12601

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/00MW/LSC/2017/0079 & CHI/00MW/LDC/2017/0080
Property:	4 Trinity Road, Ventnor, Isle of Wight. PO38 1NL
Tenants:	Marianne Davies (Flat 1) Bryan Tiller (Flat 3) Sally Fairhurst (Flat 4) Catriona Di Pasquale (Flat 5)
Representative :	Glanvilles LLP Solicitors
Landlord:	Steven MacEwan (1) 4 Trinity Road Management Company Limited (2)
Representative:	Roach Pittis Solicitors
Type of Applications:	Reasonableness of service charges under Section 27A Landlord and Tenant Act 1985 ("the 1985 Act") and Dispensation application under Section 20 of the 1985 Act
Tribunal Members:	Judge P.J. Barber Mr P D Turner-Powell FRICS Surveyor Member
Date of Hearing:	11th January 2018 — Isle of Wight Combined Court, The Law Courts, 1 Quay Street, Newport, Isle of Wight. PO30 5YT
Date of Decision:	22nd January 2018

DECISION

Decision

(1) The Tribunal determines in accordance with the provisions of Section 27A of the 1985 Act that the sums as follows referred to in the *Scott Schedule* as estimates for the service charge year 2017, are reasonable as estimated or tender amounts:

(a) Item 8 – Emergency Roof Repairs £950.00

(b) Item 9 – Structural Wall Rebuilding Costs £147,450.00

(2) The Tribunal determines in accordance with the provisions of Section 20ZA of the 1985 Act that no order is made for dispensation with all or any of the consultation requirements in relation to the structural wall rebuilding costs.

(3) The Tribunal determines in accordance with the provisions of Section 20C of the 1985 Act that none of the Respondent landlord`s costs incurred or to be incurred in connection with these proceedings, are to be regarded as relevant costs to be taken into account in determining the amount of any service charges payable by any of the tenants of the Property.

Reasons

INTRODUCTION

1. The Tribunal has received two applications; firstly that dated 26th July 2017 from the tenants, seeking a determination of reasonableness of service charges in the service charge year 2017 under Section 27A of the 1985 Act, and secondly, an application dated 20th November 2017 from the landlord, seeking dispensation from consultation requirements under Section 20 of the 1985 Act. Directions were issued variously, dated 6th September 2017; 10th October 2017 and 22nd November 2017, the latter providing for consolidation and hearing together of the two applications.
2. In broad terms the tenants allege that the service charges for the period in question are higher than they should have been owing to historic neglect.
3. The landlord then applied for dispensation from statutory consultation requirements in regard to various works including, an alarm system; landlord`s electricity supply; roof repair and structural building work.
4. The witness statements indicate that the Property was built around 1880 and contains five flats all held on long leases; the landlord is the headlessee of the building, pursuant to an Underlease dated 27th September 1865 for a term of 998 years from 24th June 1865. The landlord does not own the freehold.
5. The bundle of documents provided to the Tribunal included copies of the applications, the directions issued, witness statements, various invoices and correspondence. The bundle also included copies of the following inspection and/or survey reports:

Patterson Reeves & Partners Report dated 14th May 2012

Innovation Group Engineer`s Report dated 16th May 2012

Tombleson Associates Report dated 23rd June 2014

Daniells Harrison Report dated 27th November 2017

Gully Howard Report dated 21st November 2017

In addition, copies of two of the leases were included in the bundle being:-

Lease of Flat 1 (First Floor)

Lease dated 15th February 1974 made between Leonard Holden and Hilda Holden (1) Jeanette Walters (2)

Lease of Flat 5 (Basement)

Lease dated 23rd July 2004 made between Stephen MacEwan (1) Stephen MacEwan and Lee Rogerson (2)

The bundle also included witness statements made respectively by Marianne Davies, Carolina Di Pasquale, Bryan Tiller and Stephen MacEwan.

6. The tenants broadly submitted that the cost of repair being claimed by the landlord, could have been avoided or substantially reduced if the landlord had remedied the defects at the time required by the repair covenants in the leases; the tenants suggested that there had been disrepair since or about 2012 onwards, particularly in relation to the roof and also regarding vertical cracking to cornices above first floor windows.

7. Mr MacEwan broadly asserted that he had acquired the headlease of the Property in or about 2004, and he referred to various works which he said he had carried out and verbal consultations with some of the tenants.

8. The tenants also sought an order pursuant to Section 20C of the 1985 Act, that all or some of the landlord`s costs in relation to these proceedings are not to be regarded as relevant costs to be taken into account in determining future service charges payable.

