ch.D.* roof terraces were held to be part of the main structure of the building within the landlord's express repairing covenant, except for the surface tiles, which were repairable by the tenant. In contrast the Court of Appeal in *Petersson v Pitt Place (Epsom) Ltd* (2001) 82 P. & C.R. 276, CA decided that roof terraces were not part of the main structure.

56. The general principles to be drawn from the decided cases are that the "physical extent of the premises subject to a repairing covenant depends on the wording of the lease, construed in the context of the lease itself and in the light of all the other facts and circumstances of the particular case", and that "reading across from one lease to another is a risky business".

57. The Tribunal returns to the wording of the respective leases. The Tribunal notes that the definition of the Demised Premises in the Second Schedule for Flat 2A does not explicitly refer to the "balcony". Equally the definition for Flat 1A makes no mention of the garden. In both leases it is the red hatching of the Plan that determines the extent of the Demised Premises which in the case of Flat 2A includes the balcony.

58. The Tenant's repairing covenant under clause 4(ii) is substantial in its obligation (repair and renew and keep in good and substantial repair), extensive in scope (the Demised premises and all walls, party walls, sewers drains pipes cables wires and appurtenances) and not limited to the protection of the Demised premises (so as to support shelter and protect other parts of building).

59. The Tribunal is satisfied that the repair and renewal of the balcony structure would fall within the Tenant's repairing covenant in the lease for Flat 2A if it did not have the reference to the Lessor's repairing covenant. The question then is whether the proviso of not including the parts referred to in the Lessor's repairing covenant takes the repair and renewal of the balcony structure beyond the remit of the Tenant's repairing liability.

60. The Lessor's repairing covenant applies to the "common parts" and "the main structure". The Tribunal has established that the balcony to the front and side of Flat 2A is not a communal part.

61. The next issue is whether the balcony is part of the "main structure". Sub clause (v)(a) stipulates that the main structure excludes the window frames and the glass in each of the Flats and includes in particular the roof, chimney stack, gutter, rainwater pipes and the

foundation of the building. The Tribunal construes the ordinary and natural meaning of "main structure" in the context of the Tenants' leases as including those parts of the building designed for the purposes of support and protection from the elements.

62. In order for the Tribunal to decide whether the balcony falls within the meaning of "main structure" the Tribunal is required to ascertain the intentions of the parties at the time of the making of the lease. In this regard the Tribunal has been assisted by the photographs of the building in the Respondent's bundle dated 17 January 2006. Although the photographs are dated some 20 years after the making of the lease, they corresponded with the layouts of Flat 1A and Flat 2A as showed in the lease plans.

63. The photographs revealed there was an open veranda along the side and most of the front of Flat 1A with the conservatory located on the corner of the building on its right side looking from the road. This is different from the position today with the conservatory running the whole length and sides of Flat 1A.

64. At the time the leases were made the balcony for Flat 2A was operating primarily as a balcony giving the Tenant of Flat 2A an exclusive open space to be enjoyed with the Flat. The Tribunal notes that the ground floor Flats have gardens as their own private open spaces. The balcony of Flat 2A then was not doubling up as the roof for the conservatory below except for a small part and essentially gave a canopy for the open veranda below.

65. The Tribunal considers it telling that Mr Heselden in his survey of September 2016 reported at [7.05], "alternatively, should you decide to reinstate and renovate the original balcony as a floor, the conservatory roof/ceiling below would need to be upgraded or replaced and redesigned to function as a roof." The Tribunal observes that the definition of demised premises includes floors as well as floor coverings.

66. The Tribunal looking at the photographs taken in January 2006 would accept that the open veranda and the balcony for Flat 2A contributed to the overall appearance and shape of building, and in that sense the balcony was part of the structure of the building.

67. The Tribunal, however, is not convinced that the veranda and the balcony fell within the ordinary and natural meaning of main structure as applied in the respective leases. The veranda as such was an empty space which only became part of the building because it was directly below the balcony for Flat 2A. The protection offered by the balcony structure was primarily to an empty space, and not to the structure of the building as a whole. The fact that part of the empty space had been filled in by a small conservatory does not detract from the validity of the analysis because the conservatory itself was an adjunct to the building. The balcony itself stood outside the walls of the building.

68. It follows from the Tribunal's analysis that the purpose, the design and the structure including the "joists" of the balcony were to provide an outside space to be enjoyed exclusively by the Tenant of Flat 2A, and not to give support and or protection to the building. The provision of an outside space for Flat 2A complemented the private outside spaces in the form of gardens enjoyed by the Tenants of the ground floor flats.

