FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case References	**:**	CHI/45UC/LSC/2018/0030 and 0034 (Service charges) CHI/45UC/LDC/2018/0088 (Dispensation)
Property	**:**	Flats 2,3, 4 and 5 Swansea House, West Street, Bognor Regis, West Sussex
Applicants **(Service charges)**	**:**	Neale and Stuart Watts Marion Rishman Clare Pegg Thomas Blackler
(Dispensation)	**:**	Swansea House Freehold Limited
Respondents **(Service Charges)**	**:**	Swansea House Freehold Limited
(Dispensation)	**:**	The Lessees
Representatives	**:**	Natasha Watts (For Lessees) Northover Litigation (For Swansea House Freehold Limited)
Type of Application	**:**	Service charges and dispensation from consultation
Tribunal Member(s)	**:**	Mr D Banfield FRICS Judge D Agnew
Date of Decision	**:**	13 February 2019

DECISION

The Tribunal;

grants dispensation from the Consultation requirements of S.20 Landlord and Tenant Act 1985 on the condition that none of the costs incurred in making the application to the Tribunal including a fair proportion of the costs of the hearing shall be met by the lessees in any way.

disallows £6,488.64 which together with £870 conceded totals £7,308.64 which must be credited to the lessees.

1. The Tribunal received two applications from lessees in respect of service charges; Flat 3 in respect of 2017 and Flats 2,3,4 and 5 for service charge years 2003 onwards.

2. In its Directions of 3 May 2018, the Tribunal identified a number of issues and determined that the application would benefit from a case management hearing which took place by telephone on Wednesday 23 May 2018.

3. At the case management hearing it was explained that a number of issues raised by the lessees were outside the Tribunal's jurisdiction and Further Directions made following the hearing joined the two applications and identified the following matters that the Tribunal was able to consider;

    a) The reasonableness of the service charges
    b) Whether the 2018 bill of £133,103 increased by previous neglect
    c) Whether "legally" demanded
    d) The amount of the managing agents' fees
    e) Why the cost of building works increased from quotes of £75K to £133K
    f) What maintenance was carried out prior to Oysters and Holmes Management's involvement.

4. It was also confirmed that whilst the Tribunal was able to determine all of the service charge years challenged, due to the effect of the Limitation Act 1980 in restricting the ability to recover over paid service charges before 3 April 2012 the Tribunal would not determine matters before that date.

5. Mr Sandham (counsel for Swansea house (Freehold) Limited) then said that his client had acquired the property on 30 April 2014 from the now liquidated Tallyoak Limited and that any argument regarding historic neglect could only go back to when his client acquired their interest. In support he referred to *Daejan Properties Ltd v Griffin* [2014] UKUT 206(LC)

6. On 26 October 2018 Swansea House Freehold Limited made an application under S.20ZA Landlord and Tenant Act 1985 (the 1985 Act) for dispensation from the consultation requirements of s.20 of the Act in respect of certain fees which had been omitted from the consultation on major works already carried out.

7. The Tribunal made Directions on 1 November 2018 joining the application to the service charge proceedings and indicated that an oral hearing would be required to determine both matters. This was held on 9 January 2019.

8. The hearing was attended by Lessees Neale Watts, Marion Rishman, Clare Pegg and Thomas Blackler represented by Natasha Watts. For the landlord was a Director R J Ryan, Lee Hellin and James Sandham of counsel.

9. The Tribunal indicated that it would determine the S.20ZA application and whether it could consider the period before the current freeholder acquired the property as preliminary issues.

10. To avoid confusion between the parties they will now be referred to as "Lessees" and "Landlord"

Dispensation application

11. In their application the Landlord explained that on 25 April 2016 a Stage 1 Consultation Notice was sent to all lessees which was followed by a Stage 2 Notice on 9 September 2016 and a Stage 3 Notice on 21 October 2016. Due to an error the Stage 2 Notice erroneously omitted the surveyor's professional fees associated in supervising the major works and the management charges of the managing agents in respect of the project.

12. In their statement dated 19 November 2018 the lessees opposed the application on the grounds that this was necessitated due to the landlord's negligence and a failure to provide them with the information they required as to why the final bill had increased by such a substantial amount. There was no evidence of transparency in respect of the fees and if consulted they would have raised objections. A penalty interest payment should be made to the lessees in respect of incorrectly collected payments and reimbursement of the legal costs they had incurred.

13. In reply Mr Sandham referred to the approach the Tribunal should take as set out by the Supreme Court in *Daejan Investments v Benson and Others* [2013] UKSC 14 (as referred to below) and summarised by the Upper Tribunal (Lands Chamber) in *Jastrzembski v Westminster* CC [2013] UKUT 0284 (LC).

14. Mr Sandham submitted that the lessees had not identified where the extent, quality and cost of the works have been affected by the failure to consult and have not demonstrated that the outcome would have

differed. There is no basis to a demand a "penalty" interest rate on the sums demanded.