INSPECTION

9. The Tribunal carried out an inspection of the Property prior to the hearing in the presence of Ms Davies of the Applicant tenants, accompanied by Miss Hazel Hobbs of counsel and Miss Long from the Applicants` solicitors. The Respondent landlord also attended the inspection accompanied by Mr Simon Allison of counsel. The Property was constructed in or about the second half of the nineteenth century in approximately a wedge shape on the corner of Trinity Road and Madeira Road; it comprises five flats arranged under a flat roof, over three floors, including at basement level.

10. Externally, it was noticeable that the front corner of the building had dropped at upper levels, with visibly split lintels above certain of the first floor windows, and splitting and/or cracks to stucco work. There were plastic barriers erected on the pavement of Madeira Road, close by the front corner of the building to obviate the risk of debris possibly falling on to pedestrians. Flat numbers 1, 2 & 5 are approached via a communal entrance door at pavement level on Trinity Road; Flat number 4 is approached via a door at pavement level on Madeira Road. Flat 3

is a ground floor flat with its own front door at the front corner of the building. It appeared that the front corner of the Property may previously have been used as shop premises many years ago.

11. The Tribunal inspected inside Ms Davies` Flat No. 1 on the first floor of the building; cracks were visible in high positions on the outer wall of the living-room and also certain damp effects to wallpaper. High level cracks were also visible to the outer wall of the kitchen and damp staining and deterioration to the ceiling of an inner lobby area. A damp patch was also noted in the centre of the bedroom ceiling.

THE LAW

12. Sub-Sections 27A (1), (2) and (3) of the 1985 Act provide that :

"(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable."

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

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the cost, and, if it would, as to –

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

"Service Charges" are defined in Section 18 of the 1985 Act as follows

18(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent-

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements, insurance, or the landlord `s costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs

18(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

18(3) For this purpose-

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 20ZA(1) of the 1985 Act provides that:

Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

REPRESENTATIONS

13. Miss Hazel Hobbs of counsel appeared for the tenants; Ms Davies, Ms Di Pasquale, Mr Tiller and Miss Long also attended and in addition, Mr Paul Badham surveyor was present for part of the hearing. Mr Allison of counsel appeared for the landlord, together with Mr MacEwan and the landlord`s surveyor, Mr Shaun Woolford was present for part of the hearing.

14. A short adjournment was requested at the outset of the hearing by the parties to facilitate discussions between them with a view to certain issues possibly being agreed and the Tribunal allowed two short adjournments for such purpose. At the commencement of the hearing, Mr Allison made application for "*4 Trinity Road Management Company Limited*" to be added as a second Respondent in respect of both applications; he explained that Mr MacEwan had transferred his head leasehold interest to 4 Trinity Road Management Company Limited on 13th September 2017 and he said he had been awaiting a response from the Tribunal to an earlier similar request for the company to be so joined. Mr Allison said it is no longer intended that Mr Jackson should be added as a party. Miss Hobbs did not object and accordingly the Tribunal agreed that the company may be added as a party in respect of each of the applications. Mr Allison then advised the Tribunal that it had been agreed between the parties that Items 1-7 in the *Scott Schedule* were no longer in dispute, as a result of Mr MacEwan having agreed not to pursue the costs arising in respect of those matters, from the leaseholders. Following the initial representations and disclosures, the Tribunal then invited the parties to present their respective cases, starting with the tenants` Section 27A application.

15. Miss Hobbs presented the case for the tenants in regard to Items 8 & 9, being the only remaining disputed matters arising from the *Scott Schedule*. Miss Hobbs said that it was agreed that the works identified in the Patterson Reeves and Partners` report should be done; she said that various documents had not been received from the landlord by the tenants such that until disclosure in the bundle, they had been unable to give them proper consideration. Miss Hobbs said that two of the three tenders had been obtained by Ms Davies and the third tender had not been received by all the tenants. Miss Hobbs said both experts agreed that there is a history of neglect.

16. Mr Allison said that the five leases are in broadly similar terms, albeit the 2004 lease of the basement flat is slightly different and provides for a service charge contribution of one-fifth of total costs, while the earlier four leases each provide for a one-quarter contribution. Mr Allison said however that in practice, total service charges were divided equally by the landlord between the five

leaseholders. The Tribunal asked the parties to make submissions regarding whether the leases entitle the landlord to collect service charges on account, in advance of incurring the costs. Mr Allison said it is implicit that service charges may be collected on-account, adding that the leases are old, but nevertheless required an initial payment of £5.00 for service charges which he said indicated an intention by the parties for on-account payments. Miss Hobbs said that the leases are not expressly clear and that the word "incurred" in the Fourth Schedule in conjunction with the tenants` obligation at clause 4(2), give the closest indication that service charges are only due, once costs are incurred. Miss Hobbs did however confirm that equal division of the service charges as between the five leaseholders was agreed.

