FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CH1/29UC/LIS/2019/0029 CH1/29UC/LDC/2019/0031
Property:		Flat 5, 10 High Street, Herne Bay, CT6 5LH
Applicant	**:**	10 High Street Herne Bay Ltd
Respondent	**:**	Mr and Mrs Gupta
Representative	**:**	N/A
Type of Application	**:**	Service Charge/Dispensation
Tribunal Members	**:**	Judge S Lal LL.M, Mr K Ridgeway MRICS
Date and venue of Hearing	**:**	22 August 2019, Margate Court, CT9 1RL
Date of Decision	**:**	30 August 2019

DECISION

Application

1. The Applicant seeks a determination by the Tribunal under section 27A of the Landlord and Tenant Act 1985 as to the reasonableness or otherwise of service charge in respect of the year 2018/19 and possibly 2019/20.

2. The Applicant also applies under Section 20ZA of the Act for dispensation in respect of fire alarm works carried out in October 2018.

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3. Directions were issued in respect of both matters and the Tribunal was in possession of the trial bundle which consisted of two separate files. The Tribunal was also supplied with the decision of Judge Tildesley OBE and Mr R Athow FRICS, dated 21 December 2017. The Tribunal noted that this decision dealt with a previous application in respect of Right to Manage. It very helpfully set out the history of the subject property as well as making findings in respect of apportionment.

4. The present Tribunal noted the related matter of freehold transfer in the County Court where it was eventually settled but not without some degree of animus as between the parties.

5. Mr Patel attended in person and he was accompanied by Mr and Mrs Pennington who were the former owners of Flat 3. Mr Patel is the owner of Flat 2. Likewise, Mr Gupta attended in person and owns Flat 5. It appears the majority of the flats have been let to tenants under assured shorthold tenancies and some of those tenancies have not been without issues around anti social behaviour.

The Inspection

6. The Tribunal inspected the property on the morning of the hearing. It is a four storey and basement mid terraced, mixed use, Victorian property. Construction is stock brick under a slate roof and timber sash windows. The ground floor is used as a cafe and access to the flat is situated to the right.

7. Access was not available to flat five on the ground floor and basement, nor to the rear yard, so the inspection was limited to the common parts. The Tribunal was shown the new fire control panel on the ground floor and sensors on each floor. The decoration was noted with the paintwork to the walls and ceiling being in good order. However, the vinyl flooring was tired and paint splashed.

The Case for the Applicant

8. In respect of the oral submissions advanced at the hearing, Mr Patel relied on his witness statement and that of his wife. In summary, he referred to the specific items in dispute for service charge year 2018/19. He stated he is a Director of 10 High Street Herne Bay Ltd and the owner of Flat 2. Mr Pennington is a joint Director. They have been appointed directors since the company acquired the freehold from SPG Holdings. Mr Gupta is a director and shareholder of SPG Holdings as well as being connected to a number of other companies that have been involved with the subject property, the details of which were explored in the Decision of Judge Tildesley OBE.

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9. In respect of the matters in dispute and reflecting the 25% accepted apportionment, Mr Patel stated the insurance premium of £127.38 was for the whole building. The amount of £187.50 was paid to Property Care which was actually Mr Pennington, in order to paint the common parts. In respect of the £ 28.50 to Achieving Clarity this was for a fire risk assessment. In respect of the £ 45 to ASI Environmental Ltd this was in respect of an asbestos survey. The sum of £ 582 was due because the new fire alarm system was required by the Council as was the additional maintenance fee of £ 49.50. The electricity bill of £30 was estimated as the matter was still being pursued with the supplier and related to the communal parts. Mr Patel referred to the use of Leasehold Debt Recovery in respect of sum of £ 420 and the additional insurance premium. He suggested the sum of £250 working capital on account was reasonable. The total value of the service charge in dispute was therefore £ 1854.88.

10. Mr Patel was at pains to point out that Mr and Mrs Gupta had maximised profits from their previous management and that Flat 5 is the only flat that has not paid. Flat 1 is exempt from paying hence the 25% apportionment between the remaining 4 flats.

11. In additional submissions, Mr Pennington stated he had not painted the communal areas in the year 2017 and that was just a "touch up" but they needed doing in 2018.

12. In respect of the Section 20ZA application, Mr Patel submitted that Canterbury City Council had served an improvement notice on 31 August 2018 for the works to be started by 5 October 2018. He had no choice but to comply with the notice and the specific deficiency noted which was a lack of provision for a working fire detection installation system in the common parts.

<u>The Case for the Respondent</u>

13. Mr Gupta in oral submissions stated the following with regard to the various heads of service charge expenditure. In respect of the insurance premium he stated he wanted to know whether it was for just one flat or the whole building. He submitted that the communal areas did not need painting in 2018 and a "touch up" would have done. He argued the asbestos and fire risk assessment was only done because some of the flats were being sold. He submitted that the fire alarm system could have been cheaper by employing a different system and the maintenance should have bene included in the first year for free. He added the electricity was an estimate and in respect of a working capital sum this was without a budget. He was at pains to highlight the sums that he had spent on a pavement leak and drainage issues.

14. In respect of Section 20Za, he again referred to what he saw was an expensive installation and the fact that Mr Patel did not talk to him when the latter received the enforcement notice.

