RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

S.27A & S.20C Landlord & Tenant Act 1985 (as amended)
S.20ZA Landlord & Tenant Act 1985

Residential Property
TRIBUNAL SERVICE

DECISION

Case Number:	CHI/45UB/LSC/2007/0088
Property:	11 The Haven, Brighton Road, Lancing, West Sussex BN15 8EU
Applicants:	S.27A: Mr & Mrs N Subedar (tenants of Flat 11) S.20ZA: Chalice Properties Ltd (landlord) The Haven (Lancing) Management Ltd
Respondents:	S.27A: Chalice Properties Ltd The Haven (Lancing) Management Ltd S.20ZA: The Lessees
Applications:	S.27A: 17 September 2007 S.20ZA 30 November 2007
Directions:	25 September 2007 & 12 October 2007
Pre Trial Review	16 November 2007
Hearing:	05 February 2007
Appearances:	For the landlord: Mr J Everett of Coole & Haddock, Solicitors Ms C Dacombe, Mr B Partington, Mrs P Cox, Mrs J Seabrook, Mrs M Warden of the Haven (Lancing) Management Co Ltd Mr N Subedar in person
Decision:	18 March 2008

Members of the Tribunal

Ms J A Talbot MA, Chairman
Mr N Robinson FRICS
Mrs J Morris

Case Nos. CHI/00ML/LDC/2007/0031

Property: The Haven, Brighton Road, Lancing, West Sussex BN15 8EU

Applications

1. On 17 September 2007 Mr & Mrs Subedar, tenants of Flat 11, made an application under S.27A of the Landlord and Tenant Act 1985 ("The Act") for a determination on the payability of service charges for the year ending 25/03/2007 in connection with driveway resurfacing at a cost of £9,050.

2. Following Provisional Directions issued on 25 September 2007, a Pre Trial Review took place on 16 November 2007. The Further Directions record that "the only issue to be decided by the Tribunal is the liability of the Applicants under the terms of the lease to pay the proportion of the costs of driveway resurfacing. In particular the Applicants contend that no Section 20 Notice was served and that the costs incurred include an element of improvement rather than repair."

3. It was further recorded that the parties agreed the following points were not in dispute: (a) the proportion of service charges payable by the Applicants and (b) the quality of the works to the driveway resurfacing.

4. Permission was also given to The Haven (Lancing) Management Limited ("the management company") to make an application under Section 20ZA of the Act for the Tribunal to dispense with all or any of the statutory consultation requirements in relation to the driveway works. This application was made on 30 November 2007. Both matters were heard together on 5 February 2008.

Jurisdiction

5. The tribunal has power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Under S.27A of the 1985 Act the tribunal can determine by whom, to whom, how much and when a service charge is payable. The tribunal also determines whether a service charge has been reasonably incurred and whether the works or services to which it relates are of a reasonable standard.

6. S.20ZA of the 1985 Act provides that the tribunal may dispense with all or any of the consultation requirements in relation to any qualifying works if satisfied that it is reasonable to do so. Those requirements are to be found in S.20 of that Act (as amended) and in the Service Charge (Consultation Requirements) (England) Regulations 2003 which supplement it.

Lease

7. The tribunal had a copy of the lease of Flat 11. The lease dated 5 December 1974 and is for a term of 99 years from 25 March 1974 at an initial ground rent of £20 and rising thereafter.

8. The provisions relating to the calculation and payment of service charges are to be found at Clause 3(xiv). The tenant covenants to pay a proportion of "all expenditure and other liability incurred by the landlord or the association in complying with the covenants on the part of the landlords and in execution of the powers contained in the Third Schedule". The proportion payable by Flat 11 is 2.2%, which was not in dispute.

9. The landlord's repairing obligations are to be found in the Third Schedule. At paragraph 2 the landlord covenants "to keep clean tidy and in good condition order and repair any lawns and gardens ...and (until such time as the same shall be taken over and adopted by the appropriate Authority) the said access roads pedestrian footpaths and accessways referred to in paragraph 1(a) of the First Schedule hereto and the refuse bin store and the visitors car parking spaces".

10. In addition at Paragraph 8 the landlord has power to "carry out such other repairs and works and to defray such other costs as the landlords or the association shall consider necessary or convenient to maintain the Haven as a first class residential community".

