



Sections 20ZA, 27A and 20C Landlord & Tenant Act 1985

## DECISIONS & DETERMINATIONS

### Case Numbers:

**S.27A** CHI/45UG/LDC/2007/0016

**S.20ZA** CHI/45UG/LDC/2007/0021

**Property:** 43 Lucastes Avenue  
Haywards Heath  
West Sussex RH16 1JZ

**Applicant:** Longmint Ltd (landlord)  
Per Haywards Property Services Ltd (managing agents)

**Respondents:** Mr & Mrs Bowyer-Sidwell (tenants of Flat 1)  
Mr M Baker (tenant of Flat 2)  
Mr P Smith and Ms K Tipper (tenants of Flat 3)

### Applications:

**S.20ZA** 20 April 2007

**S.27A** 31 May 2007

### Directions:

**S.20ZA** 27 April 2007

02 May 2007

**S.27A** 18 May 2007

04 June 2007

**Hearing:** 03 July 2007

### Appearances:

For the Applicant:

Mr M Powell, solicitor, of Juliet Bellis & Co

Ms T O'Toole, Haywards Property Services

Mr G Jones, MRICS, Erinaceous Building Consultancy

For the Respondents:

Mr & Mrs Bowyer-Sidwell

Mr Baker, Mr Smith & Ms Tipper, all in person

**Decision:** 17 September 2007

### Tribunal Members:

Ms J A Talbot MA

Mr B H R Simms FRICS MCI Arb

Ms J Dalal

**Case Nos. CHI/45UD/LSC/2007/0016 & 0021****43 Lucastes Avenue, Haywards Heath, West Sussex RH16 1JZ****Application**

1. There were two Applications before the Tribunal. The first was made by Haywards Property Services on 20 April 2007 pursuant to Section 20ZA of the Landlord and Tenant Act 1985 ("the 1985 Act") for the dispensation of all or any of the consultation requirements contained in Section 20 of the 1985 Act. The second was made by Longmint Limited on 31 May pursuant to Section 27A of the 1985 Act for a determination as to the payability of service charges in relation to certain works carried out in 2006 at 43 Lucastes Avenue, Haywards Heath, by McCoy Hill costing £5,944.34. The Respondents in each case were Mr and Mrs Bowyer-Sidwell, Mr M Baker, Mr P Smith and Ms K Tipper, tenants of flats 1, 2 and 3 respectively.
2. Directions were issued on 27 April 2007 in respect of the S.20ZA application proposing that the matter should be dealt with on the papers and asking for a report from McCoy Hill and statements of case to be provided. A request for a hearing was received and further Directions issued on 2 May with a hearing date of 8 June. By Directions issued on 18 May the hearing was adjourned to 3 July and deadlines extended for the Applicants to produce a bundle of papers for use at the hearing and for the Respondents to produce any statements and documents upon which they wish to rely. Following the S.27A application, further Directions were issued on 4 June indicating that both applications would be heard together.
3. The Applicants complied with the Directions providing a Statement of Case dated 8 June and trial bundles. Mr and Mrs Bowyer-Sidwell prepared a Statement in advance together with documents in support. Mr Baker handed in a Statement during the hearing which was copied to the parties and has been considered by the Tribunal. No Statement was received from Mr Smith and Ms Tipper.

**Jurisdiction****Service Charges**

4. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (S.18 Landlord and Tenant Act 1985). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.

**Consultation Procedure**

5. Under Section 20ZA of the Commonhold & Leasehold Reform Act 2002 ("the 2002 Act") The Tribunal has the power to dispense with all or any of the statutory

consultation procedures required by Section 20 of the 1985 Act (as amended) where it considers this reasonable.