15. The lessees' complaints are really directed to the question of reasonableness and are matters for S.27A not 20ZA.

16. At the hearing Mr Sandham for the landlord accepted that the consultants' costs should have been consulted on and said that prejudice might have been demonstrated if a lower quote could have been obtained. However, no replies were received to the S.20 notices and no damage has been identified.

17. In objecting to the application for dispensation Mrs Watts explained that the reason they had not responded to the S.20 consultation was that they had done so on a previous consultation and had thought that there was no need to do so again.

18. In answer to the Tribunal's question Mrs Watts said that the Lessees had not incurred any costs with respect to the S.20ZA application.

The Law

19. The relevant section of the Act reads as follows:

20ZA Consultation requirements:

a. (1) Where an application is made to a Leasehold Valuation 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.

20. The matter was examined in some detail by the Supreme Court in the case of Daejan Investments Ltd v Benson. In summary the Supreme Court noted the following

b. The main question for the Tribunal when considering how to exercise its jurisdiction in accordance with section 20ZA (1) is the real prejudice to the tenants flowing from the landlord's breach of the consultation requirements.
c. The financial consequence to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.
d. Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.
e. The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.
f. The Tribunal has power to impose a condition that the landlord pays the tenants' reasonable costs (including surveyor and/or

legal fees) incurred in connection with the landlord's application under section 20ZA (1).

g. The legal burden of proof in relation to dispensation applications is on the landlord. The factual burden of identifying some "relevant" prejudice that they would or might have suffered is on the tenants.
h. The court considered that "relevant" prejudice should be given a narrow definition; it means whether non-compliance with the consultation requirements has led the landlord to incur costs in an unreasonable amount or to incur them in the provision of services, or in the carrying out of works, which fell below a reasonable standard, in other words whether the non-compliance has in that sense caused prejudice to the tenant.
i. The more serious and/or deliberate the landlord's failure, the more readily a Tribunal would be likely to accept that the tenants had suffered prejudice.
j. Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

Decision

21. The only question the Tribunal has to determine is whether the failure to consult in respect of fees arising from the major works has caused the lessees any prejudice. The amount of those costs is not relevant to the decision as they will be considered in the S.27A application.

22. The Tribunal is satisfied that the services provided were necessary and must therefore ask itself whether the landlord would have appointed alternative consultants at a lower cost if the lessees had been consulted.

23. The Tribunal is not satisfied that consultations would have produced an alternative outcome and as such the lessees have not been prejudiced by the failure to consult.

24. The Tribunal is therefore prepared to grant dispensation on the condition that the costs of the dispensation application to remedy the previous omission do not fall on the lessees.

25. The Tribunal grants dispensation from the Consultation requirements of S.20 Landlord and Tenant Act 1985 on the condition that none of the costs incurred in making the application to the Tribunal including a fair proportion of the costs of the hearing shall be met by the lessees in any way.

Service Charge application

26. The second preliminary issue to be determined before hearing submissions on the substantive matter was the effect of the liquidation of the previous landlord Tallyoak and its replacement by the current freeholder. This question has relevance to the period over which historic

neglect may be relevant and whether there can be recovery of any sums determined as not payable during Tallyoak' s ownership.

27. The Lessees argue that Mr Ryan's involvement in both Tallyoak and Swansea House Freehold Limited means that, in effect, the ownership has not been affected by the liquidation of the former company and the subsequent transfer to the present landlord.

28. In their statement of case the lessees refer to Mr Ryan's involvement in the freehold company since 1988 and that the current landlord cannot therefore suggest a lack of knowledge over the building prior to 2014.

29. They refer to many years of neglect and to various surveys carried out in 2008 in respect of damp as evidence.

30. The lessees see Mr Ryan and the company as one and that whilst the freeholder's assertion that they are two companies may be "legal" it is neither moral nor ethical.

31. Mr Sandham said that on 30 April 2014 Swansea House Freehold Limited replaced Tallyoak as freeholder following the liquidation of the former company. He said that Mr Ryan's involvement in both companies was irrelevant and he was merely an officer of two separate legal entities. As such the current freeholder could not be held liable for matters that arose during previous periods of ownership.

32. In support he referred to S.23(1) Landlord and Tenant (Covenants) Act 1995 and the Upper Tribunal case of *Daejan Properties Ltd v Griffin* [2014] UKUT 206(LC).

33. No rights or liabilities were assigned to the current freeholder as permitted by S 23(2) of the 1995 Act and further the Upper Tribunal in Daejan v Griffin overturned the First tier Tribunal's determination that historic neglect included periods prior to the current freeholder's ownership.

34. Mr Sandham said that it must follow that the lessees' set off only operates against a breach of covenant by the current freeholder who became such on 30 April 2014 and that the Tribunal was precluded from including any period prior to that date.