17. Submissions were then made as follows in regard to the work arising respectively under Items 8 and 9 in the *Scott Schedule*:

Emergency Roof Repairs £950.00

Mr Allison referred to the document at Page 67BQ in the bundle, adding that it was a demand from the landlord, albeit not a valid one, and that it included the sum of £950.00 for these works which the landlord intended to carry out himself. Mr Allison clarified the position by explaining that substantive repairs to the flat roof will be separately needed, but the landlord`s object had been to carry out temporary works now, so as to avoid having to recharge tenants simultaneously, not only for the major wall repair costs, but also the roof repair costs. Mr Allison referred to Page 356 in the bundle and a quote of approximately £25,000.00 (including VAT) for the substantive roof repair work; Mr MacEwan confirmed that the temporary work he had in mind would involve covering of the existing damaged zinc plates, with a layer of felt, to include appropriate dressings adjacent to the outer parapets walls. Miss Hobbs submitted that the tenants had been provided with no clear physical quote to allow them to consider the temporary roof repair costs and that it had not been made clear that the landlord would do the works himself. Mr Allison said the question should be as to whether it is reasonable to do a patching job on the roof; he added there is no dispute that a full repair is required, but that the landlord had understood that the tenants had not wished to incur costs for a full roof repair at the same time as the major wall repair costs.

Structural Wall Rebuilding Works £147,450.00

Miss Hobbs said it is agreed that the works are urgent; however she said that the works have been exacerbated by the landlord`s failure to do them sooner. Miss Hobbs added that the expert report in May 2012 indicated that the need for the works could have been ascertained at the point when the lintels failed, owing to water ingress. Miss Hobbs indicated that she wished to call her client`s surveyor to give oral evidence; Mr Allison objected and referred to a joint statement by the parties` experts in which he said they had agreed and confirmed that they could not determine any specific increase in the cost of the works, either for inflation, or for any deterioration in the fabric due to delayed implementation of the works. Miss Hobbs said that inflation had possibly affected the costs and she wished the expert to give general evidence on this. Mr Allison submitted that whilst inflation indices might give a generalised indication, his concern is that by allowing new oral evidence to be given on this for the tenant today, his client will be disadvantaged by not having prior opportunity to consider and properly to rebut

it. Mr Allison referred to a joint agreed statement as between the parties` surveyors dated 22nd December 2017 in which he said both surveyors had agreed that they could neither determine any specific increase for inflation, nor could they identify any specific deterioration in the fabric of the building likely to have increased the cost of implementing the works. Miss Hobbs said that her client`s surveyor could give oral evidence as to inflation on a generalised basis over a broad range; she added that her clients` solicitor`s clerk has copies available of the joint statement. At this point the Tribunal expressed its concern to the parties regarding the experts` joint statement dated 22nd December 2017 and as to why it had not been previously filed with the Tribunal, nor had any request been made at the start of the hearing to allow late filing of the same, nor indeed any reference made as to its` existence until part way through the hearing. Copies of the joint statement dated 22nd December 2017 were then handed to the Tribunal and a short adjournment occurred whilst the Tribunal considered the joint report, and as to whether in the light of its contents, permission should be given to allow the surveyors to give further oral evidence.

18. Following the short adjournment, the Tribunal reiterated its considerable concern regarding the joint statement dated 22nd December 2017 having been referred to and provided to the Tribunal only part way through the proceedings, particularly given the significance of paragraphs iv and v, by which the parties` surveyors unequivocally agreed firstly that they could not determine any specific increase for inflation and secondly, that they could not identify any specific deterioration in the fabric of the building likely to have increased the cost of implementing the works. The Tribunal noted that the joint statement was unequivocal as to the position in regard to any specific determination of deterioration due to any historic neglect and/or inflation. Furthermore, the Tribunal determined that in circumstances where the parties` experts had already agreed that they could not provide any advice specifically upon the points which would be of paramount importance to the Tribunal in determining any historic neglect, it would be inappropriate to allow the experts to give further and/or new oral evidence today, either (a) on a generalised basis so as apparently to contradict the earlier agreed joint statement and/or (b) given that the landlord`s surveyor would be unprepared to provide any proper response or rebuttal. The surveyors were then released.