Inspection

11. The members of the tribunal inspected the exterior of the property before the hearing accompanied by Ms Dacombe and Mr Partington for the management company and Mr Subedar. The property consists of a purpose-built block of flats, constructed in the 1970's, containing 27 self-contained flats of varying sizes, located between the A259 and the seafront at Lancing. The property is accessed to the north via a short drive leading from the main road to the block. Part of this is a drive adopted and maintained by the Council. The driveway area nearest the block is part of the freehold and has several marked parking spaces. To the south side of the property are further parking areas. It was evident that some resurfacing work had been carried out to both the north and south areas

Hearing

12. A hearing took place in Worthing on 5 February 2008. It was attended by Mr Everett, solicitor, representing the management company, accompanied by Ms C Dacombe, Mr B Partington, Mrs P Cox, Mrs J Seabrook and Mrs M Warden. Mr Subedar attended in person.

13. On the basis of its inspection, the documents produced and submissions made at the hearing the tribunal found the following facts:

    (a) The Haven is managed by the management company known in the lease as "the Association" and registered under the name of The Haven (Lancing) Managements Ltd in accordance with the terms of the lease. Ms Dacombe is the current company secretary. The freeholder is a separate company, Chalice Properties Limited, whose company secretary is Mr L Harper, an accountant. All lessees are members of the management company and elect the board of directors.

(b) The north driveway area originally had a small concrete slab footpath bordering the grassed area, which had fallen into disrepair. The concrete slabs had become cracked and damaged partly as a result of vehicles driving over and parking on the path. The south car park and garage area was constructed of concrete which had become worn and uneven in places.

(c) The management company obtained a survey report dated 19 May 2005 "for proactive maintenance planning" from Mr A K Mellors FRICS. At paragraph 17.0 Mr Mellors found that the parking areas were in disrepair, and noted: "the defective areas of tarmac, concrete hard surfacing and paving could cause injury to pedestrians ... there are health and safety issues". One suggested option was to "repair/relay/renew" at a potential cost of "£20/30,000." No further details of the repairs were given.

(d) The survey report also recommended exterior decoration works and these were carried out in 2005/06. Minutes of an AGM on 30 June 2006 under "future plans" record that "the Board is planning more extensive maintenance to the concrete parking areas and the pathways at the north of the block during the coming year". These Minutes were not circulated until shortly before the next AGM in June 2007 and were not posted on any notice boards at the property.

(e) At a Directors' meeting on 12 July 2006 it was decided that Mr Partington would obtain 3 quotations for the driveway works "as recommended by the surveyor". Mr Partington, a retired engineer, met on site with 3 contractors, who had been given copies of Mr Mellors' report, but no other written instructions or specification of work. The intention on the north side was to remove the defective pathway and to tarmac the area to widen the access road. This would create additional parking spaces and avoid replacing the pathway which would be likely to suffer similar damage from vehicles and need ongoing maintenance.

(f) In July and August 2006 estimates were provided by All Driveways, Best Choice and AJR Driveways. All quoted separately for the north and south driveways. The costs varied significantly, the quotations did not contain the same information, and were not on a clear like-for-like basis.

(g) The Board decided to instruct All Driveways for the south side initially, as it was in more urgent need of repair. The directors wanted to monitor the quality of work and to ensure that it was completed satisfactorily before possibly instructing the same contractor to carry out work to the north side. In addition it would have been disruptive to residents to undertake all the work together as parking would have been very restricted.

(h) On 31 August 2006 Ms Dacombe wrote to Mr Harper asking for the freeholder's permission to carry out the works including the alterations to the north side. In this letter Ms Dacombe also asked his advice on whether it would be necessary to consult the lessees under S.20 of the Act: "Could you please clarify that if maintenance work comes to a certain figure, and I have

it in my head that it is £500 per flat that a Section 20 Schedule of Works has to be given to all leaseholders for intention of works and costing. Please correct me if I am wrong as I say I am not sure of the amount".

(i) Mr Harper replied on 1 September 2006 that "the landlords have no objection to this work being carried out." In relation to the Section 20 query he went on: "Expenditure requiring notice to be given to every leaseholder accompanied by copies of at least two estimates is set by Section 20 of the Landlord & Tenant Act 1985 and is required where the expenditure exceeds £250 per flat."