Decision on the preliminary issues

35. The effect of any demonstrated historic neglect is examined by Judge Rich in the Upper Tribunal case of Continental Ventures v White paragraph 14 of which states; "*One reason for the correctness of Mr Lindsay's conclusion is that there can be no doubt that breach of the landlord's covenant to repair would give rise to a claim in damages. If the breach results in further disrepair imposing a liability on the lessee to pay service charge, that is part of what may be claimed by way of damages. At least to that extent it would, as was held by the Court of*

Appeal in Filross Securities v Midgley (Peter Gibson, Aldhous and Potter L.JJ., 21 July 1998), give rise to an equitable set-off within the rules laid down in Hanak v Green [1958] 2 QB 9, and as such constitute a defence."

36. The Tribunal has some sympathy with the lessees' position. However, it is well established law that limited companies exist in their own right as separate entities as distinct from whoever owns or controls them. The Tribunal therefore accepts that the legal ownership changed on 30 April 2014 from Tallyoak to the current freeholder.

37. The effect of this decision is that to succeed, a lessee must first demonstrate that the landlord has committed a breach of covenant that gives rise to a claim for damages. If so proved those damages may then be "set off" against any current service charge liability.

38. However, one must then consider the effect of the decision of Daejan *Properties Ltd v Griffin* [2014] UKUT 206(LC) paragraph 86 of which states: - "It is common ground, and we accept, that the LVT's focus on the condition of the steel beams in the 1960's was inappropriate and could provide no basis for its conclusion that the service charge should be reduced on the basis of "historic neglect". *The appellant did not purchase the freehold interest in Crown Terrace until 1973, and any failure to carry out remedial work in the 1960s was not its responsibility.* (emphasis added) Moreover, none of the current leases in the building existed in the 1960s."

39. Given this guidance by the Upper Tribunal this Tribunal can only determine that when considering any question of historic neglect, the starting point must be taken as 30 April 2014 being the date that the current freeholder acquired its interest.

40. Turning now to the effect of S.23 Landlord and Tenant (Covenants) Act 1995 which states;

> (1) Where as a result of an assignment a person becomes, by virtue of this Act, bound by or entitled to the benefit of a covenant, he shall not by virtue of this Act have any liability or rights under the covenant in relation to any time falling before the assignment.
>
> (2) Subsection (1) does not preclude any such rights being expressly assigned to the person in question.
>
> (3) Where as a result of an assignment a person becomes, by virtue of this Act, entitled to a right of re-entry contained in a tenancy, that right shall be exercisable in relation to any breach of a covenant of the tenancy occurring before the assignment as in relation to one occurring thereafter, unless by reason of any

waiver or release it was not so exercisable immediately before the assignment.

41. We are told that no rights or liabilities have been assigned to the current freeholder and as such we must accept that S23 (1) applies and that the current freeholder does not have any liability for matters prior to their ownership.

42. We also refer to clause 2(1) of the lease which states "To pay the rent hereby reserved on the days and in the manner aforesaid without any deductions whatsoever and without exercising any right of set off. (The Tribunal's emphasis)

43. Given the above it seems to the Tribunal that on a number of bases any claim to reduce a current liability based on historic neglect prior to 30 April 2014 must fail.

44. On the same basis, whilst the Tribunal may have jurisdiction to determine service charges prior to 30 April 2014 any determination that would result in recovery of service charges would be pointless as the entity against which any such claim would have to be made is the now liquidated Tallyoak and not, in the absence of any assignment of rights or liabilities, the current landlord.

45. Given that it is both rights and liabilities that have failed to be assigned it must of course follow that the current freeholder cannot pursue any monies that were originally due to Tallyoak.

46. We now turn to the substantive issue of the service charges from 30 April 2014.

47. The bundle contains service charge accounts and demands up to 30 June 2017 and Mr Sandham explained that those for 2017/2018 had not been concluded. Copy invoices have also been provided.

48. In their Statement of Case the lessees say that they do not understand how the cost of major works increased from quotes of £75k to over £133K and suggested that Sussex Renovations who carried out the work had under-priced the contract. They also raised whether the works to the bathroom and kitchen to Flat 1 (owned by the freeholder) were included in the cost. Insurance was also raised, both as to whether cover had been maintained and also Oyster's costs of administering claims.

49. A Scott schedule containing 57 items covering the period from 2012 to 16 April 2018 has also helpfully been prepared setting out the challenges made by the lessees to individual invoices together with the landlord's comments.

50. The Lessees also refer to the many years lack of maintenance including the damp penetration affecting Flat 4 the subject of various survey reports in 2008. Photographs were provided in demonstration.

