FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/17UH/LIS/2019/0051** **BIR/17UH/LDC/2019/0014**
Property	**:**	**Flat 3, 5 The Square, Buxton, Derbyshire, SK17 6AZ**
Applicants	**:**	**Stephen Peter Robinson (1)** **Heather Michelle Robinson (2)** **Katie Louise Robinson (3)**
Respondent **Represented by**	**:**	**High Peak Theatre Trust Limited** **Ms Seitler, Barrister and W. H. Lawrence, Solicitors.**
Type of Application	**:**	**Service charges and dispensation from consultation, Section 27A, 20, 20C and 20ZA of the Landlord and Tenant Act 1985.**
Tribunal Members	**:**	**Judge C. P. Tonge, LLB, BA.** **Mrs A. Rawlence, MRICS.** **Mrs K. Bentley**
Date of Decision	**:**	**28 January 2020**

DECISION

Application and background

1. The Applicants in this case are Stephen Peter Robinson, Heather Michelle Robinson and Katie Louise Robinson, the long leaseholders' of Flat 3, 5 The Square, Buxton, Derbyshire, SK17 6AZ, "the property". By an application dated 9 October 2019 they apply for service charges in respect of the property to be considered for service charge year 2018 to 2019 (actual figures spent) and 2019 to 2020 (budgeted expenditure). The Tribunal to determine whether service charges are payable under the terms of the lease and if so whether or not they are charged at a reasonable level. There are also applications under section 20C of the Landlord and Tenant Act 1985, "the Act" and Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002, "the 2002 Act", limiting the landlord's costs.

2. The Respondent freeholder of the property is the High Peak Theatre Trust Limited, who run the Buxton Opera House.

3. In particular three items of work are placed in issue in respect of which it is common ground that consultation required by Section 20 of the Landlord and Tenant Act 1985 has not taken place.

4. Directions were issued in this part of the case on 18 October 2019, indicating that the case will involve a hearing to take place after the property has been inspected and requiring the Applicants to serve a statement of case and all relevant documents by 2 December 2019.

5. The Respondent then placed a second application before the Tribunal, received 11 November 2019, requesting retrospective dispensation from consultation requirements in respect of the third item of work, referred to above, pursuant to Section 20ZA of the Act. Directions were issued in respect of this application on 13 November 2019, joining these two applications together. Since this later application is made by the High Peak Theatre Trust Limited, roles of applicant and respondent are reversed but for the sake of simplicity the Tribunal will throughout refer to the Robinson family as the Applicants and the High Peak Theatre Trust Limited as the Respondent. These Directions required the Applicants to serve a statement by 13 December 2019.

6. The Parties have served statements of their respective cases and supporting evidence mostly in accordance with these Directions, where there has been breach of the Directions it will be dealt with later in this Decision. There are several hundred pages of evidence and these are not indexed and paginated, so that reference to them will be made more complex than normal. An offer to prepare a joint

hearing bundle was sent to the tribunal office, by email on Friday 3 January 2020 , but this could not be considered by the Tribunal Judge until Monday 6 January 2020 by which time it was too late to justify this extra expense, Tribunal members having already prepared the case for the hearing.

The Inspection

7. The Tribunal inspected the property and part of the block that contains the property, commencing at 10 am on Thursday 9 January 2020. Present at the inspection were Mrs Heather Michelle Robinson on behalf of the Applicants and Mr Clarkson the Applicants' sub tenant. Present on behalf of the Respondent were the Respondent's employees Mr Barry Cook and Susan Howe.

8. The property is contained within a much larger building, constructed circa 1800. It is a grade 2 listed building, constructed with ashlar stone and a pitched and hipped slate roof. Flat 3 is situated in a corner of the building that is three storeys high and is a self contained apartment on the upper floors. The ground and first floors that once were flats 1 and 2 have now been converted into offices for the use of the Respondent. Access is gained to the property by an external common entrance door leading to a common passageway that leads to the basement that is said to be in common use for storage purposes and to the common area where refuse bins are stored. Stairs lead off the entrance passage that lead up the property, these stairs being in common usage initially, but higher up they are demised to apartment 3.