### **Lease**

6. The Tribunal had copies of 2 leases: for Flat 2 (attached to the S.27A application) and Flat 1 (provided by Mr and Mrs Bowyer-Sidwell). These were in substantially the same form but with some differences. The lease of Flat 1, the ground floor flat, is dated 21 September 1992 and is for a term of 99 years from 24 June 1988 at a ground rent of £50 and rising thereafter. The lease of Flat 2, on the first floor, is dated 23 September 1994 and is for a term of 99 years from 24 June 1994 at the same ground rent.
7. In each lease "the Building" is defined as 43 Lucastes Avenue, divided into flats. In each lease the "Demised Premises" is the flat, defined in the First Schedule lease to include (*inter alia*) all internal walls, internal surfaces of external and party walls, floors including joists and beams upon which the floors are laid, and ceilings excluding the joists and beams to which they are attached. The definition of Flat 2 includes a garden area shown on the lease plan. The definition of Flat 1 does not include a garden area but the Tribunal was told that this has been dealt with by a separate deed.
8. The provisions relating to the calculation and payment of the service charge are to be found at Clause 4(d). The lessee covenants to "*contribute and pay a due proportion ... of the costs expenses and outgoings and other provisions mentioned in the first part of the Fifth Schedule*". The "due proportion" is not defined in the lease but all the parties agreed that the proportions payable were 50% by Flat 1 and 25% each by Flats 2 and 3, and this was not in dispute. The contribution is payable "*in advance by equal half yearly instalments*" in June and December. The lessor is to prepare accounts to 31 December each year.
9. The costs and expenses referred to in the Fifth Schedule are those incurred by the lessor in relation to, *inter alia*, the "*repair and maintenance of the Building*". In the lease of Flat 1, at Clause 5(d)(i), the lessor covenants to maintain and keep in repair "*the main structure and in particular the roof foundations chimney stacks gutters and rain water pipes of the Building*". Clause 5(d)(i) of the lease of Flat 2 is similar but not identical, in that the additional words "*main walls and timbers*" appear after the word "*structure*" and before the words and "*in particular*".
10. At Clause 4(a) of each lease, the lessee covenants to "*keep the flat described in the First Schedule hereto (other than the parts thereof comprised in the lessor's obligations referred to in sub-clause (d) to (g) inclusive of Clause 5 hereof) and all walls party walls and other party structures ... in good and tenantable repair and condition*".
11. Both leases further provide, at Clause 7(c), "*that the word repair includes the rectification or making good by the lessor of any defects in the foundations or structure of the Building notwithstanding that it is inherent or due to the original design of the Building*".

### **Inspection**

12. The Tribunal members inspected the property before the hearing, accompanied by Mr and Mrs Bowyer-Sidwell, Mr Powell and Mr Jones. It comprises a substantial detached property, situated in a pleasant residential area of Haywards

Heath, probably constructed in the 19<sup>th</sup> century as a private residence and later converted into 3 flats. The building is of brick construction with part pebbledash render under a pitched tiled roof and is surrounded by gardens. Externally the building is in reasonable decorative order. An area of pebbledash render has been removed at the base of part of the external walls to a height of about 2ft. An old slate damp proof course ("DPC") is visible around the property, apart from an area near the front door to Flat 1. Also visible externally is a series of plug holes indicating a new injected DPC. Along the base of the external living room wall is a narrow excavated trench covered with timber decking. There is some poor quality re-rendering to the wall above the trench. The external ground level outside the kitchen and living room of Flat 1 is above the internal floor level. The chimney stacks have at some earlier date been re-rendered.

13. Flat 1, on the ground floor, has its own separate entrance leading to a wide hallway. The accommodation consists of 2 bedrooms, kitchen, bathroom, separate toilet and store room off the kitchen with sloping roof above, and a large rectangular living room with the floor laid on joists and evidence of an injected DPC. There is some internal re-plastering to a height of 1.2 metres consistent with the injected DPC. Some skirtings have been replaced by Mr Bowyer-Sidwell and new radiators installed. Generally the flat has been renovated and decorated internally to a high standard.

### **Issues in Dispute**

14. The Tribunal was asked to determine whether the sum of £5,944.34 paid by Mr Bowyer-Sidwell in respect of damp proofing works carried out by McCoy Hill was incurred as a service charge payable by the tenants, and whether the statutory consultation requirements in respect of those works should be dispensed with.