51. In reply the landlord says that the Scott Schedule contains invoices for three periods; 3 April 2012 – 30 April 2014 which, being prior to the landlord's ownership should be dismissed. For the second period for 24 June 2017 – 23 June 2018 accounts are not yet available and as such should be treated as on-account service charges in accordance with s19(2) of the 1985 Act.i.e. "payable before the relevant costs(were) incurred" The sums demanded for this period were therefore "interim demands" incapable of challenge save as to the reasonableness of estimates/budgets or recoverability. In the absence of such assertions these challenges should be dismissed.

52. With regard to the third period from 30 April 2014 – 30 June 2017 answers are given on the Scott Schedule and in many instances, ask a question rather than raise a challenge.

The Scott Schedule

53. Of the matters challenged by the Lessees the landlord says that Items 1-6, 8, 9-12, 13 and 27 are in respect of payments made during the service charge year 2017/18 and as such have not yet been demanded.

54. The Tribunal accepts that to challenge these sums is premature as they will be included in the 2017/18 service charge accounts at which time a challenge to the individual amounts may be raised.

55. Item 7; £450 for managing agent's fees. The lessees say this is a duplicate of Item 6. The landlord says it is for the period 1/1/17 to 30/6/17 whereas Item 6 is for the following 6 months.

56. **The Tribunal accepts the explanation and allows the amount in full**.

57. Items 14 and 15; £1,162.50 and £900 for legal fees. The Lessees require more information on the advice received. The landlord says the advice is privileged and declines to give any further information.

58. **In the absence of an explanation as to the subject of the legal advice sought the Tribunal is unable to determine whether it is properly recoverable as a service charge. The whole sum of £2,062.50 is therefore disallowed**.

59. Item 16; Managing agent's fees £450. The lessees say this is a duplicate of Item 7 which the Landlord accepts pointing out however that it has only been paid once.

60. Items 16 and 7 are clearly duplicates as accepted by the landlord. However, examining the 2016/217 accounts shows that only £900 appears as management fees confirming that payment has not been duplicated.

61. Items 17; Managing agent's fees of £4,000. The lessees query the address of the invoices and want an explanation as to the work involved. The landlord doesn't understand the challenge on the address and says that the work charged for is advice on major works and is chargeable under paragraph 12 of the sixth schedule to the lease. At the hearing Mr Sandham said that he had no information other than that on the invoice.

62. In the breakdown of major works costs attached to Northover Litigation's letter of 12 March 2018 this and other Oyster fees are described as "Major works Sec 20 Engineer". Also listed on the same schedule are the costs of Philip Goacher and Associates, Consulting Civil and Structural Engineers totalling £12,954.16. It would seem unlikely to the Tribunal that two sets of engineering consultants were required and assumes therefore that Oyster's fees are for some other purpose. It is accepted that any major works project requires co-ordination including managing the budget, paying the contractor etc for which some remuneration is expected. **Doing the best it can in the absence of more detailed evidence the Tribunal allows £2,000.**

63. Item 18; Managing agent's fees for S.20 consultation of £160.80. The lessees say this is for a Section 20 Notice on works to Flat 2 that has not gone ahead. The Landlord agrees but says that the works were delayed due to the change of managing agent but will now proceed to issue a Stage 2 Notice.

64. The Tribunal accepts the Landlords explanation and allows the sum in full.

65. Item 19; Managing agent's fees of £2,600. The lessees again challenge the address for which the landlord makes the same response as in respect to Item 17. The landlord says that the works relate to S.20 for Flat 2 which has been delayed.

66. The Tribunal notes that the work has not commenced and no Stage 2 Notice has been served. The costs of serving the Stage 1 Notice has been allowed under Item 18 and no details are given as to how costs of £2,600 have been incurred at this stage of what is a somewhat minor (albeit important to the lessee) project. It is accepted that some preparation work may have been carried out and, doing the best it can on the limited evidence available allows £1,000.

67. Item 20; Managing Agents fees of £340.80. The lessees say this relates to a stage 3 notice but query the date of the invoice. The landlord says the date is immaterial.

68. The Tribunal accepts the Landlord's submission and allows the sum in full.

69. Item 21; **The sum of £210 for changes to locks has been conceded by the landlord.**

70. Item 22; Managing Agents fees of £340.80. The lessees say this is for a Stage 2 Notice but query the date. The landlord says the date is immaterial.

71. The Tribunal accepts the Landlord's submission and allows the sum in full.

72. Items 23-26 and 28-31; Invoices of Philip Goacher Associates. The lessees query the additional costs not referred to in the S.20 consultation and query why the contractor's invoices have been sent to them rather than Oyster. The landlord says that it is usual practice for major works to be supervised by a qualified surveyor.

73. Having given dispensation under s.20ZA the lessees objection on the ground of not being consulted must fall away. The Tribunal accepts that such an appointment is usual in such contracts and whilst the level of fees has not been questioned accepts that the amount charged is reasonable. **The sums are allowed in full.**

74. Item 32; Water supply of £74.70. The lessees say it is addressed to Oyster Estate's offices and shouldn't be charged to Swansea House service charge. The landlord explains that it was for the supply of water during the major works which, in the absence of a landlord's supply had to be taken from Flat 1.

