8337

H.M. COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

Sections 19, 27A and 20C of the Landlord and Tenant Act 1985 (as amended) ("the Act")

Case Number:	**CHI/00ML/LSC/2011/0171**
Property:	**Flats 1 & 3, 43 Grand Parade, Brighton, BN2 9QA**
Applicant:	**Ms Elza Alexander (Flat 1)** **Mrs Christine V Paterson (Flat 3)**
Respondents:	**Mr Mark Chinman**
Appearances for Applicants:	**Applicants in person**
Appearances for Respondent:	**Miss Emily Fitzpatrick, Solicitor** **(Mr Mark Chinman and Miss Kirsty Marshall, Pepper Fox, also attending)**
Date of hearing:	**25 June 2012**
Tribunal:	**Ms E Morrison LLB JD (Lawyer Chairman)** **Mr A Mackay FRICS (Valuer Member)**
Date of the Tribunal's Decision:	**2 July 2012**

The Applications

1. The Applicant leaseholders applied under section 27A (and 19) of the Act for a determination of their liability to pay service charges for service charge years 2007 -08 to 2010-11 inclusive (four years) and to pay the on account service charge demanded for the first half of service charge year 2011-12. The Respondent is the freeholder of 43 Grand Parade.

2. The Tribunal also had before it an application under section 20C of the Act that the Respondent's costs of these proceedings should not be recoverable through future service charges.

Summary of Decision

3. The service charges recoverable by the Respondent are as follows:

Service Charge Year	**£**
2007-08	1988.20
2008-09	9236.77
2009-10	2659.61
2010 11	3341.50
2011-12 (first half-yearly demand)	3567.50

4. The Applicants' proportions of these charges are as set out in their respective leases.

5. An order is made under s 20C of the Act with respect to 50% of the Respondent's costs of these proceedings.

The Lease

6. The Tribunal had before it a copy of the lease for Flat 3 and was told that leases for all the other flats were in similar form, save that the Flat 1 lease had not been seen and was not produced. The Flat 3 lease was originally for a term of 99 years from 9 June 1987 at a yearly ground rent of £40 for the first 25 years and rising thereafter. On 6 July 2007 (the date of Ms Alexander's purchase) a Deed of Variation extended the term to 999 years from that date.

7. The relevant provisions in the lease may be summarised as follows:

   (a) The tenant is liable to pay a specified proportion of the service charge, being the costs incurred by the landlord in complying with the repairing, insuring and other obligations as set out in the 4th Schedule and in connection with other costs as set out in the 5th Schedule;

(b) On account sums are payable on 24 June and 25 December in each year;
(c) The landlord is to produce a certified account of service charge expenditure as soon as possible after 24 June in each year;
(d) The tenant is then to pay any balance due or is to be refunded any excess paid;
(e) The landlord may set up a reserve fund as provision for future expenditure which is not of a recurrent nature.

Inspection

8. The Tribunal inspected the subject property immediately before the hearing. The parties and the Respondent's representatives were also in attendance. 43 Grand Parade is a terraced building built circa 1870, situated in a city centre location adjacent to a controlled traffic intersection. At peak times Grand Parade itself is heavily trafficked and some disturbance from this source should be anticipated. The property is arranged over basement, ground and three upper floors and comprises five flats, one on each floor, formed as the result of a conversion. The property has a frontage at rear to Circus Street. The front elevation is rendered and painted and incorporates a square bay with a number of relatively complicated architectural features; by comparison, the back of the building is plainer, but again its organisation is relatively complicated, incorporating both flat and pitched roofs. The external maintenance and repair of the property has been neglected, and the normal cycle for repainting is overdue. In repainting the building it must be accepted that other repairs will be required, which will become evident when scaffolding to carry out the repainting has been erected. The internal common parts are also neglected and in need of attention.