9. The Tribunal inspected the upper level of the apartment first. The apartment has a small second bedroom which has suffered with a rainwater leak through its ceiling since 2004, this coming through the pitched ceiling at the far end of the room where it abuts the dividing wall between the apartment and the remainder of the building. This has not yet been repaired.

10. There is a second rainwater leak through the velux widow area of a dressing room that has been leaking for 12 months and has not yet been repaired. This leak would have been present at the time when the work was done that is now subject to the application for dispensation.

11. The shower room did have a rainwater leak through the ceiling, but this has been repaired, the work being done prior to the work that is now subject to the application for dispensation.

12. The living room has suffered from a major rain water leak on three separate occasions over the last three years. On each occasion

rainwater leaking into the room in the area of a window. On the last occasion this was with such high level of flow that buckets had to be used in an effort to catch the rainwater. This is the leak that has required the use of a cherry picker vehicle twice in the past, lifting a man to unblock the gutter and a rainwater hopper. The leak in the third year brought about the work which is now subject to the application for dispensation. There are five windows in this room with a further two windows in bedroom one.

13. The Tribunal then inspected the rooms that now form office space for the freeholder Respondent. The chief executives room suffered an overflow leak from the rainwater leak in the living room of apartment 3, above. This came through a window area situated underneath the affected window in the living room above and it was also necessary to utilise buckets in an effort to catch the rainwater in this window area.

14. The Tribunal took note of the fact that all of the windows that it observed during this inspection are constructed with wooden frames and are single glazed. This has to be kept like this because it is a listed building. The Tribunal inspected the other rooms forming part of the converted office.

15. There is an area on the ground floor off the passageway that leads to the area in which refuse bins are stored that that was converted in 1998. This was originally a yard but is now covered over.

16. Externally, the Tribunal saw the gutter is made from shaped stone, lined with lead. The Tribunal established the location of the leak in relation to which dispensation is sought and utilised small field glasses to inspect this from a convenient location on the ground, suggested by Mr Cook. There is an area on either side of the hopper that has lead overlapping the pre repair lead. Rainwater will now go through a pipe into the hopper instead of falling from the gutter into the hopper. Mr Cook stated that at some point in the future it would be necessary to change the hopper to a differently shaped hopper as required by the heritage department.

The Law

Section 18 of the Landlord and Tenant Act 1985. Meaning of "service charge" and "relevant costs".
(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 purposes—

(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 20 of the Landlord and Tenant Act 1985. Limitation of service charges: consultation requirements

(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 20C "Limitation of service charges: costs of proceedings.
(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 or leasehold valuation tribunal (relevant tribunal), or the Lands 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;

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

(c) in the case of proceedings before the Lands 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."

Section 27A of the Landlord and Tenant Act 1985. Liability to pay service charges: jurisdiction
(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

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

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.
(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or
(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

Section 20ZA Consultation requirements: supplementary

(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.

(2)In section 20 and this section—

- "qualifying works" means works on a building or any other premises, and
- "qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3)The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a)if it is an agreement of a description prescribed by the regulations, or

(b)in any circumstances so prescribed.

(4)In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5)Regulations under subsection (4) may in particular include provision requiring the landlord—

(a)to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,
(b)to obtain estimates for proposed works or agreements,
(c)to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,
(d)to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and
(e)to give reasons in prescribed circumstances for carrying out works or entering into agreements.
(6)Regulations under section 20 or this section—
(a)may make provision generally or only in relation to specific cases, and
(b)may make different provision for different purposes.
(7)Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

The Commonhold and Leasehold Reform Act 2002
SCHEDULE 11
Limitation of administration charges: costs of proceedings

Paragraph 5A
(1)` A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.
(2)The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.
(3)In this paragraph—
(a)"litigation costs" means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and
(b)"the relevant court or tribunal" means the court or tribunal mentioned in the table in relation to those proceedings.