### **Hearing**

15. The hearing took place in Haywards Heath on 3 July 2007. It was attended by Mr M Powell of Juliet Bellis & Co, solicitors, on behalf of the freeholder Longmint Ltd ("Longmint") and managing agents Haywards Property Services Ltd ("HPS"). He was accompanied by Mrs O'Toole of HPS and Mr Jones MRICS of Erinaceous Building Consultancy ("Erinaceous"). Mr and Mrs Bowyer-Sidwell attended in person along with the other tenants Mr Baker, Mr Smith and Ms Tipper.

### **Facts**

16. On the basis of its inspection, the documents produced and submissions made by the parties at the hearing, the Tribunal found the following facts:
  - (a) Mr and Mrs Bowyer-Sidwell purchased Flat 1 in March 2006. Before that it was owned by Mr and Mrs Hands, who sub-let it. The tenants of flat 3 were, from June 1988 to February 2005 Ms Collins and Mr West, from February 2005 to February 2007 Ms Emanuelle, and from February 2007, Mr Smith and Ms Tipper. Mr Baker has been the tenant of flat 2 since July 2003. At all material times the freeholder was Longmint and HPS their managing agents. It emerged at the hearing that Juliet Bellis, of Juliet Bellis & Co, which acts for Longmint and HPS, is a director of Longmint.
  - (b) HPS commissioned a report from Protim Services dated 27 September 2004 in response to complaints from the Hands about damp. The report noted rising damp to the living room and bedrooms of Flat 1. Protim recommended 17 items

of remedial work and quoted for items 14-17, which were to inspect and report on floor timbers, hack off wall plaster, insert chemically injected DPC and re-plaster, at a cost of £1,370 plus VAT. Items 1-13 included preparatory work to facilitate the DPC and to reduce external ground levels to below internal floor level, but it was intended that these works would be undertaken by other contractors and were not included in the price quoted.

- (c) HPS wrote to the tenants on 11 October 2004 enclosing a copy of the report and stating: "as managing agents we have an obligation to have such works carried out". A second letter headed "Notice of Intention under s35 of Part 2 of Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 that the landlords intended to carry out work to "remedy damage caused by damp to Flat 1" which was necessary "to avoid the damage progressing further which left untreated may have a detrimental effect to the property".
- (d) An informal discussion took place outside the property between Mr Hands, Mr Baker, Ms Collins and Mr West regarding the necessary works in which it was agreed that the Hands would arrange for some unspecified work to remedy the damp, the cost of which would be shared between them. The exact nature and scope of the work carried out by the Hands is unclear, but from the inspection it appears that this work included the partial removal of the external rendering to expose the original slate DPC, and the forming of a bell mouth to the lower edge of the rendering above the exposed bricks to allow water run-off. In addition there was some excavation of ground against the external north living room wall with some timber decking.
- (e) The Hands wrote to HPS on 3 November 2004: "we have engaged a builder to strip off the pebbledash render where it bridges the DPC and to form a bell mouth lip above the DPC. This work has revealed considerable external dampness ... we are advised that complete drying will take some time. In view of this we intend to undertake no further structural work at the moment but to monitor progress next spring. The costs of the work so far are relatively small and will be borne by the three tenants in the usual proportions without any further formalities".
- (f) It is not known whether the Hands carried out any other external work, for example to the chimney, and in the absence of any builders invoice it is not known when or by whom the work was carried out, or at what cost. They did not carry out any internal remedial works. The only indication is a letter dated 19 October 2005 by from Colemans, the Hands' conveyancing solicitors, in reply to pre-contractual sale and purchase enquiries by the Bowyer-Sidwell's solicitors to the effect that "the best course of action would be to strip away the render which was bridging the damp course ... the work was done and the cost of approximately £1,000 shared between the lessees". In his oral evidence, Mr Baker estimated that he had contributed £300 to £400 towards the cost of the Hands' work but his recollection was unclear.
- (g) Following this it appears that no further steps were taken by HPS in relation to the Protim report and recommendations. There was no second stage consultation letter following the Notice of Intention dated 11 October 2004. No damp proofing works were carried out inside Flat 1 by the Hands.
- (h) In 2005 the Hands put Flat 1 on the market for sale at an asking price of £235,000. Mr and Mrs Bowyer-Sidwell made an offer of £225,000 subject to survey. They obtained a Home Buyer's survey report dated 7 October 2005 from surveyors Martin & Lacey. The opinion in the report was that the flat was affected

