FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00HH/LIS/2019/0024
Property	**:**	**Flat 2, Grantham Hall, Lincombe Road,Torquay TQ1 2HJ**
Applicant	**:**	Owen Robert Hill
Representative	**:**	Wollen Michelmore LLP
Respondent	**:**	Julian Michael Walley
Type of Application	**:**	For the determination of the reasonableness of and the liability to pay service charges.: Section 27A of the Landlord and Tenant Act 1985, and for an order limiting payment of Landlord's costs: Section 20C of the Landlord and Tenant Act 1985.
Tribunal Judge	**:**	T.Hingston Barrister at Law
Date of Decision	**:**	13th August 2019

Decisions of the Tribunal

1. The Tribunal determines that the sum of £6,360 will be payable by the Applicant in respect of the service charges for the year 2018, but this determination is suspended until a formal application to dispense with the requirements of Section 20 of the Act is received from the Respondent Mr. Walley.

2. It is understood that Mr. Hill paid £250 on the 6th of March 2019, and he has exhibited a document showing the online payment from his Barclays Bank account to Mr. Michael Julian Walley. It is further understood that the full £6,360.00 was then paid to Mr. Walley on the 12th of April 2019 by Kitsons solicitors from the proceeds of sale of Flat 2, with no deduction being made for the £250 paid earlier. Thus the effect of this determination will be that the Respondent must reimburse the Applicant the overpayment of £250.

3. It may also be necessary to make an adjustment to the amount payable by the Applicant once it is clear what proportion of the total sum was attributable to redecoration and what proportion was attributable to repairs/maintenance. (See para. 40 below.)

4. The Tribunal makes no order at this stage under Section 20C of the Landlord and Tenant Act 1985 as to whether the Landlord's costs of the Tribunal proceedings may be passed to the Lessees through any service charge; this aspect of the decision is reserved until the case is finalised.

The application

5. The Applicant seeks a determination pursuant to Section 27A of the Landlord and Tenant Act 1985 ("the Act") [and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")] as to the amount of service charges payable by the Applicant in respect of the service charge year 2018.

6. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute. This determination has been made on the basis of documents supplied to the Tribunal by the parties.

7. The relevant legal provisions are set out in the Appendix to this decision.

The background

8. The property which is the subject of this application is a detached building containing 3 flats.

9. At the relevant time the Applicant Mr. Hill and his ex-wife Tina Louise Germaine had been joint owners of Flat 2, whilst Flat 1 was occupied by Mr. William John Kinstree and Flat 3 belonged to the freeholder and Respondent Mr. Julian Walley .

10. On the 11th of January 2018 Mr. Hill left the property, and he and his wife began divorce proceedings thereafter.

11. As set out in Mr.Hill's first Witness Statement dated 2nd of May 2019, and enlarged upon by the statement of Mr. Walley (undated) the chronology was then as follows: -

    i) 17th June 2018 - Mr. Walley emailed the Applicant referring to the fact that he was preparing:
    '…a *specification for the redecoration and general repair to the exterior of the building…'* and asking him to *'forego*' his right to be consulted. (Applicant's bundle page 33).

    ii) 19th June - 2018 the Applicant replied by email saying '*I cannot agree to waive any rights in relation to your proposals…'*. (Applicant's bundle page 34/35.)

    iii) 2nd July 2018 - Mr. Walley emailed the Applicant stating that he needed to send him a formal '*Notice of Intention under Sec.20 of the L&T Act …'* and asking whether the Applicant was prepared to accept service by electronic mail or not. (Respondent's bundle Tab. 5)

    iv) 2nd July 2018 – later the same day the Applicant replied with a long email querying whether it was :- '*…really necessary to go through the procedures that are really designed to apply to the management of major apartment buildings by managing agents and professional landlords?*' and stating that if Mr. Walley, Ms. Germaine and Mr. Kinstree all wanted to proceed then he was '*…hardly going to stand in your way.'* The Applicant proposed that Mr. Walley should simply *'present the proposals and a budget and ask for consent to save yourself the trouble of having to faff around with this horrible statutory compliance',* but concluded by saying that '*…if there are reasons why you need to do this by the book then please feel free to serv(ice)(sic) notice by email to this address.'* (Respondent's bundle Tab. 5)

    v) 12th July 2018 – Mr. Walley sent a letter to the Applicant (which can be found at the back of the Respondent's bundle, Tab. 5.) This letter is un-headed and undated and printed very faintly, but we are told that it was sent on 12.07.18 together with the 7 pages of the schedule of 'Works' to be undertaken. (Section 3 of the 'specification', Tab. 4 of the Respondent's bundle) The letter states that Mr. Walley will be getting quotes on this schedule, and estimates that the likely cost will be a minimum of £15,000.