19. Miss Hobbs then proceeded by saying it was agreed that major works are needed, but that the experts are unable to conclude any specific increases as to cost and that inflation therefore cannot be explored further. Mr Allison said that the history and background should be taken into account; he said that Mr MacEwan had bought the headlease, which then included the basement flat, in 2004 and had then granted a new underlease on the basement flat to a third party, leaving him as headlessor. Mr Allison said that his client is not a professional ground rent investor and did not know about Section 20 consultation requirements for major works. Mr Allison alluded to "practical realities" saying that his client accepted that he had not maintained the building as well as it could have been maintained, but that he had nevertheless conceded on the Items 1-7 in the *Scott Schedule*. Mr Allison said that the single page tender from RO Property Services for £89,560.00 at Page 123 of the bundle, had been obtained in March 2016; Mr MacEwan said that he has worked with the contractor concerned, Robert Ormond, before but they are not related. Mr Allison confirmed that the two other tenders date from

March 2015. Miss Hobbs said that her clients have little idea as to the nature of RO Property Services - who they are, where they are based and whether or not they are a limited company. Mr Allison said that Mr MacEwan would like to use R O Property Services and he asked that the Tribunal should provide clarification in such regard, although he accepted that it is his client`s decision regarding which contractor should actually be used. Mr Allison referred to the joint statement of the expert surveyors and that it had indicated that they could not determine any increase due to historic neglect; he added that no evidence had been submitted as to such increase and referred to the decision in *Daejan v Griffin[2014] UKUT 206* in the bundle.

20. Section 20ZA Dispensation Application:

Mr Allison referred to the decision in *Daejan v Benson [2013] UKSC 14* at Page 228 of the bundle; he said that paragraph 44 in the decision alludes to the extent of any prejudice suffered by tenants as a result of landlord failure to consult and added that it is for the tenants to demonstrate the existence of any such prejudice. Mr Allison said the crucial questions are what consultation was there and what evidence is there of prejudice? Mr Allison referred to various copy emails contained in the bundle which he suggested, indicated that Ms Davies had been keen for his client to get on with the work and he said that the letter at Page 67AV of the bundle was broadly equivalent to Stage 2 consultation having taken place. Mr Allison said that his client had complied with the overall purpose and intent of the consultation regulations, but he had not complied with the letter of them. However Mr Allison added that no prejudice to the tenants is evident, that there is no prejudice regarding increased costs and that dispensation should be granted without conditions. Miss Hobbs submitted that the tender letter at Page 67AV had in fact only been sent to Mr Tiller and Miss Fairhurst and that the other tenants had not seen it; accordingly she said that there had not been even informal consultation, with each tenant. Miss Hobbs submitted in regard to prejudice, that the quotes are all a number of years old; she added that no information was given about RO Property Services and that whilst the tenants might have agreed the lowest quote, they had been denied proper opportunity to investigate whether or not the work might have been appropriately undertaken by RO Property Services. Miss Hobbs added that the Section 20Za application was not due to urgency as the Respondent suggested, but to his lack of knowledge; she said that the tenants` view was that Mr MacEwan had obtained a survey but then failed to progress matters allowing years to pass, and that dispensation should not be allowed.

21. Section 20C Application

Mr Allison said his client accepts that there is no provision in the leases entitling the landlord to charge costs and that accordingly, he accepts that costs should not be re-charged in respect of any of these proceedings.

22. In his closing, Mr Allison submitted that there is no evidence of prejudice and that even if the tenants had not seen the quotes until they were included in the bundle, they have still now been aware of them for a period of several months, adding that the regulations do not in any event entitle the tenants to further information regarding the quotes. Mr Allison said that he would not repeat himself further on the issue of the Item 9 works, beyond asking the Tribunal to provide a pragmatic steer to the parties regarding tender selection. Mr Allison

said the situation cries out for the appointment of a manager. In regard to whether service charges are payable in advance or on account, Mr Allison said the £5.00 initial service charge payable on the date of the leases, was an indication that the parties intended advance payments.

23. In her closing, Miss Hobbs submitted that the tender from RO Property Services is very brief and with no contact details, adding that a valid Section 20 quote must give enough information so that tenants may consider suitability; she said that had Section 20 consultation been carried out, the tenants would have known and benefitted. In regard to Section 27A, Miss Hobbs said that the expert evidence cannot add much given that neither expert can quantify inflation. Miss Hobbs said there must be some kind of inflation element. In regard to service charges, Miss Hobbs said the tenants say that use of the word "*incurred*" in the Fourth schedule in the past tense, indicates that service charges are not payable in advance and she said that the initial £5.00 payment has little relevance one way or the other. Miss Hobbs said that this is a sad case for all the parties and that they all seek a resolution of the matter; she added that it is clear that the works are urgent in order to prevent risk to the public, and that the tenants had been active in trying to resolve matters by obtaining reports and quotes. Miss Hobbs said that the ongoing uncertainty is most unhelpful to the tenants, who have to contend with the disrepair on a day to day basis; she added that the tenants are frustrated by persistent neglect on the part of the landlord.