Representation and Evidence at the Hearing

9. Ms Alexander was the original applicant. She had provided a witness statement and documents and gave oral evidence at the hearing. Mrs Paterson was joined later as an applicant but did not provide a statement of case. She gave some brief oral evidence. Mr Chinman was represented by Miss Fitzpatrick, his solicitor. A bundle of documents was provided. Mr Chinman and Miss Marshall, from the managing agents Pepper Fox, were permitted to give brief oral evidence although they had not provided witness statements.

The Law

10. The Tribunal has power under Section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The Tribunal can decide by whom, to whom, how much and when service charge is payable. However the Tribunal cannot deal with charges that are already agreed or admitted.

11. By section 19 of the Act service charges are only payable to the extent that they have been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

12. By section 20 and regulations made thereunder, where there are qualifying works or the landlord enters into a qualifying long term agreement, there are limits on the amount recoverable from each lessee by way of service charge unless the consultation requirements have been either complied with, or dispensed with by the Tribunal. In the absence of any required consultation, the limit on recovery is £250 per lessee in respect of qualifying works, and £100 per lessee in each accounting period in respect of long term agreements.

13. Under section 20C a tenant may apply for an order that all or any of the costs incurred in connection with proceedings before a leasehold valuation tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

The Applicants' case (largely presented by Ms Alexander)

14. Management fees: For service charge years 2007-11 inclusive Ms Alexander challenged the charges payable in respect of the fees of the then managing agents Graves Jenkins. Her argument was exactly the same for each year. Mr Chinman had entered into a written agreement with Graves Jenkins on 8 June 2006. Their basic fee for managing 43 Grand Parade was to be £950 + VAT per annum. Clause 7.1 provided for either party to terminate the agreement after the expiration of 1 year by giving not less than 3 months notice to be served on or before a quarter day following the expiry date. This was a qualifying long term agreement and there had been no consultation or application for dispensation. Accordingly the contribution of each lessee should be limited to £100 per year.

15. Cleaning charges: Again Ms Alexander challenged the charges in each relevant year. A cleaning company had been paid £20 per month (with a few exceptions) for a monthly visit to the property to clean the internal common-ways. The amount was slightly higher in the final year when there was a change of cleaning contractor part way through the year. Ms Alexander contended that cleaning had not been carried out as frequently as every month. She spent most, but not all, working weeks in London but was at the flat at the weekends and over holidays. She frequently found the hall and stairways to be dirty. She had complained verbally to Graves Jenkins and written to them on 20 December 2010. In 2007-08 she suggested the cleaners only attended 6-8 times. She suggested she should pay only 50% for 2008-09 and 80% for 2009-10. The new cleaner was no better than the previous one.

16. 2007-08:

£153.62 had been charged for works to the ceiling of Flat 4. The invoice referred to 'water leak to ceiling'. Ms Alexander said there was no information as to the cause of the leak and submitted the bill should be paid by Flat 4 only, rather than being included in the service charge.

17. 2008-09:

(a) £115.15 had been charged under General Repairs arising from an invoice which contained the narrative "To carry out treatment re flies at 2 Grande Parade Brighton within the basement". Ms Alexander contended this should be the responsibility of the basement flat only.

(b) £7249.75 charged for Rear Addition Roof and Rendering Repairs. Ms Alexander disputed her liability for any part of this cost on the following grounds:

(i) These were works requiring consultation under s 20. She had purchased her flat from Mr Chinman, who was then the leaseholder of Flat 3 as well as the freeholder. She accepted Mr Chinman had been served with the second necessary notice under s 20 before she purchased the flat, but she had been asking for years to see a copy of the first s 20 notice. This had never been provided until 19 June 2012. In any event, she herself had never been consulted, but was being asked to pay.

(ii) When she purchased the flat, her solicitors had obtained a written undertaking from Mr Chinman's solicitors that they would 'discharge all arrears of ground rent and service charges on completion'. The sum of £1595 was shown as a debit entry (described as Major Works re Rear Addition) in Flat 3's service charge account on 8 June 2007. Mr Chinman had not paid this sum on completion as had been promised. The money was therefore due from Mr Chinman and not from her. Under cross-examination she accepted that Graves Jenkins had dealt with her solicitors' enquiries in April 2007.