75. The Tribunal accepts the landlord's explanation and allows the sum in full.

76. Item 33; These are the service charge accounts for 2016/17 a number of items of which are the subject of challenge;

a) Major works at a cost of £110,597. The lessees ask for a breakdown of costs which the landlord says has been provided on a number of occasions including invoices.

b) In the major works breakdown referred to at paragraph 62 above the costs of major works have been itemised indicating that Sussex Renovations' final costs of £89,989.99 was less than their quote of £90,277 (inc VAT). The increase over the consultation figure is due to the omission of professional fees and, subject to the reductions made to Oyster Estates' fees as detailed elsewhere are allowed in full.

c) Legal and Professional fees of £2,062.

d) Disallowed as per paragraph 58 above.

e) "Service charge Debtor written back" £67,854. The lessees queried what this was, and the landlord explained that it was the repayment of a loan from the landlord to the service charge account to cover the cost of running the building in the absence of payments by the lessees.

f) The Tribunal accepts the landlord's explanation.

g) "transfer from major maintenance reserves" £58,876. Again, the lessees require an explanation. The landlord explained that it was a transfer from reserves to pay for major works during 2016/17.

h) The Tribunal accepts the landlord's explanation.

i) Interest on loans of £6,782. The lessees require information. The landlord explains that this is interest on loans made by the landlord to the service charge account and is properly charged under paragraph 1(1) of the Fourth Schedule to the lease and as previously explained to Mr Blackler. In his witness statement Mr Ryan explains the difficulties of obtaining a loan from commercial sources where the asset to be offered as surety is less than the loan required. The loans to the landlord are charged at 10%, the overall cost to the lessees being less than if such a loan was obtained from a bank.

j) Paragraph 1. (1) of the Fourth Schedule states;

"Expenditure on Services" means the expenditure by the Landlord in complying with its obligations set out in the Sixth Schedule including interest paid on money borrowed for that purpose"

k) The Tribunal accepts that the lease allows interest payment to be charged to the service charge and determines that the rate of 10% is reasonable in the circumstances. The amount is allowed in full.

77. Item 34; These are the service charge accounts for 2015/16 which are challenged as follows;

a) Where do the debtors of £68,323 come from.? The landlord explains that it is a loan from the landlord to the service charge account.

b) Various loans i.e. £15,040, £1,668 and £1,668. These are explained by the landlord as loans to the service charge account required to meet costs.

c) **The Tribunal accepts the explanation**.

78. Item 35; Managing Agent's fees of £366.14. The lessees query what the charge is for and the landlord explains that these are cost of advising the

landlord on repairs and funding issues as a result of the non-payment of service charges.

79. The Tribunal accepts that some additional work is involved but would expect that part at least would be covered by the standard management fee. **The Tribunal allows £200.**

80. Item 36; Management fees for £360. Explained by the landlord as travelling and access for a surveyor in respect of major works planning and professional advice concerning the cause of structural damage.

81. See 79 above. The Tribunal allows £200

82. Item 37; Court fees of £610**. Mr Sandham says these will be credited to the service charge account.**

83. Item 38; Service charge accounts for 2014/15. Same challenges as for previous years.

84. **The Tribunal accepts the Landlords explanation**.

85. Item 39; An invoice from Future Management & Construction Ltd date 1 July 2013 for £1,788. Noted on the invoice were payment dates of 11 October 2013 - £500; 18 February 2014 - £288 and 23 May 2014 for £500. The last payment was made after Tallyoak went into liquidation. Mr Sandham was unable to provide any information as to why the current landlord should be settling the previous owner's debts.

86. Much has been made of the need to disregard event prior to 30 April 2014 and the Tribunal has received no explanation as to why this payment was made when there appears to be no obligation to do so. As such **the Tribunal disallows the payment of £500 made on 23 May 2014.**

87. There are two further items incurred after 30 April 2014; 43 comprising £12.10 for professional fees and 44, an invoice for £7 also for professional fees both described as Land Registry search fees incurred to ensure no unauthorised creation of registerable interests or underlettings have been created.

88. The Tribunal considers that such checks are a reasonable part of the management function and allows both items in full.

89. Items 47 and 48 totalling £50 are noted as being conceded.

90. Item 51 refers to the service charge accounts for 2013/14 and an explanation is sought for the figure of £61,500. The landlord explains that this refers to loans made by the landlord to cover service charge expenditure.,

91. The Tribunal accepts the explanation.

92. In considering the Tribunal's jurisdiction to determine the remaining items on the Scott Schedule Mr Sandham said that this would be a pointless exercise as any recovery could only be sought against Tallyoak, a company which no longer existed.