by rising damp and that further investigation was needed from a specialist contractor. The report valued the property at £215,000. On this basis the Bowyer-Sidwells subsequently negotiated a price reduction via the estate agents.

- (i) Mr and Mrs Bowyer-Sidwell had no direct contact with the Hands when purchasing the property. All pre-contractual matters were dealt with between solicitors. In October 2005 their solicitors, RHW, enquired about damp. Initially Colemans stated "as far as our clients are concerned there is no damp problem. Rendering was removed beyond damp course level"). Subsequently in their letter of 19 October 2005 they stated: "Our clients [i.e. the Hands] believe that this [work] has resolved any problem and no doubt your client's survey will reveal". In particular, there was no evidence of any pre-sale agreement between the Bowyer-Sidwells and the Hands that they (the Bowyer-Sidwells) would carry out any further works, internal or external, to remedy the damp at their own cost. There was no retention from the sale price and no outstanding service charges.
- (j) In December 2005 Mr and Mrs Bowyer-Sidwell obtained 3 reports and quotations from McCoy Hill, Archers Specialist Treatments and Lawson's Woodworm and Damp Control Co. McCoy Hill's quotation was £668 for a silicon injection DPC, £407 for woodworm treatment to the floorboards and internal store roof timbers, and £3,513 for replastering walls. It was apparent that further extensive work to remedy the damp was necessary but they did not seek a further price reduction.
- (k) Mr and Mrs Bowyer-Sidwell completed the purchase in March 2006. They did not move all their furniture or possessions in immediately because of the extent of the internal work required, and On 4 April 2006 they sent copies to HPS and in their covering letter stated: "since it is the responsibility of the freeholder to maintain the building we request a swift consent to commence this work". HPS did not reply or return phone calls. At that stage a Ms Shoesmith was dealing with the property. Mr Bowyer-Sidwell wrote again on 19 May 2006: "I need you to advise me that I can go ahead and make a booking to have the work done in HPS's name. On completion I can forward the bill deducting 50% of the cost as my contribution under the lease agreement".
- (l) HPS replied on 22 May 2006 to the effect that copies of the reports and quotations had been sent to the other lessees "for their approval and consent to carry out the works as agreed" and enclosing a so-called "consent form". This form stated: "I hereby authorise Haywards Property Services to proceed with the Damp works without entering into the 60 Day Notice Period. I understand and agree that I waiver [*sic*] my rights to the Statutory Consultation. I understand that I will receive a demand for payment for my apportionment towards the cost of these works". Mr and Mrs Bowyer-Sidwell, without taking any independent advice, signed and returned this form on 24 May 2006.
- (m) In the absence of any progress, Mr Bowyer-Sidwell continued to write, telephone and email. He instructed solicitors who wrote on 5 July 2006 but could not afford to retain them further. By September 2006, Ms S Glover, who had taken over at HPS, emailed that there had been no response from the other tenants who had "failed to return the waiver form", that a Notice of Intention would be sent and their surveyor consulted. On 28 September 2006 a Notice of Intention was sent with the description of work "to carry out damp repairs to the block". The nature and scope of the work was unclear. Mr Baker asked about the "proposed works" but no information was forthcoming, although observations were invited by 27 October. HPS took no further steps. Following advice from its surveyor, a Mr

Ashworth, HPS wanted to look at possible damp elsewhere in the property and wrote to Mr Baker and Ms Emanuelle accordingly, but this was not pursued.