(iii) Ms Alexander argued that under the lease she has no liability to pay for work on the rear addition, which is an extension over the ground floor and basement flats only. The work had nothing to do with what she described as the main building. She relied on the wording of the 5th Schedule paragraph 1 (a) which refers to maintaining etc. the "main structure of the Building ... and areas used in common". She had no access to the rear addition. She accepted the work was required by the Local Authority.

18. 2009-10:

(a) £230 had been charged under General Repairs for supplying and fitting a new digital aerial and loft mast. However neither Ms Alexander nor Mrs Paterson had any TV connection to the aerial so liability to pay this was disputed.

(b) £270.25 had been charged under General Repairs for repairs to 'steps and bannister rail'. A banister rail had been replaced but it was still wobbly and this charge was disputed.

19. 2010-11:

(a) £996 had been charged for a new entry phone system. Ms Alexander said she had not been consulted or told this work was to be done and her flat had not been connected, so she disputed the charge. Mrs Paterson's flat was connected.

(b) £105.60 had been charged under General Repairs for repairing the TV reception and aerial connection in Flat 4. This should be payable by Flat 4 only.

(b) £85.00 had been charged under General Repairs for repair of a leaking gas pipe and a second visit to re-establish the gas connection to appliances in Ground Floor Flat. Ms Alexander said this should be paid by Mrs Paterson in Flat 1. Mrs Paterson said it was nothing to do with her flat.

20. 2011-12 Budget:

(a) The budget includes £1000 for emergency lighting and £2000 for other fire precaution works. Ms Alexander disagreed with the type and scope of fire precaution works to be carried out and thought the cost was too high.

(b) The budget includes £1200 for management charges. The new managing agents Pepper Fox have a basic charge of £850 + VAT. Ms Alexander thought a reasonable fee would be £600 but she had no comparative quotes.

(c) The budget sum for General Repairs of £1200 was too high. No detail had been given of what was planned, She referred to a problem with the electricity which kept going off. She suggested a figure of £300.

21. Mrs Paterson's evidence did not add in any material respect to that set out above. Her main concern was with neglect of the building, in particular the failure to repair and redecorate the exterior. She said that the cleaners now come regularly. She did not see why the tenants should have to pay any accountancy fees.

The Respondent's case

22. Management fees: It was accepted that there had been no consultation under s 20 with regard to the agreement with Graves Jenkins. However it was argued that the limitation of costs should only apply with regard to the first 15 months of the agreement. After that it could be terminated on 3 months' notice. The law was directed to the mischief of long term commitment without consultation. After 15 months there was no such commitment and therefore no prejudice to the lessees.

23. Cleaning charges: Cleaning was chargeable under the lease and the Applicants accepted some cleaning had been done. After Ms Alexander's first written complaint in December 2010, the cleaners had been changed. Mr Chinman said that £20 per month was a very small sum.

24. Repair works (various):

Mr Chinman said he had left matters in the hands of Graves Jenkins and had no personal knowledge regarding the various disputed repair works. With regard to the ceiling repairs in Flat 4 it was submitted that a water leak was likely to have come from the roof or loft space which was the freeholder's responsibility to repair and therefore chargeable to the lessees.

25. Rear Addition Roof and Rendering Repairs

Mr Chinman was consulted under s 20 before the sale of Flat 3 to Ms Alexander and there was no obligation to repeat the process with Ms Alexander. Mr Chinman said that on completion of the sale some money had been paid over in respect of outstanding charges and other charges had been apportioned. He did not have the paperwork as his solicitors were no longer trading. He was not aware of service charge demands for the costs for the rear addition works before Ms Alexander's purchase. In any event any dispute about who should pay this charge was a matter for the county court not the Tribunal. The rear addition was clearly part of the Building as defined in the lease to which the freeholder's repairing covenants, and therefore also the service charge, applied.