69. The Tribunal, therefore, finds that the balcony for Flat 2A was not part of the main structure of the building. The balcony is included in the Demised Premises for Flat 2A. The Tribunal concludes that the Tenant of Flat 2A is liable for the repair and renewal of the balcony under the Tenant's repairing covenant under sub-clause 4(ii) of the lease. Further the Tenant of Flat 2A is responsible for the payment of the costs of the repair undertaken in September 2018. Finally these costs are not a charge on the service charge fund.

70. The corollary of the Tribunal's finding on the repairing responsibilities for the balcony for Flat 2A is that the Tenant of Flat 1A is responsible for the repair of the structure below supporting the balcony which now includes the conservatory infill.

71. The next issue for the Tribunal is whether the recoverability of the costs of the repairs to the balcony is in any event limited due to the failure to consult by the Lessor.

72. It might appear that the answer to this question is academic following the Tribunal's determination in respect of its decision on the Tenant's liability to pay for the costs of the repair to the balcony. The Tribunal, however, previously indicated that the Respondent had not supplied clear evidence of the scope of the balcony works. The Tribunal acknowledged that some of the costs may have been expended on the communal access to Flats 2A, 2B and 3. Also it is necessary for the Tribunal to make a finding on this question in the event that its decision on repairing liability might be found wanting.

73. Section 20 of the 1985 Act provides Tenants of residential properties with the statutory safeguard of consultation in respect of the costs of major works. The statutory provisions are triggered when the threshold of £250 for the Tenant's contribution to the costs of the major works is exceeded. If the Lessor fails to comply with the statutory requirements for consultation, the Tenant's contribution is fixed at the threshold of £250.

74. The requirement to consult involves the Lessor in following prescribed steps set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 (SI 2003/1987). Essentially the Lessor is required to issue sequentially a Notice of Intention, a Statement of Estimates and a Notice of Awarding a Contract, to give time at each stage of the process for the Tenant to make observations, and to have regard to those observations.

75. The Respondent proceeded on the assumption that the costs of the balcony works were recoverable from the service charge. The costs of those works were £12,000 which required a contribution of £2,400 from each Tenant above the £250 threshold for triggering the consultation requirements.

76. The Respondent accepts that it did not follow the statutory requirements for these works, and that the scale of its failure was total. Given those circumstances the Tenants' individual liability for their contribution to the costs of those works is fixed at £250.

77. The Respondent, however, submitted an Application for dispensation from consultation requirements in accordance with section 20ZA of the 1985 Act. If that Application is successful, the threshold of £250 is lifted, and that the Respondent may be able to recover the full costs of the works from the Tenants subject to the question of reasonableness.

78. The Tribunal received responses from three Tenants, Mr Holm of Flat 1B, Mr Downes, Flat 2A and Mr Jennings of Flat 3 supporting the Application. Mrs Gunner of Flat 1A opposed the Application. The Respondent submitted a hearing bundle.

79. Section 20ZA provides that the Tribunal may grant dispensation if satisfied that it is reasonable to do so. The Tribunal used to approach the question of dispensation by considering amongst other matters the scale of the failure to consult. The validity of that approach was upset by the decision of the Supreme Court in *Daejan Investments Ltd v Benson and Others* [2013] UKSC 14 & 54 which decided that the discretion in section 20ZA should be exercised in the context of the legal safeguards given to the Applicant under sections 19 and 20 of the 1985 Act. Thus the Tribunal should focus on the issue of prejudice to the Tenant in respect of the statutory safeguards.

80. Lord Neuberger in *Daejan* said at paragraph 44

> "Given that the purpose of the Requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under s 20ZA(1) must be the extent, if any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the Requirements".

81. Thus, the correct approach to an application for dispensation is for the Tribunal to decide whether and if so to what extent the Tenants would suffer relevant prejudice if unconditional dispensation was granted. The factual burden is on the Tenants to identify any relevant prejudice which they claim they might have suffered. If the Tenants show a credible case for prejudice, the Tribunal should look to the landlord to rebut it, failing which it should, in the absence of good reason to the

contrary, require the landlord to reduce the amount claimed as service charges to compensate the leaseholders fully for that prejudice.

82. Mr Jennings for the Respondent asserted that whilst formal consultation satisfying the full requirements of section 20 may not have been met, the Applicant had been kept well-informed on numerous occasions in this matter as to the need for, and progress of works by virtue of financial statements and bank statements. Mr Jennings referred to various e-mails and minutes of meetings of the Respondent to substantiate his assertion.