- (n) Mr and Mrs Bowyer-Sidwell, concerned at the delays and about a possible increase in price, obtained an updated quotation from McCoy Hill dated 20 October 2006. The revised quote was £881 for the DPC, £427 for timber treatment and £3751 for specialist replastering (all plus VAT). They decided to go ahead with the works themselves and instructed McCoy Hill in November 2006, informing HPS on 5 November. The work was completed in December 2006. McCoy Hill's final invoice, dated 14/12/2005 is for £5,059 plus VAT of £885.34, totaling £5,944.34, in accordance with the revised quote. Mr Bowyer-Sidwell paid in full and sent the invoice to HPS with the comment: "My 50% share in the costs of these works has been paid and I am therefore in credit to Haywards to the value of £2,972.17".
- (o) It emerged at the hearing that on 28 April 2007, between the S.20ZA and the S.27A Applications to the Tribunal, HPS sent service charge demands to each of the tenants, requiring payment for their respective proportions of the McCoy Hill invoice. Mr Smith and Ms Tipper of Flat 3 produced their demand which was for £1,486.09, which is 25% of £5,944.34, the cost of the McCoy Hill works. Mr Baker and Mr Bowyer-Sidwell confirmed that they had also received demands. Mr Powell and Ms O'Toole were unaware of the demands and were unable to comment, save to accept that they could not be disregarded by the Tribunal..

### **The Applicants' case**

17. Mr Powell, for the Applicants, submitted that the works carried out by McCoy Hill, commissioned and paid for by Mr and Mrs Bowyer-Sidwell, were not reasonably incurred as service charges and therefore not payable as service charges by the Bowyer-Sidwells and the remaining two tenants. It was reasonable that the costs of those works, which were internal to Flat 1, should be payable in full by Mr and Mrs Bowyer-Sidwell themselves.
18. Mr Powell based his case on the existence of an alleged "Agreement" between the tenants in 2004, that they would organise works to remedy the damp at the property and agree between themselves which of the works would be paid for as service charges in their proportionate shares, and which works would be undertaken and paid for separately by the then tenants of Flat 1, the Hands. Mr Powell referred to these as the "Agreed Works" and "Remaining Works" respectively. He further submitted, in reliance on the Hands' letter of 3 November 2004 to HPS, that by not objecting, HPS had consented to the "Agreement". As a result the cost of the work done by the Hands was not the subject of any service charge demands and did not appear in any accounts. On questioning from the Tribunal, Mr Powell was unable to specify the nature and extent of the Agreed Works" and the "Remaining Works", or the terms of the "Agreement", of which there was no written evidence or record
19. Mr Powell presented oral and written evidence from Mr Jones, MRICS, of Erinaceous, with the aim of demonstrating with hindsight which works were the subject of the "Agreement". Mr Jones inspected the property on 5 June 2007 and produced a report dated 8 June 2007. He described external works, including the re-rendering to the chimney stacks and the area above the excavated trench, the bell-mouth drip and the reduction of external ground levels at the rear. He estimated that the works had been carried out over 6 months previously but he could not exactly when or by whom.