(j) Unfortunately this advice was incorrect: first, it was out of date, referring to the procedure before the 1985 Act was amended by the Commonhold and Leasehold Reform Act 2002 as from 31 October 2003; secondly, the procedure applies where the relevant contribution of any tenant exceeds £250, not £250 per flat.

(k) Relying on this advice, which was apparently confirmed by the Leasehold Advisory Service and a local solicitor (not Mr Everett), the directors did not follow the S.20 consultation procedure. They calculated the £250 per flat on the basis of the work to the north and south sides being two separate contracts rather than one split contract and therefore believed that the cost of the works was under the statutory limit. In fact, even with regard to the first contract for £6,350, of the 27 flats, 11 were liable to pay a contribution exceeding £250. Mr Subedar's contribution of 2.2% was below £250, at £141.60, as his was the smallest flat. The legislation still required consultation with all lessees but the Board failed to understand this.

(l) On 25 September 2006 Ms Dacombe also wrote to the Planning Department of Adur District Council to seek clarification as to whether planning permission would be required. On 28 September the Planning Services Manager replied to the effect that "the works are of a sufficiently minor nature as not to require an application for planning permission".

(m) Work to the south side was carried out in October 2006 at a cost of £6,350 as per All Driveways' estimate, supervised by Mr Hartington. This work was considered satisfactory and the same contractor carried out work to the north side in March 2007 at a cost of £2,700. The total cost of the work in dispute was therefore £9,050.

(n) Minutes of Directors' Meetings dated 6 September 2006, 18 October 2006, 6 December 2006 and 24 January 2007 record the progress of the works. These were not circulated to the lessees although they were available if requested. The only information given to lessees was in the form of notices dated 22 September 2006 displayed shortly before commencement of both the works stating: "Essential repairs to the south car park are scheduled to commence on Monday 2 October 2006 in accordance with the recommendations from the surveyors report". An identical notice dated 2 March 2007 was later displayed regarding the north driveway.

(o) Mr Subedar, who does not live at the property, was unaware that the south side works had been carried out. He wrote to Mrs Dacombe on 13 December 2006: "I notice from the Budget 2006-7 that considerable amounts were set aside for repairs to car park and driveway extension. I haven't received the consultation notices and wonder if this work is due to be scheduled in this maintenance year". A letter dated 28 January 2007 in reply from "the Board of Directors" stated that "as no one estimate is more that £6750 (the requirement is in excess of £250 per flat) a Section 20 of the Landlords [*sic*] & Tenant Act 1985 was not required".

(p) Mr Subedar did not accept that this was correct, and correspondence continued. In particular, he requested a breakdown of maintenance charges and wished to know whether there was a Schedule of Works and whether a suitably qualified person would oversee the works. Unfortunately the directors did not specifically answer these points but repeated their view that it was not necessary to consult under S.20. A letter dated 20 March 2007 was sent to all leaseholders setting out the Board's position and explaining the directors' understanding of the S.20 procedure.

(q) On 25 July 2007 Mr Subedar wrote again asking (inter alia) 4 questions:
1. Who drew up the specification & could you send me a copy?
2. How did you choose which contractors should quote?
3. How many quotes were obtained?
4. Who supervised the work?

(r) No direct reply to these questions was provided but Mr Subedar was given an opportunity to view "copies of the estimates" at the management company's registered office (Ms Dacombe's flat) but Mr Subedar declined as the proposed time was outside office hours. Unfortunately by this stage the tone of correspondence between the parties had become hostile and the issues were not resolved. Mr Subedar subsequently applied to the tribunal.

The case for the tenant

14. At the hearing Mr Subedar confirmed (as recorded at the Pre-Trial Review) that the overall cost and quality of the works to both the north and south driveways were not in dispute. Mr Subedar's case was that the management company should have consulted as they were legally required to do. He was concerned with the way the Board had conducted itself and felt his requests for information were reasonable but had been met with "a blank wall".

15. Mr Subedar suggested that the driveway works had been spilt into two contracts in order to avoid the S.20 procedure (as understood by the Board). He contended that if the tribunal agreed to dispense with the consultation requirement this would give the wrong message to the management company.