(It is not clear whether there was any reply from the Applicant. He (Mr. Hill) states that he never received this communication.)

vi) 19th February 2019 – Mr. Walley sent a letter to the Applicant enclosing the '*formal account*' for the '*redecoration*'. In this letter the Respondent confirmed the need for decoration and the difficulties he had encountered in getting any contractors to tender, and stating that, of the two who did so, the lower quotation was £24,280 plus VAT.* He explained that, with the agreement of Ms. Germaine and Mr. Kinstree, he had decided to undertake responsibility for the works himself 'to keep the costs down', and that they had agreed a price which was calculated by taking the cost of the last redecoration (10 years previously) of £12,000 and adjusting it for inflation. Mr. Walley attached to this letter an invoice for £6,360.00, which represents a 40% share of the total bill of £15,900. (Letter and Invoice can be found at Tab. 4 of the Applicant's bundle, pages 39-41).
N.B. It appears that no detailed breakdown of actual costs giving rise to the figure of £ 15,900 was provided at any stage.

(*The 'Form of Tender' from Chelston Decorators can be found at the back of Tab 4 in the Respondent's bundle.)

vii) Photographs provided by the Respondent Mr. Walley appear to show the property before and after the works were done. (Respondent's bundle Tabs 3 and 4).

The Lease.

12. The Applicant holds a long lease of the property (a copy of which has been supplied to the FTT) which requires the Landlord to provide services and the Tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.

13. The lease provides (at 3(e)) that the lessor/Respondent Mr. Walley must keep the main structure of the building '*in a good and substantial state of repair and condition*'.

14. In the same clause, 3(e), the lease purports to provide for a process to be gone through in relation to estimates and agreements before contractors are engaged to carry out '*major or substantial structural or decorative works*'. (This procedure is not exactly in accordance with Section 20 of the 1985 Act.)

15. Under clause 3(g) the lessor is obliged to decorate the exterior at least every 4 years.

16. Clause 4 deals with the tenant/lessee's obligations, which include a requirement to pay the following: -

    i) 40% of redecoration costs (4(c))
    ii) 'one third' of all other expenses in pursuance of the lessor's general maintenance expenses and insurance costs (4(c)) and
    iii) 50% of costs associated with upkeep of the driveway (which only applies to Flats 2 and 3.) (4(d)).

The issues

17. The parties identified the relevant issues for determination as follows:

    - The payability of service charges for 2018, namely £6,360, which represents a 40% share of the cost of repairs and redecorations to the property;
    - Whether the landlord/Respondent's failure to comply with the requirements of Section 20 of the Act resulted in the amount payable being limited to £250, and
    - Whether the landlord/Respondent's failure to comply with Sections 21 (as to 'statements of account' and provision of a summary of the rights and obligations of tenants) and Section 47 (as to the requirement for any written service charge demand to contain the name and address of the Landlord) of the Act has any bearing on the matter.

18. There is no suggestion by the Applicant that the works were not done to a reasonable standard, nor indeed that the cost of the works was excessive. Mr. Hill makes no reference to what course of action he might have taken if the procedure had been followed, and has provided no evidence at all as to what prejudice he has suffered as a result of the failure to comply as above. His sole objection seems to be on the ground that the consultation process was not followed.

19. The Applicant argues that the amount recoverable by the Respondent/lessor is limited to £250 because of the said failure to consult.

20. The Applicant states that he only paid the full £6,360 because he was under 'duress' to do so and was 'coerced' into agreeing to payment out of the proceeds of sale because his wife refused to release the balance of the monies until he had done so.

21. The Applicant seeks a refund of the sum of £6,360 from the Respondent.

22. The Respondent Mr. Walley contends that the Applicant agreed to waive the Section 20 requirements in his email of the 2nd of July 2018. He therefore argues that the failure to comply with the requirements is irrelevant and the full amount is payable.

23. Copies of the relevant correspondence are provided in support of the Respondent's argument.

24. It is argued that the building and its outgoings have always been dealt with by agreement between the parties and on an 'ad hoc' basis.

25. A very detailed 'Specification' for the required works has also been provided to the FTT by Mr. Walley, who explains that this specification was put out to 6 different contractors for tender.

26. Mr. Walley outlines the difficulty which he experienced in getting quotations and in getting the works done at all. He describes how he decided to take on management of the works himself, with the agreement of the two other occupants, and points out that this course of action appeared to have been approved and accepted by Mr. Hill. As above (11(vi)) he has explained some of the calculations made in arriving at the final figure. He does not, however, provide a full breakdown of the costs nor give information as to how much – if anything – he received for his part in the process.