26. 2011-12 Budget

(a) The fire precaution works to be carried out were in accordance with recommendations of a fire risk assessment. Section 20 consultation had been carried out and the work was due to start on 9 July 2012. The estimate accepted was for £4004, higher than the budget figure.

(b) Pepper Fox's basic charges will be £1050 inc. VAT. There will be additional charges for extra work, for example with respect to the fire precaution works.

(c) The budget sum for General Repairs of £1200 was Miss Marshall's reasonable estimate. There were many items that might require repair, for example the gutters, pipes and common-ways.

(d) The Tribunal queried the budget figure of £2000 for a Reserve Fund. Miss Marshall accepted there was already £7978.50 in Reserve as of 24 June 2011 but said funds would be needed for internal and external redecoration.

Section 20C

27. Ms Alexander said her letters and queries had been ignored. She had been waiting for 5 years to get a copy of the s 20 notice relating to the rear addition and it had only been supplied last week. The Respondent had made no attempt to negotiate with her and she did not feel the Applicants should be penalised for making an application to the Tribunal. She asked for a s 20C order

28. Miss Fitzpatrick submitted that there had been no responses to Ms Alexander's letters as the Respondent was trying to keep costs to a minimum. Ms Alexander had raised issues not suitable for the Tribunal. If she had taken advice on the definition of Building in the lease there would have been no need to spend so much time on that issue. She objected to a s 20C order.

The Determination

29. Management fees: Under s 20ZA (2) of the Act a qualifying long term agreement means an agreement entered into by or on behalf of the landlord for a term of more than 12 months. Under Regulation 4 of the Service Charges (Consultation etc) (England) Regulations 2003, section 20 applies to such an agreement if the relevant costs incurred in any accounting period result in any tenant's share being more than £100. Under section 20(7) a failure to consult means that each tenant's contribution is limited to £100. These statutory provisions are clear. The Respondent's argument seeks to place a gloss on the provisions which is contrary to their plain meaning and Miss Fitzpatrick accepted there was no legal authority to support her argument. There should have been consultation with respect to the Graves Jenkins agreement as its minimum term was 15 months and there has been no application for dispensation. The Tribunal therefore determines that the total amount recoverable for management fees for each of the four service charge years in question is limited to £500 (£100 per tenant).

28. Cleaning charges: The Applicants accept some cleaning was carried out and there was no challenge to the rate of charge, which the Tribunal regards as a minimum amount. Invoices were submitted and have been paid. The accounts have been certified. Ms Alexander was not present at the premises sufficiently often to be able to give reliable evidence as to the level of attendance by the cleaners. Her evidence that the common-ways were often dirty is consistent with a monthly visit, as this level of frequency is, on a common-sense view, insufficient to maintain a good level of cleanliness. There was no written complaint until December 2010. Given the low amounts involved, the Tribunal is not persuaded that any part of the cleaning charges in the relevant years should be disallowed.

29. 2007-08: There was no evidence before the Tribunal with respect to the disputed costs of repairing Flat 4's ceiling except the copy invoice. Doing the best it can the Tribunal finds on a balance of probabilities that the water leak damage to the ceiling fell within the freeholder's repairing obligations. This is because Flat 4 is the top floor flat and if water came through the ceiling the likelihood is that it came via the roof or pipes in the roof-space outside the demise of Flat 4. The charge is therefore allowed.

30. 2008-09:

(a) There was no evidence save the invoice itself with respect to the treatment re flies. As the invoice narrative refers to work at 2 Grand Parade, a different address, this charge of £115.15 is disallowed.