93. It was noted that credits had nevertheless been given for items 47 and 48 and Mrs Watts could not understand why similar credits could not be made for other items.

94. Mr Sandham in referring to Section 23 of the 1995 Act said that an incoming landlord took the property with a "clean slate" with the exception of any monies held on trust.

95. The lessees referred to proceedings taken by the current landlord to recover debts owed to Tallyoak and that the delays in getting the major works done had increased costs by £37,000.

96. With regard to the pursuit of money owed to Tallyoak the Tribunal refers the parties to paragraph 45 above.

97. The Tribunal accepts the futility of determining matters which are incapable of resulting in recovery and as such declines to do so.

98. In summary the sums disallowed with their paragraph references are as follows; para 58, £2,062.50; para 62, £2,000; para 66, £1,600; para 69, £210 conceded; para 79, £166.14; para 81, £160; para82 £610 conceded; para86, £500.

99. This gives a total of £6,488.64 disallowed which together with £870 conceded totals £7,308.64 which must be credited to the lessees.

Section 20C

100. Written submissions are invited from both parties addressing whether a Section 20C order should be made preventing the costs of this application being recovered through the service charge. Such submissions must be sent to the Tribunal within 21 days of the date of this determination.

Mr D Banfield FRICS (Chairman)
Judge D A Agnew

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. 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.

2. 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.

3. 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.

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 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 or 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.

(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.

(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 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long-term agreement—
(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 27A

(1) An application may be made to the appropriate 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 the appropriate 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 costs 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.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case References	:	CHI/45UC/LSC/2018/0030 and 0034 (Service charges) CHI/45UC/LDC/2018/0088 (Dispensation)
Property	:	Flats 2,3, 4 and 5 Swansea House, West Street, Bognor Regis, West Sussex
Applicants (Service charges)	:	Neale and Stuart Watts Marion Rishman Clare Pegg Thomas Blackler
Respondents	:	Swansea House Freehold Limited
Representatives	:	Natasha Watts (For Lessees) Northover Litigation (For Swansea House Freehold Limited)
Type of Application	:	Section 20C - costs
Tribunal Member(s)	:	Mr D Banfield FRICS Judge D Agnew
Date of Decision	:	2 April 2019

DECISION

Background

101. The Tribunal received two applications from lessees in respect of service charges; Flat 3 in respect of 2017 and Flats 2,3,4 and 5 for service charge years 2003 onwards. The Applicants indicated that they wished to make applications under section 20C of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

102. In its determination of the substantive issues on 13 February 2019 written submissions were invited from both parties addressing whether a Section 20C order should be made preventing the costs of the application being recovered through the service charge.

Submissions

Applicants

103. The lessees incurred legal fees in an attempt to reach agreement with the then landlord, Tallyoak which was then liquidated.

104. The Lessees request for a breakdown of the major works bill explaining a substantial increase were ignored.

105. The landlord omitted fees and interest from the Section 20 Notices and required the Tribunal's directions to provide invoices previously requested.

106. Oyster Estates submitted questionable invoices with very little detail which required an application to the Tribunal.

107. Parts of the service charges demanded have now been conceded or disallowed.

108. The Lessees had no other choice to obtain explanations despite contacting the managing agents.

109. The application could have been avoided had the expenditure been more reasonable and the landlord more cooperative in sharing information requested by the lessees.

110. The Tribunal identified costs in excess of £7k as unreasonable.

Respondents

111. Preliminary Issue;
   a. It remains unclear whether a S.20C application is to be made.

112. Contractual provisions;
   a. The lease entitles the Respondent to recover the cost of legal proceedings. Cl.1 requires the lessees to pay service charges in

accordance with paragraphs 4-6 of the Fourth Schedule which includes the landlord's obligations set out in the Sixth Schedule.

b. The obligations include the costs of retaining of any professional adviser.

c. Various cases were referred to in support of the contention that such costs were properly recoverable by way of the service charge.

113. Section 20C:

1. In *Langford Tenants v Doren Ltd* Judge Rich QC emphasised that the only applicable principle is what is just and equitable in the circumstances and should only be used to avoid the unjust payment of otherwise recoverable costs.
2. In *Bretby Hall Management Co Ltd v Pratt* [2017] UKUT 70 Judge Behrens summarised the relevant principles

114. The Applicants had permission to pursue 57 issues for the period 3 April 2012 -23 June 2018 of which 11 were either conceded, reduced or disallowed. In financial terms the reduction of £7,358.64 represents 5.1% of the £144,215.70 challenged.

115. Applying *Langford,* The Respondent's conduct cannot be described as "oppressive"

116. The landlord is a single asset management company analogous to the resident owned management company in "Bretby".

117. From 16 May 2018 the Respondent has consistently made the point that the application was substantially without merit in particular;

1. The defects to the beam and building pre-dated 30 April 2014 and the effect of Daejan v Griffin meant that any claim for equitable set off must be dismissed.
2. The period of challenge had to be limited to 30 April 2014 -y/e 2018
3. Of the 57 challenges almost half were either outside the period of challenge or were interim demands not substantively challenged.