20. In his written report Mr Jones commented that the works carried out by McCoy Hill were "an internal issue and should be covered by the lease [sic] and not the service charge". However, on questioning from the Tribunal, Mr Jones accepted that the damp proofing works were structural and that specialist re-plastering would normally be regarded as an included feature of those works rather than a separate or merely cosmetic item. He did not dispute that the works carried out by DPC were not necessary or not done to a reasonable standard. He was unable to comment on whether the purchase price paid by the Bowyer-Sidwells was under the market value.
21. Mr Powell further contended that under the "Agreement" any "Remaining Works" were to be carried out by Mr and Mrs Hands, or by any subsequent purchasers of Flat 1. The Hands chose not to carry out any further works, but instead put the property on the market, and accepted a reduced purchase price which reflected the anticipated cost of those works. In his view, the reduction in purchase price was consistent with his argument that the Bowyer-Sidwells must have known about, and were bound by, the "Agreement" to carry out and pay for the "Remaining Works" themselves, and indeed they had derived some benefit akin to compensation from the reduced purchase price. When the Bowyer-Sidwells contacted HPS throughout the summer of 2006, insisting that the McCoy Hill works were the responsibility of the freeholder, they did so contrary to the "Agreement".
22. In support of this argument, Mr Powell relied on oral and written evidence from Mr Baker. Mr Baker had written to the Bowyer-Sidwells on 1 February 2007 to the effect that following the Protim report the then tenants had agreed that the Hands would carry out some external works to the property to which they would each contribute, that the Hands were aware further extensive internal works would be needed but that they wanted to sell the flat and would take a reduction in purchase price as they did not want to do the works themselves. As a result Mr Baker felt that he should not have to contribute towards the works in Flat 1 as there had been no consent with HPS to the works being paid for through the service charges. Under questioning from the Tribunal, Mr Baker said there had been an informal conversation at the property and that he did not know what works the Hands carried out or how much they cost. He thought he had paid about £300 or £400 but was not sure. Mr Powell did not produce any evidence from Mr and Mrs Hands.
23. Regarding HPS's position, Mr Powell submitted that HPS were unaware of the "Agreement", and that was why Ms Shoemith had served the first Notice of Intention of 11 October 2004 and sent a form of consent and waiver of consultation rights to the other tenants for McCoy Hill works in May 2006. Similarly, when Ms Glover took over, she was equally unaware of the "Agreement" and therefore acted in ignorance of it in her dealings with the Bowyer-Sidwells during the summer of 2006 and in serving another Notice of Intention on 28 September 2006. Mrs O'Toole, of HPS, accepted that the description of the "proposed works" in that Notice was probably incorrect.
24. Ms O'Toole added that HPS had a strict procedure in place to comply with the statutory consultation requirements and that it was not usual practice to ask tenants to consent to works or waive their consultation rights. She assumed that Ms Shoemith had acted in this way to speed up the process and that HPS had informed Mr Bowyer-Sidwell of the consultation procedures. Under questioning from the Tribunal, Ms O'Toole acknowledged that HPS had received Mr Bowyer-



Sidwell's initial letters in April and May 2006 and were aware of the need for the McCoy Hill works. She accepted there would have been enough time, between May and November 2006, when the Bowyer-Sidwells finally instructed McCoy Hill, to have complied with the S.20 consultation requirements.

25. In relation to the S.20ZA Application, Mr Powell argued that HPS had been unaware of the Agreement and that is why the two Notices of Intention had been served. Once Mr Bowyer-Sidwell had instructed McCoy Hill direct there was no point in proceeding to the second stage of the statutory consultation procedure.

