FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/21UC/LIS/2020/0016
Property	**:**	4c, South Cliff Tower 16 Bolsover Road Eastbourne, BN20 7JN ("the property")
Applicants	**:**	(1) Barry Southon (2) Angela Southon
Representative	**:**	Chris de Beneducci Counsel instructed by DMH Stallard LLP solicitors (present at hearing)
Respondent	**:**	South Cliff Tower (Eastbourne) Limited
Representative	**:**	Robert Darbyshire Counsel instructed by Chandler Harris LLP (Mr S Stopher not present at hearing)
Type of Application	**:**	For the determination of the liability to pay a service charge
Tribunal Member	**:**	Tribunal Judge H Lederman Tribunal Member C Davies FRICS ACIArb Tribunal Member J Playfair
Date of hearing	**:**	By cloud video platform on 18 January 2021
Date of Decision	**:**	5th March 2021

DECISION AND REASONS

Summary of Decision

The Tribunal determines:

a. the appointment of Faithful & Gould as project manager under an agreement on 16 October 2017 concerning works to South Cliff Tower was in breach of all of the requirements in Schedule 1 to the Services Charges (Consultation Requirements) (England) Regulations 2003 SI 1987 ("the 2003 Regulations") concerning qualifying long term agreements;

b. The Respondent's failure to make available copies of estimates for works to South Cliff Tower tendered by 2 proposed contractors to Reginald Downs and Andrea Bloom as lessees on 24th April 2018 was a breach of paragraphs 4(5)(c) and 4(11) of part 2 of Schedule 4 to the 2003 Regulations;

c. The Respondent's offer to make facilities available for inspection at its agents offices in Polegate in 2018 between 9 and 5 pm was not a breach of paragraph 2(1)(a) of part 2 Schedule 4 to the 2003 Regulations;

d. The Respondent's failure to have regard to the written observations of Mr Downs of 1st May 2018 prior to appointing CBG Construction Limited as main contractor was in breach of paragraph 5 of part 2 Schedule 4 to the 2003 Regulations as far as it affected Mr Downs.

e. The Respondent's Notice of Intention to carry out works dated 12th February 2019 ("the 2019 Notice") did not infringe part 2 Schedule 4 to the 2003 Regulations. The 2019 Notice provided a compliant general description of the proposed works.

f. The Respondent did not infringe the requirement to have regard to written observations lodged by lessees in response to the 2019 Notice in paragraph 5 of part 2 Schedule 4 to the 2003 Regulations.

g. The Respondent failed to comply with the requirement to make available the estimates referred to in the Statement of Estimates dated 12 April 2019 (the 2019 Statement of Estimates) to Reginald Downs and Andrea Bloom as lessees.

h. Issues of whether dispensation from non-compliance should be ordered and if so upon what terms, application for orders for costs, reimbursement of fees and application under section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") and/or paragraph 5A of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 are adjourned for determination at a separate hearing.

The Application

1. Page references in [ ] are to the bundles filed for the hearing on 18 01 2021 [380 numbered pages) and the Respondent's bundle numbered as pages B1-B134.

2. The Tribunal is required to determine an application under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") in respect of liability to pay and reasonableness of service charges for what were initially categorised as service charge years 2016, 2017, 2018, 2019 and 2020.

3. Following directions given on 19 October 2020, a case management conference on 8th December 2020, helpful concessions and agreement between the parties' legal representatives, the outstanding issue for the hearing on 18 January 2021 was agreed as: whether the amounts charged to the Applicants for major works in invoices dated 15 December 2017 [101], 18 June 2018 [102] and 10 December 2018 [103] (a total figure of £26,208.00) were capped at £250.00 for non-compliance with the requirements of the 2003 Regulations and section 20 of the 1985 Act. The hearing of 18th January 2021 was solely to deal with issues of what breaches of the 2003 Regulations could be established. A separate hearing will deal with the Respondent's application for dispensation from compliance with the requirements of the 2003 Regulations.