Relevant Provisions of the Lease

17. The Applicants' hold the remainder of a lease with a term of 999 years commencing 29 August 1985, in respect of the apartment subject to this case and the upper section of the staircase leading to the apartment. The Applicants are required to pay service charges relevant to cleaning, lighting, heating and maintenance of the common parts of what was originally a part of a building containing three apartments. The service charge includes repair and decoration of the exterior, walls, windows, rainwater system and roof of that part of the building housing the three apartments and the common areas of that part of the building. The Respondent is required to paint the relevant exterior woodwork every seventh year. Service charges to be paid by the Applicants is one third of the total cost of provision of the service.

Summary of the written evidence on behalf of the Applicants

18. The Applicants' contend that they have lost faith in the landlord in that the trust acts in its own interests and not in theirs. They contend that the Respondent appears to use the contractor, J. W. Grindey, joiner and builder, habitually and does not seek tenders from elsewhere. This is the contractor used again in this case. If the landlord had asked for alternative quotes he could have saved a great deal of expense. An alternative quote is supplied from a painter and decorator at a much cheaper price and scales of charges are provided for the hire of scaffolding from an alternative company.

19. The Applicants' contend that the major leak causing this work to be done has happened twice before and has been stopped by the use of a cherry picker to lift a man to the height of the gutter to remove the leaves and debris causing the rainwater system to block. Mr Robinson who is himself a builder undertook this work himself once.

20. The Applicants' contend that consultation as required by section 20 of the Landlord and Tenant Act 1985 and the Service Charge (Consultation Requirements) Regulations 2003, did not take place in relation to any of the three items of repair work in service charge year 2018 to 2019.

21. The Applicants' contend that the original lease was drafted at a time when there were 3 apartments each contributing to the service charge costs by one third of the total costs. This apportionment is now unfair to the Applicants since the Respondent has acquired the other two apartments, turning them into office space, used by more people and thereby causing more wear and tear. As such the lease should be redrafted to take this into account.

22. The Applicants' contend that the apportionment of cost between office space and apartment 3 is unfair and unreasonable. Plans and photographs are adduced.

Summary of the written evidence on behalf of the Respondent

22. The Respondent admits that consultation did not take place as required by the Act and regulations. The Respondent now seeks dispensation from the consultation requirements in relation to the last item of work, namely the work described in the invoice from J. W. Grindey, dated 28 March 2019. In that regard the Respondent seeks to rely upon the Supreme Court case Daejan Investments Limited v Benson [2013] 1 WLR 854, contending that there has been no prejudice to the Applicants therefore retrospective dispensation

should be granted for all works carried out and that the full one third share of the cost of £4,958.40 should be allowed. Plans, photographs, invoices, demands and land registry documents are adduced.

23. Where it is necessary reference will be made to written evidence in the determinations.

The Hearing

24. The hearing was held at Chesterfield Justice Centre commencing at 12.30pm on Thursday 9 January 2020. It was only possible to hear the evidence on this day, the Tribunal reconvening in private session on Friday 17 January 2020 to decide the issues in the case. Present at the hearing were all the Applicants, Mr Robinson taking the lead role in dealing with their case. The Respondent being represented by Ms Seitler of counsel and Mr Pride of W. H. Lawrence, solicitors. Also present on behalf of the Respondent was Mr Barry Cook, Maintenance and Facilities Manager of the Respondent trust.

Procedural issues

25. The Respondent pointed out that witness statements made by Heather Michelle Robinson and Katie Louise Robinson and being brought to the tribunal room today are dated yesterday and are thereby in breach of both sets of Directions in this case. The Respondent asks the Tribunal to determine that it would be unfair and unjust to permit these to be adduced in evidence.