118. £119,274.44 of £144,215.70 was doomed from the start yet the Applicants continued their challenge requiring the Respondent to incur costs.

119. The Respondent should be entitled to recover the entirety of the costs bill (save in respect of s.20ZA) as even if the Applicants had been credited with the 5.1% determined by the Tribunal it could not have avoided incurring costs.

120. If a s.20C order is to be made the most sensible approach is that the Respondent's costs should be recoverable;

1. 94.9% of costs for the period to 16 May 2018 when it became clear to the Applicants that 94.9% of their claim would fail

2. 99% of the Respondent's costs from 16 May 2018 to reflect that the dominant yet hopeless issues were pursued but making a modest 1% allowance for the modest success achieved.

Discussion and determination

121. In considering an application to make an Order under Section 20C of the Landlord and Tenant Act 1985 the Tribunal's task is to determine whether it is just and equitable so to do. Although the Respondent has referred to the contractual provisions contained within the leases the question of recoverability is not a matter for the Tribunal under this application.

122. The original application requested the tribunal's determination on a number of issues a significant proportion of which were outside the tribunal's jurisdiction as referred to in the Directions of 3 April 2018, at the case management hearing on 23 May 2018 and confirmed in directions made the following day.

123. At the case management hearing Mr Sandham on behalf of the Respondent indicated that he would argue that his client's liability could not predate their purchase on 8 May 2018. He gave details of a decided case, Daejan Properties Ltd v Griffin which supported his contention.

124. The Applicants continued to pursue the historic neglect argument on the grounds that Mr Ryan had been involved with both freehold companies since 1988 and that whilst they may be separate companies in legal terms it was neither moral nor ethical to treat them as such.

125. Given the established principle of the corporate veil and the support given by the Daejan case referred to above the Tribunal would not expect any experienced property professional such as the Respondent to be unduly concerned by such arguments. It nevertheless accepts that any company would wish to seek the reassurance of a legal opinion as to the merits, or otherwise, of the Applicant's assertions.

126. The quantum of the legal costs incurred is not before the Tribunal at this time. If an application were to be made in due course under section 27A if/when the costs are charged under the service charge the tribunal will be able to determine whether those costs are reasonable, only reasonable service charges being recoverable.

127. The Tribunal accepts that it was necessary for the Respondent to defend itself against wide-ranging allegations and although the Applicants have achieved some limited success the Tribunal does not consider this is sufficient to supplant such rights as the Respondent may have under the lease to recover legal costs through the service charge.

128. The Respondent's suggestions at paragraph 20 above are noted but the Tribunal considers that the protection given to the lessees by Section 27A of the Landlord and Tenant Act 1985 is likely to be more effective.

129. The Tribunal does not, for the reasons given, consider that it would be just and equitable in the circumstances to make an order under section 20C and therefore declines the application.

Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

130. In the absence of evidence of such a claim being made it is unnecessary for the Tribunal to make a determination.

Mr D Banfield FRICS (Chairman)
Judge D A Agnew

4. 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. 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.

5. 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.

6. 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.

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case References	**:**	CHI/45UC/LSC/2018/0030 and 0034 (Service charges) CHI/45UC/LDC/2018/0088 (Dispensation)
Property	**:**	Flats 2,3, 4 and 5 Swansea House, West Street, Bognor Regis, West Sussex
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Type of Application	**:**	Section 20C - costs
Tribunal Member(s)	**:**	Mr D Banfield FRICS Judge D Agnew
Date of Decision	**:**	2 April 2019

DECISION

We exercise our powers under Rule 50 to correct the clerical mistake, accidental slip or omission at paragraph 23 of our Decision dated 2 April 2019. Our amendment is made in bold. We have corrected our original Decision because of a typographical error.

Dated: 10 April 2019

Background

131. The Tribunal received two applications from lessees in respect of service charges; Flat 3 in respect of 2017 and Flats 2,3,4 and 5 for service charge years 2003 onwards. The Applicants indicated that they wished to make applications under section 20C of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

132. In its determination of the substantive issues on 13 February 2019 written submissions were invited from both parties addressing whether a Section 20C order should be made preventing the costs of the application being recovered through the service charge.

Submissions

Applicants

133. The lessees incurred legal fees in an attempt to reach agreement with the then landlord, Tallyoak which was then liquidated.

134. The Lessees request for a breakdown of the major works bill explaining a substantial increase were ignored.

135. The landlord omitted fees and interest from the Section 20 Notices and required the Tribunal's directions to provide invoices previously requested.

136. Oyster Estates submitted questionable invoices with very little detail which required an application to the Tribunal.