83. The Applicant opposed the Respondent's request for dispensation in its entirety. The Applicant stated that the Respondent did not address her question about whether the works constituted a repair to the flat roof or a repair to the balcony floor. The Applicant pointed out that the nature of the repair would determine the specification for the works. The Applicant said that the work was agreed on the understanding that the contractors would repair the balcony from underneath within the conservatory which they did not and meant that the works were not completed to the required standard. The Applicant contended that she was denied sight of the photographic evidence supplied by the contractors capturing the progress of the various stages of the works. Finally the Applicant stated that she tried to mediate through emails and solicitors letter with no success.

84. The Tribunal sets out below a summary of the documents included in the hearing bundle dealing with the communication about the proposed works to the balcony of Flat 2A since the survey conducted by Mr Heselden.

a) Minutes of meeting on 12 February 2017 highlighting the key areas in Mr Heselden's survey which required attention. The minutes recorded that Mr Downes would obtain a quotation for the works from his father in law's firm based in Herne Bay. Julia Holm of Flat 1B would source a second quotation, and Mr Jennings would look to do the same with Morfa's builders. The Applicant was not present at the meeting.

b) On 20 October 2017 the Applicant obtained quotations for a range of proposed works to the balcony from Meridian Membranes, a Broadstairs contractor, that specialised in Single Ply Membranes. There were separate quotations for two areas of the balcony: area 1 (the balcony and short return on the right: £4,400 -£6,600 depending on the type of membrane used); area 2 (beyond the gate: £4,034).

c) On 23 October 2017 a response from Mrs Holm who thanked the Applicant for the quotation. Mrs Holm pointed out that it was the Respondent's responsibility to get the veranda above Flat 1A back to its original state and

purpose, and that Flat 1A was responsible for making the veranda suitable for internal habitation. Mrs Holm suggested that the Respondent convene a meeting to resolve the repair issues for the whole house.

d) In November 2017 the Applicant sent an email to the other Tenants suggesting that a solicitor should be approached to advise on the respective responsibilities of the Tenants and the Lessor for the maintenance of the building.

e) On 17 April 2018 the Applicant's solicitors wrote to the Tenants of Flats 2A and 2B, with a copy to Mr Jennings. The solicitors raised various issues about the purported responsibilities of the Tenant of Flat 2A and the Respondent.

f) On 22 April 2018 the Respondent held its AGM at which the Tenants of Flats 1B, 2A and 3A attended. The Applicant did not respond to the invitation and was not in attendance. The Tenants in attendance agreed that the priority was the building works to replace the "flat roof" between Flats 1A and 2A as well as the adjacent communal terrace. Mr Downes indicated that he had sourced two quotations and Mr Jennings one quotation. The quotations ranged from £4,500 to £7,500 plus VAT. An outline specification was agreed for the proposed works. It would appear from Mr Downes' email of 5 July 2018 that the minutes of the AGM on 22 April 2018 were not approved and circulated until after the week commencing 9 July 2018.

g) On 24 May 2018 Mr Downes responded to the solicitor's letter of 17 April 2018 refuting the various allegations made against him. Mr Downes said in the letter that he visited the property on 12 May 2018 with a builder quoting for the planned works to the flat roof and that he discussed the matter with Mr Gunner, the Applicant's son-in-law.

h) On 2 June 2018 Mr Downes distributed a revised quotation for the proposed works which would appear to be the quotation of Mida Loft Conversions Limited dated 24 May 2018 giving the sum of £12,578 including a contingency of £2,500 but excluding VAT. The address of the registered office for Mida Loft Conversions is Bexley, Kent. Mr Downes pointed out that the quotation had ended up more than what was first anticipated. Mr Downes asked Mr Jennings to provide like for like quotations in order to move matters forward.

i) Mr Jennings was only able to supply one quotation which was from APM Construction, a contractor based in

Broadstairs. The price given was £5,380 excluding VAT. This according to the email was an amended quotation to have regard to additional items. Mr Downes suggested in the Application that this quotation was not on a like-to like basis, which does not appear to be supported by the email correspondence.

j) On 5 July 2018 Mr Downes emailed the Tenants indicating that he wished to press ahead with the quotation for the "flat roof" works that he had obtained. Mr Downes stated that he had received approval from Mr Jennings which gave "us" the majority with Flat 1B to proceed with the works.

k) On the same day the Applicant responded by asking who was paying for the works. The Applicant pointed out that the two quotations did not include the costs of repair to the wooden frame.

l) Mr Downes replied saying that the costs of "roof works" would be paid out of the reserve fund, and that the Applicant was liable for the costs of the ongoing maintenance for the conservatory because the veranda was never built as an enclosed habitable space. Mr Downes advised her to take solicitor's advice.

m) On 29 July 2018 the Applicant sent an email referring to her attempts through her solicitor to resolve matters, and to reach a compromise on the moneys owed.

n) On 23 August 2018 Mr Downes notified the Tenants that the contractors were starting on 28 August 2018, although it would appear from the minutes of Respondent's meeting of 1 September 2018 that the works were commenced around 23 August 2018. At that meeting Mr Downes reported on how the works were progressing. The meeting was attended by Mr Downes, Mr Jennings and Mrs Holmes.

o) The minutes of the Respondent's meeting on 24 February 2019 recorded that the associated costs with the works was more expensive than any of them hoped despite being within the original estimate.