26. The Respondent points out that there has been negotiations between the parties and that these are reflected in without prejudice letters and documents. These have been referred to by the Applicants' in their evidence without the Respondent giving permission for this to be done, by waiving their without prejudice nature. The Respondent contends that this entirely improper so that if any document appears to be without prejudice or any evidence referring to without prejudice matters should be ruled inadmissible.

27. The Respondent submits that there is irrelevant material in the Applicants' case relating to historic matters and that these should be ruled inadmissible.

28. The Respondent submits that this Tribunal has no jurisdiction to vary the terms of the lease as requested by the Applicants.

29. The Tribunal heard brief submissions from both parties as to these points and retired, briefly, to determine the issues.

30. The Tribunal then announced its determinations. Firstly, that the two late witness statements will not be admitted in evidence, agreeing that to do so at this late stage and in breach of Directions would be unfair towards the Respondent. Secondly, that any document or reference in evidence to without prejudice material is inadmissible and will be ignored by the Tribunal. It is entirely wrong to adduce such evidence in the trial of an issue. Third, the Tribunal will decide what is or is not relevant as it determines the issues in the case. Lastly, the Tribunal agrees that this Tribunal has no jurisdiction to vary the terms of the lease.

31.The Respondent made the following concessions.

32. Item 2 on the list of issues challenged, service charge year 2018 to 2019, surface water drainage £37.73, should not have been charged as a service charge cost to the Applicants.

33. Item 6 on the list of issues challenged, service charge year 2018 to 2019, roof repair May 2018 £299.95. There was no consultation and there is no application to dispense with consultation, service charge must therefore be limited to £250.

34. Item 7 on the list of issues challenged, service charge year 2018 to 2019, roof repair November 2018 £310. There was no consultation and there is no application to dispense with consultation, service charge must therefore be limited to £250.

The oral evidence

35. The Respondent was asked to state its case first as to why the remaining service charges are a payable and reasonable.

36.Hanging baskets £78.33. The Tribunal is referred to the lease, clause 5 (1)(d)that is said by the Respondent to permit a service charge for the provision of hanging baskets on the ground floor of the building, the landlord deeming it in keeping with the style of the building to have hanging baskets displayed along the whole of the ground floor of the two facades that are relevant to this case. The Tribunal had this morning seen hanging baskets on the ground floor of the building. The Applicants challenge this on the basis that hanging baskets are not at any point mentioned in the lease and should not therefore be chargeable as a service charge expense.

37.Cleaning of communal areas £124.74. The Respondent submits that this is clearly a service charge expense. The invoiced cost for cleaning in this year is £1,871.07. The common areas under the terms of the lease that service charges can be charged for are estimated as being

20% of that total (being 24 minutes spent on cleaning the relevant common parts by dusting and vacuuming). The landlord then divides this by a third and that is charged.

38. In deciding what part of the overall charge should be apportioned as being relevant to the service charge to be demanded (20%) the Respondent takes into account that Mr Clarkson is a workman and may have dirty boots, that the Clarkson's owns dogs, causing dirt and that the Clarkson's use a coal fire that may cause dirt to be deposited. The Applicants' challenge this on the basis that far more people use the common areas because of the fact that the Respondent now has offices in this area and that Mr Clarkson does not use the passageway other than to access the stairs up to his apartment, so that the 20% apportionment is incorrect and should be much smaller.

39. Lighting of communal areas £146. There is no separate electricity supply to the communal area and so the landlord has to calculate what proportion of electricity should be charged as a service charge. The Respondent submits that there are five light bulbs in the common areas relevant to the case that are, for safety reasons and at the request of Mr Clarkson (sub tenant) illuminated 24 hours per day, every day of the year. There is little natural light in the areas that are relevant to this point. Again, there has to be some method of apportioning the cost attributable to these bulbs from a larger electricity bill.