Scope of issues for determination

4. It is to the credit of all parties and their advisers that earlier challenges as to the recoverability or reasonableness of costs claimed as service charge for management fees and non-compliance with repairing covenants or insurance covenants (featuring in the Applicants' Statement of Case (August 2020) [36-51]) have fallen away and are no longer pursued. In particular the Schedule of Disputed items on page 33 of the Bundle has now been superseded. That sensible approach mirrors the agreement of the Respondent not to seek to charge the amounts previously claimed as managing agents fees for the major works in issue.

5. In a similar vein, to his credit Mr Darbyshire the Respondent's Counsel helpfully acknowledged at the outset of the hearing on 18 January 2021 that paragraphs 5 – 16 of his skeleton argument dated 12 January 2021 were based upon a misunderstanding between himself and those instructing him and could not be pursued.

The parties to this hearing

6. One of the unusual features of this application is that the Applicants relied to a considerable extent upon written evidence from and correspondence emanating from Andrea Downs a lessee of Flat 4 A South Cliff Tower and Reginald Bloom lessee of 5C South Cliff Tower. The Tribunal was informed on 18 January 2021 that these two lessees did not wish to become a party to these proceedings and were unwilling to make witness statements which reflected the contents of their e-mails which are found at [219-226] or sign witness statements. The Tribunal was informed that Andrea Bloom a lessee of Flat 4 A South Cliff Tower and Reginald Downs are also in dispute with the Respondent about service charges and alleged arrears. The Tribunal has not had the benefit of hearing from these witnesses or assessing their evidence by reference to cross examination. One consequence of this is that any findings which the Tribunal makes in these proceedings, even where they refer to Andrea Bloom a lessee of

Flat 4A South Cliff Tower and Reginald Downs cannot and should not necessarily be taken as binding the Respondent or binding this Tribunal in any separate proceedings.

7. The Tribunal expressed concern about the costs incurred by the parties to these proceedings at the case management conference on 18 December 2020 but was not informed of the separate dispute with Ms Bloom and Mr Downs. The proliferation of proceedings concerning similar or identical issues concerning South Cliff Tower is inconsistent with the overriding objective of allocating the Tribunal's resources and dealing with cases in ways which are proportionate to the anticipated costs and resources of the parties. This is particularly relevant as the Respondent is a company which is owned and controlled by some of the lessees.

Structure of these reasons

8. References to the Respondent in the Decision and in these Reasons should be taken to include the Respondent's managing agents Southdown Surveyors Limited ("SSL") where appropriate. For ease of reference, these reasons have been divided into separate headings. Reference to reasons under one heading is often relevant to the Tribunal's conclusions under other headings. The omission to cross refer to reasons should not be read as meaning that sections of these reasons which relate to one of the issues are not relevant to other issues.

9. These reasons address in summary form the key issues raised by the appeal. They do not rehearse each and every point raised or debated. The Tribunal concentrates on those issues which in its view go to the heart of the appeal. For convenience, the Tribunal addresses the issues in the order of how they arise for the purpose of this hearing.

Findings of fact

10. Where the Tribunal finds a particular matter as a fact, it does so on the basis that it is sure that on the evidence that fact is established or proven by the Applicants on the balance of probabilities (more likely than not). The findings in these Reasons are for the purpose of the issues in these proceedings and for no other purpose or determination. Specifically the Tribunal was not provided with some documents or witness evidence that might be relevant to the sequence of events or issue arising on the issue of dispensation. Accordingly the findings should not be taken to bind other Tribunals particularly as only lessees of one flat in South Cliff Tower gave live evidence.

Background – South Cliff Tower

11. The Tribunal takes as an introduction, the initial parts of the statement of Jonathan Wicks the current Chairman of the director of the Respondent made on 18 November 2020 at [241]. South Cliff Tower is a 19 storey block including 31 3 bedroom flats, 31 2 bedroom flats 4 one bedroom flats a "manager's" flat and a penthouse constructed in about 1965. A summary of design and other

problems which arose can be found in the June 2017 report prepared by Ashburnham Cameron Partnership ("ACP") found at [269-288] ("the ACP report"). The authorship of that report is not self-evident from the copy in the Bundle, but no challenge was made to attribution by Ms Maguire Wheatley in paragraph 8 of her statement of 08 November 2020 [249].