The Law - Considerations: -

27. It is right that there is no provision in the Lease for annual service charge accounts, for annual amounts to be paid, or for any kind of sinking or 'reserve' fund. There is provision for some kind of consultation process prior to major works, but the statutory requirements of Section 20 cannot simply be overridden by clauses in a lease, and it is common ground that the law as to the consultation process applied in this case.

28. The questions identified by the FTT are:-

    i) Does the apparent consent/agreement contained in the Applicant's email of 2nd July 2018 mean that the matter has been 'agreed or admitted by the tenant' in accordance with Section 27A (4)(a), thus precluding any Application to the Tribunal for a determination? If the answer to this is 'No', then we proceed to the next question, which is:-
    ii) Can the Section 20 requirements be 'waived' by agreement between lessee and lessor, and if not, should a dispensation be made pursuant to Section 20(1)(b)?

29. In relation to the first question it is right that Section 27A(5) provides that '*...the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment*.' In this case the Applicant Mr. Hill has not only paid in full the amount demanded, he had (as discussed above) also apparently agreed to the Respondent's proposed course of action in his email of 2nd July 2018.

30. Were it not for the fact that Mr. Hill's email is a little vague as to exactly what he is agreeing to, and is slightly equivocal as to his consent, the Tribunal would have determined that the matter had been 'agreed and admitted by the tenant' in accordance with Section 27A(5) and we would have declined jurisdiction.

31. However, given the equivocal nature of the email it is not possible to make such a final determination from the outset, and we therefore proceed to consider whether the Section 20 requirements can be 'waived' by agreement.

32. It seems to the Tribunal that the two Sections, 20 and 27A, complement each other and must be read and interpreted in conjunction with each other. As the Supreme Court ruled in the case of Daejean Investments Limited (which was helpfully copied to us by the Applicant's solicitors) the question any Tribunal must ask itself is what mischief the legislation is designed to address? In this particular instance (as in the Daejean case) the intention of the statute is to prevent a tenant from being unexpectedly and unfairly confronted by a substantial bill for works which had been done without any notice to or consultation with him/her.

33. Although Section 20 states that the amount recoverable is limited to £250 unless the requirements have been either:-

i) Complied with or
ii) Dispensed with by the appropriate Tribunal,

it is surely *not* the intention of the statute to create a situation where, even if all sides are perfectly happy to proceed with works at an agreed price, they cannot go ahead until they pay the costs and incur the delay of putting the matter before a Tribunal for ratification.

34. That, it is concluded, is exactly the situation which Section 27A(4) is designed to address, where there is no need for an application or a determination because the parties have reached agreement, and where the Tribunal has no jurisdiction.

CONCLUSION AND DETERMINATION.

35. In the particular circumstances of this case, it is determined that the email from Mr. Hill does not amount to an emphatic 'agreement', and consequently the Tribunal **does** have jurisdiction.

36. The landlord/Respondent had however acted in good faith and in the best interests of all concerned, and there was no evidence of prejudice to the Applicant as a result of the failure to comply with the requirements – such question of prejudice being the crucial concern as identified by the Supreme Court in the Daejean case.

37. On the contrary, the works appear to have been done in a timely manner and from the photographs in the bundle (which the Applicant has not challenged) they appear to have been done to a good standard. The total cost was at least £8,000 less than the lowest quotation.

38. If the Respondent Mr. Walley had made an application to dispense with the Section 20 requirements, his application would have been granted.

39. The Tribunal proposes to suspend any final ruling to allow the Respondent to make such an application now, as dispensation can be granted retrospectively.

40. The detail as to what is payable remains subject to re-calculation however, as the schedule of works appears to include some structural works (re-pointing and or re-rendering of chimneys, for example?) and under the Lease Mr. Hill is only liable to pay a third of those costs, as distinct from the 40% share of the redecoration which he is obliged to pay.

41. In addition the March payment £250 should have been deducted from the final invoice.

42. In relation to the breaches of Sections 21 and 47 it is determined that neither of these failures has any bearing on the case, as the parties were well-known to each other and it was not a property (nor a Lease) which required full service charge accounts. For future reference it would be appropriate for the landlord to maintain clear records of all income and expenditure and make such records available to all concerned.

The Tribunal adjourns the final decision accordingly, to allow the Respondent to make a formal application for retrospective dispensation with the Section 20 requirements.

Application under S20C and refund of fees

iii) In the application form the Applicant applied for an order under Section 20C to limit the landlord's ability to recover the costs of the proceedings.

iv) This matter will be determined once the main issue is resolved.

Name: Judge T. Hingston (Barrister at Law.)

Date: 13th August 2019

RIGHTS OF APPEAL

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

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 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.

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 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.