40. The Respondent has chosen to estimate the cost of illuminating a 100 watt bulb as 1 pence per hour times by 24 hours per day, times by 365 days per year, times by 5 bulbs. This comes to £438, divided by 3 results in a service charge of £146. The Applicants agree that there are five bulbs but contend that although they are equivalent to 100 watt bulbs, they are in fact 13 watt LED bulbs that are cheaper on electricity than as estimated by the Respondent. It was agreed by Mr Cook, on behalf of the Respondent, that the lights bulbs are as described by the Applicants.

41. Heating of communal areas £42.23. There is no separate heating system boiler and gas supply to the communal area (which only has 1 radiator) and so the landlord has to calculate what proportion of invoiced charges should be charged as a service charge. There are 11 radiators on the heating circuit which has 1 of those radiators in the common passageway. The remainder heating the converted office space. The landlord divides the total cost by 11 to establish the cost of running that 1 radiator and then divides that by one third.

42. Roof repairs and painting, March 2019 £4,958.40, in relation to which dispensation is sought. Mr Cook fully accepts that he did not

know that consultation should take place in accordance with the Act and regulations. Further, he accepts that upon the leak again occurring he decided to save expense by repairing and painting windows at the same time as dealing with the leak so as to avoid having to use scaffolding twice. Painting was due on its seven year cycle in May 2019.

43. It is common ground that this leak had previously leaked in 2016 when Mr. Robinson cleared the leaves and debris from the gutter and hopper at a cost £125. This again occurred in 2018 (now being limited to £250) and was dealt with by Mr Cook. Mr Robinson suggests that he could have caused this work to be done at a much cheaper cost, but that could not be considered because of the lack of consultation.

44. Mr Cook accepted that further work will have to be done as required by the heritage department, the hopper will have to be changed and plastic piping be replaced. This will again require scaffolding. Mr Cook said that he relied upon the advice given to him by J. W. Grindey as to how best deal with this problem. He had not obtained any other quotes for the work.

45. In relation to the exterior paintwork Mr Cook said that he had followed the guidance provided by Dulux the paint manufacturers as to when it was possible to use their paint. However, when questioned about the acceptable moisture content of bare wood to be painted Mr Cook was unable to assist and accepted that he did not in any event have any means of testing the moisture content of the wood. Basically, it is the Applicants' case that this painting should not have been done in Buxton, a high location in the Peak District, in March. The Applicants challenge the need to use Cromapol waterproofing on a lead lined gutter that otherwise has not leaked.

46. The Applicants accepted the concessions made in relation to reducing various service charge costs and made no further representations in respect of those charges or in respect of service charge year 2019 to 2020. The challenge in respect of the later year being in the nature of a general challenge.

The Deliberations

47. The Tribunal first considers the application for retrospective dispensation with regard to the repair and external decoration work commenced in March 2019 £4,958.40.

48. The landlord should have consulted the Applicants pursuant to section 20 of the Act and has failed to do so. As a result the effect of section 20 of the Act and regulation 6 of the Service Charges

(Consultation Requirements)(England) Regulations 2003 (S. I. 2003/1987) is to limit the amount that can be charged as a service charge for this qualifying work to £250.

49. Section 20ZA of the Act then permits this Tribunal to retrospectively dispense with the need to consult if it is reasonable to do so.

50. The case of Daejan Investments Limited v Benson [2013] 1 WLR 854 provides guidance to the Tribunal in how to approach the question of whether or not to grant dispensation. The Tribunal must look at the prejudice caused to the tenant by the landlord's failure to consult and impose conditions upon the dispensation to deal with the prejudice caused. The Tribunal notes that the facts in the Daejan case are very different to those in the present case. In Daejan the landlord complied with the first two stages of the consultation procedure, failing to comply with the third by failing to send out the correct invoices to the tenant. In the present case the landlord had never intended to consult the tenants because it did not know that it had to. Never-the-less this Tribunal determines that it is bound to follow the guidance in the Daejan case.