137. Parts of the service charges demanded have now been conceded or disallowed.

138. The Lessees had no other choice to obtain explanations despite contacting the managing agents.

139. The application could have been avoided had the expenditure been more reasonable and the landlord more cooperative in sharing information requested by the lessees.

140. The Tribunal identified costs in excess of £7k as unreasonable.

Respondents

141. Preliminary Issue;
   b. It remains unclear whether a S.20C application is to be made.

142. Contractual provisions;
   d. The lease entitles the Respondent to recover the cost of legal proceedings. Cl.1 requires the lessees to pay service charges in

accordance with paragraphs 4-6 of the Fourth Schedule which includes the landlord's obligations set out in the Sixth Schedule.

e. The obligations include the costs of retaining of any professional adviser.
f. Various cases were referred to in support of the contention that such costs were properly recoverable by way of the service charge.

143. Section 20C:

1. In *Langford Tenants v Doren Ltd* Judge Rich QC emphasised that the only applicable principle is what is just and equitable in the circumstances and should only be used to avoid the unjust payment of otherwise recoverable costs.
2. In *Bretby Hall Management Co Ltd v Pratt* [2017] UKUT 70 Judge Behrens summarised the relevant principles

144. The Applicants had permission to pursue 57 issues for the period 3 April 2012 -23 June 2018 of which 11 were either conceded, reduced or disallowed. In financial terms the reduction of £7,358.64 represents 5.1% of the £144,215.70 challenged.

145. Applying *Langford,* The Respondent's conduct cannot be described as "oppressive"

146. The landlord is a single asset management company analogous to the resident owned management company in "Bretby".

147. From 16 May 2018 the Respondent has consistently made the point that the application was substantially without merit in particular;

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2. The period of challenge had to be limited to 30 April 2014 -y/e 2018
3. Of the 57 challenges almost half were either outside the period of challenge or were interim demands not substantively challenged.

148. £119,274.44 of £144,215.70 was doomed from the start yet the Applicants continued their challenge requiring the Respondent to incur costs.

149. The Respondent should be entitled to recover the entirety of the costs bill (save in respect of s.20ZA) as even if the Applicants had been credited with the 5.1% determined by the Tribunal it could not have avoided incurring costs.

150. If a s.20C order is to be made the most sensible approach is that the Respondent's costs should be recoverable;

1. 94.9% of costs for the period to 16 May 2018 when it became clear to the Applicants that 94.9% of their claim would fail

2. 99% of the Respondent's costs from 16 May 2018 to reflect that the dominant yet hopeless issues were pursued but making a modest 1% allowance for the modest success achieved.

Discussion and determination

151. In considering an application to make an Order under Section 20C of the Landlord and Tenant Act 1985 the Tribunal's task is to determine whether it is just and equitable so to do. Although the Respondent has referred to the contractual provisions contained within the leases the question of recoverability is not a matter for the Tribunal under this application.

152. The original application requested the tribunal's determination on a number of issues a significant proportion of which were outside the tribunal's jurisdiction as referred to in the Directions of 3 April 2018, at the case management hearing on 23 May 2018 and confirmed in directions made the following day.

153. At the case management hearing Mr Sandham on behalf of the Respondent indicated that he would argue that his client's liability could not predate their purchase on **30 April 2014**. He gave details of a decided case, Daejan Properties Ltd v Griffin which supported his contention.

154. The Applicants continued to pursue the historic neglect argument on the grounds that Mr Ryan had been involved with both freehold companies since 1988 and that whilst they may be separate companies in legal terms it was neither moral nor ethical to treat them as such.

155. Given the established principle of the corporate veil and the support given by the Daejan case referred to above the Tribunal would not expect any experienced property professional such as the Respondent to be unduly concerned by such arguments. It nevertheless accepts that any company would wish to seek the reassurance of a legal opinion as to the merits, or otherwise, of the Applicant's assertions.

156. The quantum of the legal costs incurred is not before the Tribunal at this time. If an application were to be made in due course under section 27A if/when the costs are charged under the service charge the tribunal will be able to determine whether those costs are reasonable, only reasonable service charges being recoverable.

157. The Tribunal accepts that it was necessary for the Respondent to defend itself against wide-ranging allegations and although the Applicants have achieved some limited success the Tribunal does not consider this is sufficient to supplant such rights as the Respondent may have under the lease to recover legal costs through the service charge.

158. The Respondent's suggestions at paragraph 20 above are noted but the Tribunal considers that the protection given to the lessees by Section 27A of the Landlord and Tenant Act 1985 is likely to be more effective.

159. The Tribunal does not, for the reasons given, consider that it would be just and equitable in the circumstances to make an order under section 20C and therefore declines the application.

Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

160. In the absence of evidence of such a claim being made it is unnecessary for the Tribunal to make a determination.

Mr D Banfield FRICS (Chairman)
Judge D A Agnew

7. 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. 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.

8. 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.

9. 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.