### **The Respondents' Case**

26. Mr Bowyer-Sidwell presented his case on behalf of himself and his wife. They submitted that they had no knowledge of the "Agreement". The first they knew of it was when they received the Applicant's written Statement of case. They had never spoken to the Hands or dealt with them direct. They had conducted all pre-contractual enquiries through their solicitors and dealt with the purchase price with the estate agents. Before they bought the property, they were aware, from their Home Buyer survey that there were damp problems inside Flat 1. At that stage they did not know how much remedial works would cost. They offered a reduced purchase price of £215,000 because this was the valuation they had been given by the survey, which took into account the damp and also the need for redecoration and kitchen improvements. They did not seek a further reduction after they had obtained the 3 specialist reports and quotations.
27. Regarding service charges and repairing obligations under the lease, Mr Bowyer-Sidwell explained that their solicitor's advice, by letter dated 20 October 2005, was that the maintenance and repair of the main structure should be carried out by the managing agents on behalf of the landlord, and that they would be liable for 50% of the cost through the service charges. They therefore believed that the damp proofing works would be paid for through the service charge and their share of the cost would be 50%. They pointed out that the Hands, through their solicitors, had asserted that the damp problem had been cured, but this plainly was not the case.
28. Once they moved in, Mr Bowyer-Sidwell said that he wrote to HPS with a copy of their reports and quotations. He could not explain why, if the work was the responsibility of the landlord, he had asked HPS to authorise him to instruct McCoy Hill. He put this down to inexperience in such matters and the urgent need for the works. However, it was always their understanding that they would pay 50% of the cost as a service charge. They thought, once they had returned their consent form in May 2006, and later after the Notice of Intention, that the works would go ahead. They became frustrated by HPS failing to respond to their letters and calls, and what they saw as HPS's delaying tactics. Finally, in desperation, they instructed McCoy Hill themselves as the situation had become intolerable and they still had many of their possessions in storage.
29. On questioning from the Tribunal on the terms of the lease, Mr Bowyer-Sidwell accepted that the floor timbers were part of the Flat and therefore the tenant's responsibility, and that this meant in any event they would be responsible for the timber treatment costs.
30. Mr Baker, Mr Smith and Ms Tipper also briefly addressed the Tribunal. Mr Baker believed that he should not have to contribute towards the cost of for works inside Flat 1. Mr Smith said that when he and Ms Tipper purchased Flat 3 in February

2007 they were unaware of any potential service charge liability for these works and had no knowledge of either the "Agreement" or the history of events surrounding the McCoy Hill works.

### Decision

31. In making its decision the Tribunal first considered the nature and extent of the tenant's liability to pay service charges under the terms of the lease. At Clause 5(d)(i), the lessor covenants to maintain and keep in repair "*the main structure ... of the Building*". The damp proofing works fell within this obligation, as they were structural in nature. The specialist re-plastering work to the walls inside Flat 1 was an integral part of this work, as accepted by Mr Jones, the Applicant's surveyor. The cost of the damp proof course and the specialist re-plastering is therefore a service charge item under the lease, and *prima facie* payable by the tenants of all 3 flats in their respective contributions.
32. However, the Tribunal considered that the woodwork and timber treatment was not a service charge item because the definition of the Flat in the First Schedule includes the floors, *including joists and beams upon which the floors are laid*. Under Clause 4, the tenant has the responsibility to maintain and repair the Flat. The cost of this work, £427 plus VAT, is payable by Mr and Mrs Bowyer-Sidwell, as they accepted during the hearing.
33. The Tribunal considered whether there was any enforceable "Agreement" between Mr and Mrs Bowyer-Sidwell, the other tenants and the landlord that the tenants of Flat 1 would be solely responsible for any future work to remedy the continuing damp problem. The Tribunal was not persuaded by Mr Powell's argument. It did not accept that any such "Agreement" existed beyond an informal arrangement between the tenants in 2004 to share the cost of the external work carried out at that time by the Hands. From its inspection, the observations of Mr Jones, and the Hands' letter, the Tribunal found it was likely that this work was the removal of some render to expose of the original DPC, the forming of the bell mouth to the edge of the rendering, and the excavated trench with decking, which had plainly not cured the damp problem. There was no clear agreement of any kind in relation to any future works.
34. Mr Baker's recollection of a casual conversation at the property, coupled with the Hands' letter, did not in the Tribunal's view amount to any kind of "Agreement" capable of ousting or varying the clear obligations under the terms of the lease. There was no supporting evidence to substantiate the "Agreement" or its terms. The fact that not only Mr and Mrs Bowyer-Sidwell, but also HPS, were completely unaware of it adds weight to the conclusion that there was no such "Agreement". Even if there had been a clear agreement between the tenants and the landlord in 2004, Mr and Mrs Bowyer-Sidwell were not a party to it and not bound by it.
35. Although it may be somewhat unusual for a tenant to instruct contractors and pay for works that should properly be the landlord's responsibility, this does not mean that the tenant becomes liable because of what is arguably the landlord's default. It is clear that Mr and Mrs Bowyer-Sidwell eventually acted out of frustration at the delays and the confusion that arose as a result of HPS's actions between May and November 2006. The Bowyer-Sidwells were consistent and credible in their understanding that they would be liable for 50% of the cost and in seeking authority from HPS to engage McCoy Hill. The Tribunal concluded that the costs were reasonably incurred on behalf of the landlord.