51. The invoice for this work, dated 28 March 2019, splits the work done into 4 stages. Stage 1 is work done to alter the rainwater gutter in an attempt to make a permanent repair or modification to the gutter and hopper so as to prevent this leak happening again. The Tribunal takes note of the fact that on two occasions previously there has been a leak at this location, dealt with by utilising a cherry picker to raise a man to the required level to clean out the gutter and hopper. It is evident that this has not brought about a permanent solution to the problem and the Tribunal determines that on the third time of this happening it was reasonable for the Respondent to seek a permanent solution. This work involved the need for scaffolding to be provided for a two week period, being a major part of the cost.

52. The Tribunal accepts the Applicants' case that there was a delay between water leaking from the gutter and the hopper into the property and the repair being commenced, but determines that it was right for the Respondent to deal with this as a matter of urgency to stop any further leaks as soon as possible. The Tribunal determines that it is reasonable to grant dispensation from consultation to the full value of stage 1 of the work, £1,969.20, including V. A. T.

53. The Tribunal then considers the remainder of the work done in the following three stages. This required the scaffolding to be extended three times for each different stage of work and the whole scaffolding system to be in place for a six and a half week period. The invoice

reveals that this work can properly be classed as the work that would otherwise have been done later in the year in the painting cycle work.

54. The Tribunal considers the evidence in the case and determines that prejudice has been caused to the Applicants by the Respondent's failure to consult in relation to stages 2, 3 and 4 of the work.

55. There was no need to do this additional work as a matter of urgency at the same time as the leak repair work. If the Respondent had treated this as separate from the repair it could have been properly planned, with the heritage office being consulted in advance in respect of what should be done. All painting work could have been carried out in warmer, drier weather, having more daylight hours per day for the work to done over a shorter period of time, reducing hire charges for the scaffolding.

56. Prejudice has been caused to the Applicants with regard to stage 2, 3 and 4 of the work:

- The failure to consult made it impossible for the Applicants to have any input into the choice of contractor who was engaged to carry out the work.
- The work would have been carried out more quickly in better weather. The Tribunal determines that March is the wrong time of year to conduct external painting and preparatory work in Buxton in the Peak District.
- The Tribunal accepts Mr Robinson's point that on balance the wood, prepared for painting, may have had too high a moisture content for effective paint adhesion. As such the paintwork should not have been done at this time of year.
- The Tribunal determines that there was no need to use Cromapol on lead lined gutters, to prevent a leak in the future. The proper way of dealing with a leak in such a gutter is to repair or replace the lead.
- The Respondent will have to erect scaffolding again in the near future to conduct the alterations to the repair work already done that is being required by the heritage office. Proper planning would have prevented this.
- The Respondent failed to carry out roof repairs that should have been done at the same time as the extended works (see the inspection, paragraphs 9 and 10, above). This will require scaffolding to be erected at further expense that would have been avoided by a properly planned job of work.
- The work took 6 and a half weeks because it was carried out in the winter in an ad hock manner, when it should have been properly planned and completed in the summer.

57. The Tribunal determines that it is unreasonable, unjust and unfair to grant any further dispensation from consultation. As a result the Tribunal determines that the cost applicable to this work is £1,969.20, including V. A. T. and that the Applicants will be required to pay a third of this, namely £656.40.

58. The Tribunal now considers the hanging baskets £78.33. The Tribunal agrees with the Respondent that the lease, clause 5 (1)(d)is drafted in such a way as to include the provision of hanging baskets for the frontage of a class 2 listed building in the main square at Buxton. The service charge is within the scale of charges that are considered by the Tribunal to be reasonable. This figure is allowed in full.

59. Surface water drainage £37.73 should not have been charged.

60. Cleaning of communal areas £124.74. The Tribunal determines that there must be some means by which invoices covering the provision of cleaning in a larger area can be apportioned to cover only the common areas. The Tribunal determines that the common areas that can be charged for as a service charge in this case are the entrance door and passageway leading off the door past the basement and eventually to the area where the refuse bins are stored, also including the stairs going up to the demised area of stairs for apartment 3. The Tribunal determines that the Respondent's apportionment is reasonable and that the service charge is within the scale of charges that are considered by the Tribunal to be reasonable. This figure is allowed in full.