12. No challenge was made to the photographic record of South Cliff Tower in the ACP report or the substance of the description of the design and building issues at least for the purpose of this hearing. The Applicants' Counsel relied upon the ACP in his opening. Accordingly the Tribunal adopts the following description from the ACP report:

INTRODUCTION

South Cliff Tower as originally designed and constructed in 1965 failed to take account of the severity of wind driven rain and the height of the building. This has resulted in rain penetration from the outset. Despite complaints from the residents, nothing substantial was done until the west wall, which was worst affected, was protected with a rainscreen cladding. This proved effective but problems were experienced with the inadequate specification and installation of the windows.

In the autumn of 2015 it was noticed that pieces of concrete were falling from the building, particularly the North Elevation. A specialist firm, Concrete Repairs Ltd (CRL), were commissioned to carry out a survey of the condition of the concrete on the exterior of the building except the West wall which was already protected by rainscreen cladding.

CRL reported in April 2016, and a copy of the report was made available to all residents. The report was discussed at a Lessees Meeting in December 2016, at which it was agreed that a budget estimate of cost should be prepared based upon the remedial works put forward by CRL. The brief was subsequently extended to cover all elements of the external envelope of the building. The external envelope includes; concrete repairs, rainscreen cladding, balcony & terrace waterproofing, windows and external doors and decorations.

On 19th November 2016 Storm Angus struck South Cliff Tower and there were many reports from residents of rain penetration to their flats. During Storm Angus wind speeds of up to 81 mph were recorded. During the weekend of Storm Angus Eastbourne experienced its average monthly rainfall for November in just two days. 40 – 50 mm rain fell as part of the initial storm, with a further 40 – 50 mm falling over the next 36 hours.

In total 41 flats reporting rain penetration were inspected. This number can be broken down as follows:

13. The remainder of the ACP report at pages [269-278] described the disrepair and proposed remedial measures.

14. The Respondent entered into a consultancy agreement with Faithful and Gould Limited on 16 October 2017, a copy of which was at pages [151-176]. That agreement provided for professional services for "Option 2" works to South Cliff Tower. These appear to be the Option 2 costings referred to on page [173] in the Faithful and Gould submission. The professional services offered were extensive and listed in Schedule 1 and based upon a programme length of 18 months – see [173-174]. The terms of that agreement justify the Respondent's

concession that the agreement was a qualifying long term agreement ("a QLTA") within the meaning of section 20ZA(2) of the 1985 Act, namely an agreement entered into, by or on behalf of the landlord, for a term of more than twelve months. The Tribunal floated the possibility that the cost incurred under this agreement might have been qualifying works as part of the cost of works on a building or any other premises in section 20Z(2) of the 1985 Act. However once a finding is made that the agreement is a QLTA, it is clear that the costs are not the costs of qualifying works. Different consultation requirements for a QLTA are mandated by a different Schedule to the 2003 Regulations.

15. The Respondent concedes for the purpose of this hearing that none of the requirements of Schedule 1 to the 2003 Regulations concerning QLTA's were complied with. These would have required among other things, service of a notice of intention provision for inspection and statement of estimates of a kind which parallel but do not exactly mirror those which apply to qualifying works. The concession that the requirements of Schedule 1 to the 2003 Regulations were not complied with appears to have been properly made. The Tribunal so finds. The first Notice of Intention which the Tribunal has been provided is dated 22nd January 2018.

16. It appears CBG Construction contractors ("CBG") were engaged in May 2018 under a pre-construction Services Agreement in to carry out some design work according to the Faithful and Gould second stage tender report of 30 January 2019: [138]. The Tribunal has not seen the documents leading up to that appointment or the engagement documents. It makes no determination about that issue.

17. There were two consultation processes. The first was in 2018. The second was in 2019. The rationale for this as explained by the Respondent and SSL their agents was that the scope of the works as consulted upon in 2018 had changed by 2019. The Applicants make different allegations in relation to each process.