16. Although Mr Subedar did not stand to gain financially from his application, as his 2.2% contribution to the south side works was £141.60 and therefore less than the maximum contribution of £250 payable without consultation, he believed as a matter of principle and transparency that the management company should have

obtained proper accurate advice and followed the consultation procedure. He did not accept under cross-examination from Mr Everett that he should have withdrawn his application.

17. Mr Subedar further submitted that the works to the north side constituted an improvement rather than a repair and thus went beyond the scope of the landlord's obligations under the terms of the lease. He did not offer any legal argument in the form of lease interpretation or case law in support of his contention. In his view, the management company could have repaired the pathway, and should have considered this option, though he did accept that the outcome of the work done to the north side was of benefit to the residents.

The case for the management company

18. Mr Everett dealt first with the improvement point. He contended that the wording of the landlord's covenant "to keep in good *condition* order and repair" (italics added) imposed a greater liability than simply a covenant to repair (*Woodfall 13.034*). The management company was therefore entitled within the terms of the lease to decide to remove the broken footpath and replace it with tarmac, in order to avoid similar damage occurring again in the future.

19. With regard to the management company's application, Mr Everett accepted that the S.20 procedure applied to the south side contract, as some of the lessees were liable to pay in excess of £250 towards the qualifying works. He submitted that the tribunal should exercise its discretion to dispense with the consultation requirements, and that the test under S.20ZA was one of reasonableness in all the circumstances, rather than whether the landlord had acted reasonably (which was the test under the old S.20(9) when the jurisdiction lay with the County Court).

20. Mr Everett relied on several factors in support of his argument: (a) the amended S.20 procedure was designed to benefit leaseholders and that the members and directors of the management company were themselves all lessees; (b) the Board obtained 3 tenders for the work; (c) the Board did consider whether to consult under S.20 but misunderstood the advice received from Mr Harper; (d) there were genuine reasons for undertaking the work to the north and south side separately and the directors did not intentionally seek to avoid the consultation requirements.

21. Mr Everett further submitted that the Board had the support of most of the lessees and produced letters from some of them. Overall he asked the tribunal to take into account that the directors had acted in good faith for the benefit of all the lessees.

Section 20C; Costs under Paragraph 10 of Schedule 12: Reimbursement of Fees

22. Mr Everett requested a reimbursement of fees order in relation to the S.20ZA application and a costs order under Paragraph 10 of Schedule 12. He contended that Mr Subedar has behaved unreasonably in bringing the application when he stood to gain nothing from it because his service charge contribution was less than the £250 limit. Mr Subedar had been given the opportunity to withdraw his application in a letter dated 27 November 2007 in order to avoid accruing further

legal costs to the management company, but did not respond. The management company had no separate assets with which to defray legal costs.

23. Mr Subedar denied that he had acted unreasonably; his aim in bringing the application was to make the directors accountable for their error in failing to consult, and to ensure that the consultation procedure was followed in future when there might be more at stake financially. He sought an order under S.20C and opposed Mr Everett's request for reimbursement of fees and a penalty costs order.

Decision

24. As the management company had not followed the Section 20 consultation procedure, the payability of service charges in relation to the driveway works rested solely on the outcome of the Section 20ZA application.

25. The tribunal agreed that it had to consider all the circumstances of the case when deciding whether it was reasonable to dispense with the consultation requirement. However, it took the view that the factors put forward by Mr Everett essentially concentrated on the fact that the directors of the management company had acted reasonably in their procurement of the works, albeit mistakenly in failing to grasp the detailed requirements of the S.20 procedure.

26. The tribunal was prepared to accept that there were two valid contracts and that the directors had genuine reasons for entering into separate contracts for work to the north and south sides, and did not intentionally seek to avoid the burden of consulting. However, it appeared at least part of the reasoning for staging the works was that the total cost of a single contract would be above the statutory consultation limit; the cost for the south side of £6,350 was mistakenly thought to come just below that limit, calculated on the basis of £250 per flat. The tribunal saw the force of Mr Subedar's comment that the directors could have entered into a sole contract and indeed obtained some quotations for the whole job.

27. However, the tribunal did not accept that the mere fact that the directors acted mistakenly but in good faith was a sufficient excuse for failing to follow the statutory consultation procedure. Neither was the fact that the works were necessary and reasonable in cost and quality. The directors, although lessees themselves, were acting in their capacity as the Board of the management company with the responsibility for repairs under the terms of the lease. They were equally under a duty to ensure that the S.20 procedure was properly understood and correctly followed, and this they failed to do. They did not seek detailed specific advice from a suitably qualified person but appeared to have concentrated on, and unfortunately misunderstood, the £250 limit.