85. The Tribunal finds the following facts in respect of the purported consultation carried out by the Respondent in respect of the proposed works to the balcony on Flat 2A.

a) The Respondent did not comply with the statutory requirements for consulting Tenants about major works.

b) The Applicant was not given an opportunity to comment on the outline specification for the works which was agreed at the AGM on 22 April 2018. The minutes of which were not published until after the preferred contractor had provided its quotation.

c) The Respondent made no attempt to address the Applicant's question about the respective repairing responsibilities of the Lessor and the Tenants for the building. It would appear that the Respondent considered this to be a private dispute between the Tenants of Flats 1 and 2A, and left it to Mr Downes to respond to the Applicant.

d) The Respondent did not document its reason for rejecting the quotations from local contractors for the works to the balcony obtained by the Applicant and by Mr Jennings, which were about half the cost of the quotation supplied by the preferred contactors. Mr Downes suggested in the Application that the quotations were not on a "like to like basis". There is, however, no support for the assertion in the hearing bundle. Also if Mr Downes' assertion was correct it would mean that the Respondent had only one quotation for the works, which in itself would have raised issues about whether the Respondent had taken steps to ensure value for money.

e) The Respondent did not document its explanation for why it chose the contractor sourced by Mr Downes. The contractor supplied the most expensive quotation (twice that of the other quotations), and it was not locally based unlike the other two contractors

f) The Respondent admitted that the actual cost of the works to the balcony turned out to be more than what was originally anticipated.

g) The Tribunal's overall impression from the communications exhibited was that the Respondent had no understanding of why it was necessary to undertake consultation and of its importance in safeguarding the rights of Residential Tenants. In the Tribunal's view there was a complete absence of transparency in respect of the key decisions taken by the Respondent which on the evidence resulted in the Tenants paying significantly more for the works, and potentially for works for which the Tenants had no liability.

86. The Tribunal is satisfied from the facts found that the Applicant would suffer relevant prejudice if unconditional dispensation was granted. The Tribunal does not consider that this is a case where the prejudice

could be offset by the imposition of conditions to the dispensation.

87. The Tribunal decides to refuse the Application for dispensation from consultation, and orders that the Applicant's liability for the costs of works properly charged to the Tenants is limited to £250.

88. The Tribunal's decision applies equally to all the Tenants of the building. It is a matter for them whether they wish to take the matter up with the Respondent.

89. The final issues are whether an Order should be made under section 20C of the 1985 Act preventing the Respondent from recovering its costs in connection with these proceedings through the service charge, and an Order for reimbursement of fees.

90. Under paragraph 4 of The Fifth Schedule to the lease, the lessor's legal or other costs bona fide incurred in taking or defending proceedings arising out of any tenancy of the building are a legitimate charge to the service charge fund.

91. The Tribunal has found in the Applicant's favour in respect of the two substantive matters. The Tribunal was also uncomfortable with the manner in which the Respondent conducted the proceedings. The Tribunal considered that the Respondent did not apply its mind to the issues identified by it in the initial directions, and much of its evidence focussed on the dispute between the Applicant and Mr Downes. The Tribunal acknowledges the difficulties faced by residents' management companies particularly when its members fall out, and the informal arrangements for managing the property breakdown. The Respondent, however, is a separate legal entity and should consider different arrangements in order to stand above such disputes. Given the above findings the Tribunal is satisfied that it is just and equitable to make an Order under section 20C in the Applicant's favour preventing the Respondent from recovering the costs of these proceedings through the service charge.

92. Since the Applicant has been successful with the substantive Applications, the Tribunal is also minded to Order the Respondent to reimburse the Applicant with the application fee of £100 for the Service Charge and the Applicant's share of the hearing fee in the sum of £100. This Order would take effect within 14 days unless the Respondent makes representations to the contrary which the Tribunal will consider before making a final determination. The Tribunal received no representations so the Order for reimbursement is confirmed.

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 by email at rpsouthern@justice.ogv.uk

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, 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.

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.

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