The first consultation process – alleged breaches of the Consultation requirements in the 2003 Regulations

18. The first notice of intention dated 22 January 2018 was issued by SSL referred to phasing of external refurbishment work in 2 projects [177-179]. The first was the North facing elevation. The scope and nature of the work subsequently changed. Consequently, a second consultation process was initiated by SSL on behalf of the Respondent in 2019. The 2019 consultation procedure is discussed separately below.

19. The allegations of non-compliance in relation to this procedure are considered separately. Paragraph 4(5) of part 2 of the Fourth Schedule to the 2003 Regulations requires the landlord to serve a statement of estimates upon lessees who will be liable to make contribution to the work through service charge, It was common ground that the Applicants and Andrea Bloom/Reginald Downs fell within that category. Paragraph 4(5) of part 2 of the Fourth Schedule to the 2003 Regulations provides:

> "The landlord shall, in accordance with this sub-paragraph and sub-

paragraphs (6) to (9)–

(a) obtain estimates for the carrying out of the proposed works;
(b) supply, free of charge, a statement ("the paragraph (b) statement") setting out–

(i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and
(ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and

(c) make all of the estimates available for inspection."

20. The first Statement of Estimates supplied by SSL for the Respondent was 01 April 2018 and is found at [182-184]. It included the design element and contractor's overheads and profits for 2 proposed contractors CBG Construction Limited and Ellis Building Contractors Limited: see [183]. That statement provided for inspection of "the tenders" at SSL's offices "Friston House, Dittons Business Park, Polegate BN26 6HY between the hours of 9 am and 5 pm Monday to Friday by previous appointment only" [183].

21. The Applicants allege the Respondent through SSL failed to make available for inspection all of the estimates which it had obtained (or ought to have obtained) for the carrying out of the proposed works. Specifically, the Applicants contend SSL failed to make copies of the estimates which had been tendered by the two proposed main contractors available to Reginald Downs and Andrea Bloom when they attended SSL's offices on 24 April 2018.

22. The Applicants addressed this issue in paragraphs 15-16 of Mr Southon's witness statement of 7 August 2020 [231] and paragraphs 25-28 of his statement of 03 December 2020 [338-339]. Mr Southon candidly accepts that he had no direct knowledge of what occurred between SST and Andrea Bloom/Reginald Downs and is relying upon various e-mails: see paragraph 27 of his statement at [339]. The Applicants do not contend that Andrea Bloom/Reginald Downs acted as their agents or otherwise on their behalf in 2018.

23. Mr Southon was asked whether he tried to get access to the 2018 estimates. He said that he did ask to see estimates in 2018. He said that he tried but only one in 8 appointments with SSL were fulfilled by SSL. He also said he had e-mails relating to that issue. Neither he nor the Applicants' Counsel were able to point to them in the hearing bundle. He was referred to paragraph 25 of his statement of December 2020 at [234] and said that paragraph referred to his attempts in 2018 as well as 2019. The Tribunal finds this an impossible reading of that paragraph 25 of his statement when taken with his other statement and the Applicants' skeleton argument.

24. The Applicants' skeleton argument framed the allegation as referring to Andrea Bloom/Reginald Downs. Mr DeBeneducci, the Applicants' Counsel who acted properly and courteously throughout, did not put to Ms Maguire Wheatley in

cross examination any specific examples of the Applicants being refused obstructed or delayed in obtaining access to the estimates in 2018. He would have done so had his instructions and the witness statements supported such an allegation. Finally the minutes of the Annual General Meeting of the Respondent and the Lessees Meeting on 19 May 2018 which Mr Southon is recorded as attending (and taking a recording) do not refer to any complaints of him being refused access or not being given an appointment to inspect estimates in 2018, although some of his other criticisms of the Respondent are mentioned. The Tribunal is unable to find that the Applicants were refused access to the estimates or they were not provided timeously in 2018 on the balance of probabilities. The Tribunal is not finding that Mr Southon has been untruthful and no one suggested that. Unfortunately, he has failed to establish the facts as he recalls them on the available evidence.