28. In the tribunal's view, the S.20 procedure exists for the protection of lessees, who ultimately bear the cost of the works. Although there was arguably little prejudice in this case to the lessees, as the cost of the works was relatively low, the contribution of 11 flats was over the £250 threshold, and even if the payments were met largely out of previously paid excess service charges, this was still lessees' money.

29. Apart from the cost issue, the lessees were denied the opportunity of commenting on the nature and scope of the works in advance, and of obtaining their own estimates. This was not an emergency situation where there was no time to follow the consultation process. The tribunal gave weight to the fact that although the directors kept minutes of their own meetings, they did not inform lessees of their plans, for example by letter, posting the minutes on a notice board, or having a separate residents meeting. The only notification took place when the works were about to start.

30. It was clear from the facts found that Mr Subedar had no idea that the works had either been proposed or indeed carried out to the north side, and other absentee lessees would have been in the same position. The tribunal considered that it was reasonable for Mr Subedar to request information, particularly as set out in his letter of 25 July 2007, and it was somewhat unfortunate that the directors did not straightforwardly address the points he raised.

31. In the tribunal's opinion, the quotations obtained were not truly comparable, in that there was a lack of information about the basis upon which they were obtained, there was no specification of work, and they varied significantly in content and cost. Although there is no obligation necessarily for a specification or professional supervision, this is regarded as good practice, and does ensure that the scope of works is appropriate and carried out to a satisfactory standard. In failing to do this, the management company laid itself open to the risk that the works would not be adequate. Fortunately they appear to be satisfactory.

32. Turning to the question of whether the works constituted an improvement rather than a repair, the tribunal accepted Mr Everett's argument that the obligation under the terms of the lease to keep the property "in good condition order and repair" went beyond a simple covenant to repair. The tribunal also accepted that the original pathway bordering the north driveway was out of repair, and therefore the obligation to repair arose. It was not unreasonable of the management company, with a long term solution in mind, to choose to remove the pathway and extend the tarmac area as a means of carrying out the repair and the tribunal concluded this was within the scope of the lease terms.

Section 20C; Costs under Paragraph 10 of Schedule 12; Reimbursement of Fees

33. Mr Subedar sought an order under S.20C that the costs incurred by the management company 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 him. The 1985 Act provides that the tribunal may make such order as it considers jus and equitable in the circumstances. The tribunal is concerned with the merits rather than the quantum of these costs.

34. Having carefully considered the matter the tribunal decided to make the order as sought. It took into account the fact that it found squarely against the management company on the S.20ZA application and that therefore Mr Subedar had succeeded in his S.27A application.

35. In the tribunal's view Mr Subedar was entitled to bring the application in the absence of any resolution of the issues through correspondence. There was no reason why he should have withdrawn it, even though he personally did not stand to gain financially, as there was a matter of general principle at stake, and the points he raised concerning the lack of information and transparency on the part of the management company were valid. The financial circumstances of the management company were not relevant to the consideration of whether it was just and equitable to make the order.

36. For essentially the same reasons the tribunal also declined to order reimbursement of the management company's fees or to award costs under paragraph 10. These costs are essentially penal in nature and the power to order them is not to be exercised lightly. As explained the tribunal did not accept that Mr Subedar behaved unreasonably in connection with the application, and the application itself was not frivolous or vexatious.

Determination and Order

Section 20ZA

1. **For each and every reason give above the tribunal declines to dispense with all or any of the consultation requirements in relation to the qualifying works.**

Section 27A

2. **The amount payable by Mr Subedar in relation to the works to the south side is limited to £250. The amount recoverable by the management company is limited to £250 per flat.**

Section 20C

3. **The order sought under S.20C is granted. The costs incurred by the management company in connection with the proceedings before the tribunal are not to be taken into account as relevant costs in determining the amount of service charges payable by the tenant.**

Reimbursment of Fees & Costs

4. **No order is made for reimbursement of fees and no order is made for costs under Paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002.**

Dated 18 March 2008

Signed
Ms J A Talbot
Chairman