CONSIDERATION

24. The Tribunal have taken into account all the submissions as well as the case papers provided by the parties and contained in the bundle.

25. In regard to the Section 27A application, the Tribunal notes the quote of £950.00 provided by Mr MacEwan for carrying out the Item 8 temporary emergency repairs and which appears to represent a reasonable charge for reducing the day to day problem of water leaks through first floor ceilings. Whilst it would obviously be preferable for the full roof repair to be undertaken, the Tribunal considers the proposal for a temporary solution, thus deferring the substantive repair costs at least until after the main wall repair costs have been incurred, as a reasonable proposal. In regard to the Item 9 major wall repair works, neither parties` expert was able to determine a specific increase either for inflation, or in regard to costs arising due to further deterioration. In addition, the tenants had not made out any clear objections as to the amounts of any of the tenders. On the face of it the costed tenders at Pages 100 onwards of the bundle appear to have been provided in accordance with good building practice and, as tender sums or estimates, the Tribunal finds no clear evidence has been provided upon which it may conclude that the amounts are other than reasonable. Accordingly the Tribunal determines that the amounts for the works proposed at Item 8 and Item 9 of the *Scott Schedule* are reasonable as estimates; however it would remain open to the tenants at a future date to challenge the actual costs. In regard to the issue of whether or not the leases allow for service charges to be demanded on an on account basis or not, it has not been necessary for the Tribunal to make any determination in the context of the Section 27A application, there having apparently been no formal or proper demand made for payment in any event. The landlord should of-course ensure that future demands for service charges comply with the requirements of Section 21B of the 1985 Act, by being accompanied by a summary of the rights and obligations of tenants in regard to service charges.

26. In regard to the application for dispensation from the consultation requirements arising under Section 20 of the 1985 Act, the Tribunal notes that the quotes for the works are now all in the region of 2-3 years old. Whilst the quote from R O Property Services is much lower than the others, it is considerably lacking in any detail; it is unclear as to the nature and status of the contractor, whether it is a sole trader or limited company and no address is provided. Insufficient details are provided on the single page of the RO Property Services quote, to ascertain whether the contractor has the experience, expertise, resources and appropriate workforce to carry out such a crucially important main structural repair; the provision of such details would enable the tenants to make their own separate enquiries about the contractor and to consider its suitability, including for example the existence or otherwise of proper public liability and other appropriate insurances. The fact that the quote from RO Property Services is significantly lower than the other quotes, begs the question as to suitability, particularly given the need for suitable experience and specialist skill needed to carry out such significant structural work. Given the age of all the tenders it will also inevitably be necessary for the landlord to request and obtain updated quotes from each tenderer and such process would also afford the opportunity for RO Property Services to estimate with equal transparency in relation to the other contractors. In regard to the landlord`s assertion that dispensation should be granted due to urgency, the Tribunal concurs with the view of the tenants that the application has in reality been made not as a result of urgency, but due to the landlord`s lack of knowledge. No attempt at all has been made to comply with the consultation requirements arising under Section 20 of the 1985 Act; the Tribunal notes that the extent of any informal consultation is disputed that that some of the tenants may not have received the requisite details in any event. Whilst it is clearly agreed by all parties that the work is urgently needed, the Tribunal is of the view that the tenants` interests may indeed be prejudiced if dispensation were to be granted, given the age of the tenders, the clearly apparent need to obtain updated tenders, and also the paucity of information regarding the suitability of "Malc Jenkins" and/or RO Property Services. The carrying out of consultation in parallel with the obtaining of appropriate and up to date estimates, will thus obviate the present risk of prejudice to the tenants.

27. Finally the Tribunal re-iterates its concern in this case that neither party saw fit at the start of the hearing to ensure that copies of the experts` joint statement dated 22nd December 2017 were provided to the Tribunal, particularly in circumstances where that document was of crucial evidential importance and would have been known by both sides to have an important bearing on the outcome of the matter.

28. In regard to the Section 20C application the Tribunal notes the confirmation tendered by Mr Allison and accordingly determines that none of the landlord`s costs in these proceedings should be recharged to leaseholders.

29. We made our decisions accordingly.

Judge P J Barber

Appeals :

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.

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.