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15. The hearing having concluded, Mr Gupta sent in a further email setting out his submissions and responses to the Tribunal Office. The Tribunal excluded this from its consideration as it would be unfair to Mr Patel to have allowed such material to be introduced in this way. Indeed, both parties had been warned at the hearing that the Tribunal wished to avoid endless submissions with each party determined to have the final say. The Tribunal considered the email to be an example of Mr Gupta wanting to have the final say even though he had made extensive oral and written submissions at the hearing.

The Decision of the Tribunal

16. The Tribunal has reviewed the documentation provided together with the statements from the Applicant and the Respondent in relation to this issue. The Tribunal has considered the terms of the Lease and the obligations of the parties thereunder. There does not seem to be any dispute as to liability to pay and/or apportionment which is set at 25%. The dispute is around the reasonableness of the service charge for 2018/19 and the related dispensation application.

17. The Tribunal noted that whether costs had been reasonably incurred was not simply a question of the landlord's decision-making process: it was also a question of outcome. When a Tribunal is asked to consider the reasonableness of service charges it should not impose its own decision; if a landlord chooses a course of action which leads to a reasonable outcome, the costs of pursuing that course will have been reasonably incurred even if there was another, cheaper, reasonable outcome. Reasonableness does not mean cheapest.

18. Turning to the matters in dispute, the Tribunal finds Mr Gupta has failed to demonstrate the service charge expenditure for 2018/19 was unreasonable. The Tribunal determined his main concerns, expressed in oral submissions with some force, was the overall cost per se as well as his belief that expenditure was being incurred as a precursor to the sale of some of the flats. His desire to be consulted prior to works being carried out, was the Tribunal finds, consistent with attempts to frustrate those works almost certainly related to the historical animus between the parties which has resulted in a previous contested right to manage application and the eventual transfer of the freehold title.

19. Turning to the individual items in dispute, the Tribunal finds the insurance premium for the subject premises is reasonable in the circumstances. There is no evidential material from Mr Gupta to suggest otherwise and he received clarification at the hearing that the insurance covered the entire building.

20. In respect of the communal area painting in 2018, the Tribunal finds this was reasonably incurred and it accepted Mr Pennington's evidence that he did not do this in 2017. It rejected Mr Gupta's assertion that a "touch up" would have done in light of the nature of the common part and the types of tenant that lived there.

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21. The asbestos and fire risk matters the Tribunal considered together and it rejected the submission made that this was only done as a prelude to sale. Ultimately it did not matter as both asbestos and fire safety surveys were reasonably incurred in respect of premises occupied by a number of tenants.

22. The Tribunal finds the installation of the fire alarm system was reasonably incurred and the Tribunal noted the various quotes supplied in the Bundle and the quote from the actual provider, East Sussex Fire Ltd was the lowest. Mr Gupta's submission to the effect that the existing fire alarm could be revamped was an illustration of conflating reasonableness with cheapest. The Tribunal noted that the specification adopted was consistent with the enforcement notice. The Tribunal did note an annual maintenance charge for the year of installation was perhaps unusual but overall not unreasonable as it reasonably reflected the possibility of damage to the system as opposed to a warranty on the installation.

23. The electricity bill of £30 as an estimate for the communal areas for the year which incorporated hallway lighting and power to the fire alarm was reasonable in the circumstances and Mr Gupta did not present any cogent argument to suggest otherwise.

24. In respect of the Agents recovery fee of £420, the Tribunal finds that the lease allows the landlord to employ such staff as may be necessary for the collection and recovery of services charges in respect of the building (Clause 6(i) and (j)

25. The annual sum of working capital of £ 250 per annum per flat was reasonable as it would represent a fairly minimal sum per month for a property of this type within the terms of Clause 5(a)(ii) of the lease and Mr Gupta did not suggest a cogent alternative.

<u>Dispensation</u>

26. The relevant section of the Act reads as follows:
    20ZA Consultation requirements:
    (1) 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.

27. 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:

    - 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.

    - The financial consequences to the landlord of not granting a dispensation is not a relevant factor. The nature of the landlord is not a relevant factor.

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•Dispensation should not be refused solely because the landlord seriously breached, or departed from, the consultation requirements.

• The Tribunal has power to grant a dispensation as it thinks fit, provided that any terms are appropriate.

• 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).

• 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.

• 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.

• 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.

• Once the tenants had shown a credible case for prejudice, the Tribunal should look to the landlord to rebut it.

28. The Tribunal, applying the legal principles cited above, notes that nothing has been received from Mr Gupta that purports to identify any prejudice other than he wanted the existing fire system revamped rather than replaced.

29. In the circumstances and following the parlous state of the smoke and fire alarm in the building identified by Canterbury County Council, the Tribunal is satisfied that it would be reasonable and proper to grant dispensation from consultation in the terms requested. The urgent need for such a safety system to ensure swift evacuation in the event of a fire is obvious. The Council gave a fairly strict time limit for the work to be done and in the absence of any prejudice identified the Tribunal grants dispensation.

30. In summary the Tribunal finds in favour of the Applicant in the sum of £1854.88 and grants dispensation under Section 20ZA.

31. There was no Section 20C Application. The Tribunal makes no further order.

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32. 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.

33. 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.

34. 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

Judge S. Lal ....

Date...

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