25. Ms Maguire Wheatley accepted in cross examination that when Andrea Bloom/Reginald Downs attended SSL's office on 24 04 2018 they inspected a tender report from Faithful & Gould but not the underlying estimates or tenders from contractors. She said that all the information in the estimates was in the tender report. Unfortunately, the actual tender report inspected was not in the hearing bundle. Ms Maguire Wheatley was unable to provide any real assistance as to where it was located. It seems that the report was dated 23rd March 2018 as it is referred to in a subsequent tender report of 30th January 2019 at [138] (paragraph 3). As the scope of the consultation and works had changed, the Tribunal can see how the omission to produce the 2018 report might have occurred. It does mean that the Tribunal cannot be confident that her recollection to what was in the 2018 tender report was accurate. The omission of that 2018 tender report from the hearing bundle is extremely unfortunate. If it remains in existence it might be relevant to the dispensation hearing. Ms Maguire Wheatley was unable to confirm that the tenders (i.e. the estimates) themselves were shown to Andrea Bloom and Reginald Downs.

26. The evidence goes no further than showing that Andrea Bloom and Reginald Downs were unable to inspect the estimates themselves in 2018 (that is the tenders from CBG Construction Limited and Ellis Building Contractors Limited).

27. There is no evidence from other lessees or evidence that other lessees were unable to inspect those estimates, or they were refused or delayed access to those estimates or that the consultation requirements were not complied with in 2018 in relation to other lessees. As the Tribunal has not seen the 2018 tender report from Faithful & Gould, it is unclear whether that tender report contained all or most of the information in the estimates as Ms Maguire Wheatley thought it did. The Tribunal is unable to draw the inference from Ms Maguire Wheatley's e-mail of 24th April 2018 to Mr Downs and others at [351] that the documents inspected by Mr Downs did not contain all the available information and summary of estimates.

28. In the absence of direct or live evidence from Mr Downs or Andrea Bloom, the Tribunal is unable to make the leap of speculating precisely what was inspected or not inspected by other lessees. The Tribunal is acutely aware that Mr Downs is on the record as being critical of the Respondent's Board in 2018. The

Tribunal has been told that he and Andrea Bloom were unwilling to sign a witness statement to confirm the truth or accuracy of the e-mails provided by them. It would be unsafe to draw any conclusions from the e-mails he wrote in 2018, such as the e-mail of 01 May 2018 at [349-350] as reflecting the nature of inspection facilities afforded by the Respondent to other lessees.

29. The Applicants' other criticism of this part of the 2018 consultation process is that the place and hours specified for inspection of the estimates were not "reasonable", contrary to paragraph 2(1)(a) of Part 2, Schedule 4 to the 2003 Regulations. This is applied to the statement of estimates by paragraph 4(11) of Part 2, Schedule 4 to the 2003 Regulations. As the Applicants' Counsel helpfully noted in *Ashleigh Court RTM Co Ltd v. De-Nuccio* [2015] UKUT 258 (LC), HHJ Stuart Bridge held at [45] that the arrangements ought to be "relatively convenient" for the lessees The evidence was that Polegate was some 18 minutes by car from South Cliffe Tower.

30. The issue is not whether a more convenient time and location for inspection could have been chosen by the Respondent. Andrea Bloom and Reginald Downs appear to have accessed the Polegate offices without undue difficulty or problem. In her e-mail of 31 08 2020, Andrea Bloom complained that access by bus was restricted to once an hour [page 224]). Ms Maguire Wheatley confirmed and the Tribunal accepts that Andrea Bloom was one of the lessees who was able to go the Polegate office by car. The Tribunal was referred to page 200 where in an undated e-mail from Mrs Simpson of Flat 3D she says, "I have no intention of going all the way to Polegate to inspect them as this is a considerable inconvenience to myself". It is believed this was a reference to the 12 February 2019 Notice of intention [107-108]. Mrs Simpson did not give evidence to the tribunal. Ms Maguire Wheatley confirmed that Ms Simpson was one of the lessees who did have access to a car. Mr Southon the only witness to give evidence for the Applicants does not assert that the Polegate office were not convenient for him and his wife in his witness statements. He recites the complaint by Ms Simpson in paragraph 26 on page [234] but gave no evidence about the issue himself in chief.