36. The Tribunal did not accept that the reduction in the purchase price was in any way connected to the question of payability of service charges or liability for repairs, which are governed by the lease terms. The argument that the Bowyer-Sidwells had benefited from the price reduction so therefore must be solely responsible for the damp proofing works was misconceived. The price reduction was negotiated via estate agents on the basis of the Home Buyers survey; there could be a variety of reasons why a vendor, albeit reluctantly, might accept a lower price, and such negotiations are common place in the property market. In any event, Mr and Mrs Bowyer-Sidwell remain liable for their share of the McCoy Hill costs through the service charge
37. As far as HPS was concerned, The Tribunal had some concerns over the form sent to the tenants in May 2006 suggesting that statutory consultation rights could be waived. It is not possible simply to contract out of the S.20 procedure, which exists to safeguard tenants who will ultimately be liable to pay for potentially expensive works through their service charges. In fact, HPS consistently acted on the basis that the landlord was responsible for the damp remedial works: by serving 2 Notices of Intention, albeit 2 years apart, by obtaining the Protim report in the first place, and finally by issuing service charge demands as recently as April 2007 for payment of the McCoy Hill costs.
38. The Tribunal took the view that HPS were well aware of both the necessity for the works and the requirement to consult. It was clear from the quotations provided by Mr Bowyer-Sidwell that the cost of the work would exceed the statutory limit. Furthermore, HPS had ample time to start and complete the statutory procedure between April 2006, when Mr Bowyer-Sidwell first contacted them and November 2006 when he finally instructed McCoy Hill. This point was accepted by Mrs O'Connor. The Tribunal therefore concluded that it was not reasonable in all the circumstances to dispense with the requirement to consult. The failure to comply with the consultation requirements means that the relevant contribution of each tenant, i.e. the amount that the tenant can be required to pay as service charges for the works in issue, is limited to £250 each.
39. Finally, the Tribunal considered the position of the other tenants. It concluded that both Mr Baker, and Mr Smith and Ms Tipper, were liable to pay. It is unfortunate that Mr Smith and Miss Tipper were unaware of the history and the damp problems when they purchased Flat 3, but they are plainly liable under the terms of their lease, and the demand was issued in April 2007 for work carried out less than 18 months before.

### **Determination**

40. The Tribunal therefore determines that all the Respondents are liable to pay £250 each towards the cost of works carried out by McCoy Hill to remedy damp which are repairs to the structure of the property and therefore the responsibility of the landlord. The tenants of Flat 1, Mr and Mrs Bowyer-Sidwell, are liable for the cost of timber treatment of £427 plus VAT.
41. The Tribunal declined to dispense with the requirement to consult for the reasons given above.

**Section 20C**

42. At the hearing Mr Bowyer-Sidwell sought an order pursuant to Section 20C of the 1985 Act that the costs incurred by the landlord in connection with the proceedings before the Tribunal should not be regarded as relevant costs to be taken into account in determining the amount of the service charge payable by the tenant. The 1985 Act provides that the Tribunal may make such order on the application as it considers just and equitable in the circumstances. The Tribunal is concerned with the merits rather than the quantum of these legal costs.
43. Having carefully weighed the evidence the Tribunal concluded that it would not be just and equitable for the landlord to recover his costs in connection with the proceedings before the Tribunal through the service charge. The Tribunal has found squarely against the Applicant on all points and was not persuaded that there was merit in any of the legal arguments put before it.
44. The Tribunal therefore makes the order under Section 20C as sought.

**Dated 17 September 2007**



**Ms J A Talbot**  
**Chairman**