(b) Rear Addition Roof and Rendering Repairs:

The charge of £7249.75 is allowed in full. Once Ms Alexander had been provided with the initial s 20 Notice she could no longer maintain that the required consultation had not taken place prior to her purchase. There is no legal requirement to repeat the consultation if there is a subsequent change of lessee; all relevant information should have been sought and obtained prior to purchase. As to who, between Ms Alexander as the present lessee and Mr Chinman as the previous lessee, should be primarily responsible for payment, that is an issue for

the county court, not the Tribunal. While it appears clear that Graves Jenkins' ledger makes a debit entry for these costs before completion of Ms Alexander's purchase, and that Mr Chinman's solicitors gave an undertaking to pay any service charge arrears on completion, liability is not admitted by Mr Chinman. The Tribunal can only decide the amount of the service charge, and not who, as between successive lessees, is to pay it.

Ms Alexander's argument that the work is not covered by the service charge provisions in the lease is wholly ill-founded. The Building is defined in the first recital by reference to its Title Number and is described as consisting of 5 self-contained flats. The lower two flats are larger than the three upper flats as they extend to the rear but it is clear that there is only one building which includes all five flats and that this was the position when the leases were granted. The description 'rear addition' is therefore somewhat misleading. The 5th schedule of the lease requires the lessee to pay the due proportion of repairing etc." the main structure of the Building and in particular the foundations external walls roof balconies... and areas used in common". The lessee's obligation is not limited to those parts of the Building to which she has access.

The Tribunal saw the work carried out and the Local Authority Improvement Notice dated 14 April 2008 which required that the work be done. There was no evidence that the cost was unreasonable or the work in any way deficient. The cost is allowed.

31. 2009-10:

The charges of £230 for the digital aerial and £270.25 for the steps and banister rail repairs are allowed. Under the Lease the freeholder is responsible for the maintenance repair and renewal of the common ways, and communal aerial system. There was no evidence that either charge was unreasonable.

32. 2010-11:

The charge of £996 for a new entry phone system is allowed. Under the Lease the freeholder is responsible for the maintenance repair and renewal of the door answering telephone system and this level of expenditure does not invoke the need to consult under s 20. The £105.60 for repairing the TV reception and aerial connection in Flat 4 is also allowed as it relates to the communal aerial system. The charge of £85 for the gas pipe repair is disallowed in the absence of any evidence as to where the leak arose and the impossibility of drawing any reasonable inferences.

33. 2011-12 Budget:

(a) The budget includes £1000 for emergency lighting and £2000 for fire precaution works is allowed. The work is required, and there is now evidence that the cost will exceed the budget sum. There is therefore no reason to reduce the budget sum for this item, and indeed the Reserve may need to be used to meet any shortfall.

(b) The budget includes £1200 for management charges. This should be reduced to £1050 in line with Pepper Fox's charges. There was no evidence that a fee of £1050 (£170 + VAT per flat) was unreasonable. Additional charges in connection with major works would not fall under this budget head.

(c) The budget sum for General Repairs of £1200 is allowed. Although it is higher than average annual costs incurred by the previous managing agents, it is clear that there are a number of matters which require attention and £1200 is a reasonable budget figure.

(d) The budget sum of £2000 is not allowed. While the property certainly requires internal and external redecoration there is no programme of works and there are no cost estimates. There was £7978.50 in Reserve as at 24 June 2011. There has been no expenditure from Reserve since 2008-09. The previous managing agents built up this fund, not by budgeting for a reserve, but by transferring into the Reserve any surpluses from the general service charges at the end of each year. It is suggested that the current managing agents give careful consideration as to whether this practice should be continued in light of the provisions in the lease.

The annual budget figure is therefore reduced to £7135, and the first on account demand is recoverable in the sum of £3567.50.

Section 20C Application

34. In deciding whether to make an order under section 20C a Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. Although Ms Alexander has not succeeded in many aspects of her application, it cannot be said that the application was improperly brought. She has prevailed with respect to the management fees. As regards the rear addition works, it was unjustifiable not to provide her with proof of the s 20 consultation until just before the hearing. Taking everything into account the Tribunal determines that 50% of the freeholder's costs of these proceedings, if otherwise recoverable under the lease, should not be taken into account in calculating the Applicants' future service charges.

Chairman Elizabeth Morrison
E Morrison LLB JD

Dated: 2 July 2012