61. Lighting of communal areas £146. It is agreed that there are 5 bulbs that are permanently kept lit, that these are LED bulbs of 13 watts, which is equivalent to 100 watts of a halogen bulb. This must be paid for as a service charge. The only point in issue is how should the service charge be calculated when looking at invoices that cover a larger area. The calculation used by the Respondent is simple to apply and understand and the Tribunal determines that this approach to apportionment is a reasonable approach. The service charge of £146 is within the scale of charges that are considered by the Tribunal to be reasonable. This figure is allowed in full.

62. Heating of the communal areas £42.23. There is one radiator in the communal area in relation to which a service charge can be charged. This must be paid for as a service charge. The only point in issue is how should the service charge be calculated when looking at invoices that cover a larger area. The calculation used

by the Respondent is simple to apply and understand and the Tribunal determines that this approach to apportionment is a reasonable approach. The service charge of £42.03 is within the scale of charges that are considered by the Tribunal to be reasonable. This figure is allowed in full.

63. Service charges for the qualifying works charging (a) roof repair May 2028, £299.95 and (b) roof repair November 2018, £310 are both reduced to £250 due to lack of consultation.

64. Service charge year 2019 to 2020 is a budgeted figure charged on an estimate of service charge expenditure for that year and is £1,250. The Tribunal points out that once the actual expenditure for this year is known there will be a balancing exercise in which the service charge for this year is considered again. The interim charge is detailed at page 23 of the Respondent's annex to his statement of case. It does not include any substantial items of roof or window repair. The Respondents accept that the £35 charge for surface water drainage should not be charged, but otherwise the Tribunal determines that on an interim basis the charges are within a scale that is reasonable. The charge will be reduced to £1,215.

65. The Applicants' apply for an order pursuant to section 20C of the Act. The Tribunal notes that the Applicants have succeeded in reducing the service charge demand for both service charge years in question. Further, there have been three breaches of the consultation requirements in this case by the Respondent. The Tribunal determines that it is just and equitable to order that all costs incurred by the landlord in connection with these proceedings before this Tribunal are not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by these Applicant tenants.

66. The Applicants' apply for an order pursuant to paragraph 5A of schedule 11 of the 2002 Act to extinguish the Applicant tenants' liability to pay administration charges in respect of litigation costs of these proceedings. The Tribunal, for the reasons given in paragraph 65 above determine that it is just and equitable to make this order.

Decision

67. The Tribunal decides that it is reasonable, fair and just to grant dispensation from the Respondent's duty to consult the Applicants in relation to the work described in the invoice dated 28 March

2019, Stage 1, but not otherwise. As such a service charge of £656.40 is properly charged in respect of this work.

68. The Tribunal Decides that the service charge that can be demanded for service charge year 2018 to 2019 is to be reduced by the following amounts;

• Surface water drainage	£37.73
• Roof repair May 2018	£49.95
• Roof repair November 2018	£60
• roof repair and painting March 2019	£4,302
Total	£4,449.68

69. The Tribunal Decides that the interim service charge that can be demanded for service charge year 2019 to 2020 must be reduced by £35.

70. The Respondent is required to make adjustments to the service charge account forthwith as is require by these Decisions.

71. The Tribunal makes an order pursuant to section 20C of the Act that all costs incurred by the landlord in connection with these proceedings before this Tribunal are not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by these Applicant tenants.

72. The Tribunal makes an order pursuant to paragraph 5A of schedule 11 of the 2002 Act to extinguish the Applicant tenants' liability to pay administration charges in respect of litigation costs of these proceedings.

73. Should either party wish to appeal against this Decision they must do so within 28 days of the Decision being sent, by delivering to the tribunal office an application asking for permission to appeal, stating the grounds for that appeal, particulars of the appeal and the result that the party wants to achieve.

Judge C. P. Tonge

28 January 2020