31. It is nothing to the point that a Respondent's staff member was on site in a flat in South Cliff Tower in 2018. There might be many reasons for requiring inspection of such documents at a managing agents' offices. Some were mentioned by Ms Maguire Wheatley - such as for the need to have witness available for some lessees (such as Mr Downs and Andrea Bloom whose recollection of response to questions was said to have differed from those of the managing agents on previous occasions).

32. When, in 2020, SSL opted to leave copies of documents in the foyer of South Cliff Tower this was another attempt to make consultation more convenient. Ms Maguire Wheatley's evidence suggested it was only partly successful, as some documents went missing. It comes nowhere close to leading the Tribunal to conclude that the earlier facilities were not reasonable.

33. The absence of any other complaint by any other lessees in South Cliff Tower of inconvenience is also of some relevance. The Tribunal finds that the time and location of facilities for inspection were reasonable in the circumstances of

this consultation in this building at this time in 2018.

34. The third allegation of breach concerning the 2018 consultation was that the Respondent failed to have regard to the written observations lodged by Mr Downs on 1 May 2018 prior to appointing CBG Construction Limited as main contractor.

35. Mr Downs' observations regarding the appointment of a main contractor were made by e-mail on 1 May 2018 [349-350]. The Respondent is said to have failed to have regard to those observations prior to engaging CBG. The Applicants point to the fact that the lessees were informed that CBG had been appointed at a meeting on 19 May 2018 according to the minutes of that meeting provided after the hearing on 18th January 2021. [The Minutes were however referred to in the hearing itself] The Applicants say SSL only provided a response to Mr Downs' email on 21 May 2018, but that response does not appear to be in the hearing bundle.

36. The date in May 2018 when CBG was appointed has not been specified by the Respondent. The 30-day consultation period only expired on Saturday 12 May 2018 at the earliest. The inescapable inference is that CBG had been appointed before the meeting on 19 May 2018 when Mr Peter Jackson (a director of the Respondent) is recorded as announcing that the main contractor had been appointed (see item 5.2 of the minutes of the Lessees meeting on 19th May 2018).

37. Mr Wicks' evidence did not address this. The Tribunal finds it unlikely that the Respondent had considered the issues raised by Mr Downs' e-mail on 1 May 2018 [349-350]. This is partly because (as the Applicants' Counsel suggested in cross examination), many of the issues raised required specialist technical information that could not have been understood until that specialist input had been obtained.

38. Whether Mr Downs' observations were cogent or needed to be given considerable weight, remains to be established. The Tribunal makes no findings about the cogency or weight of Mr Downs' observations at this stage. They raised questions which the Respondent might have wished to have regard to.

The 2019 consultation process – alleged breaches of the Consultation requirements in the 2003 Regulations

39. The Second Notice of Intention served on behalf of the Respondent was dated 12th February 2019 and is found at [107-108]. The covering letter from SSL of the same date sent to the Applicants is found at page [186]. That covering letter explained:

> "This updated notice has been sent further to the original which was issued in January 2018, as the scope of works has changed following the decision to remove the existing cladding and to use an external wall insulation render system instead of cladding"

40. The terms of the Notice of Intention dated 22nd January 2018 as far as it

related to the scope of the works are relevant [178]. The Applicants and other lessees were familiar with this. The scope of the proposed works had initially been described as follows in 2018:

> **"SECTION 20 LANDLORD & TENANT ACT 1985 (AS AMENDED) NOTICE OF INTENTION TO CARRY OUT WORK**
>
> It is the intention of Southdown Surveyors Ltd, on behalf of South Cliff Tower (Eastbourne) Limited to enter into an Agreement to carry out works in respect of which we are required to consult Leaseholders. (See Note 1)
>
> The works to be carried out under the Agreement are as follows:
>
> **South Cliff Tower External Refurbishment** (See Note 2) to include;
> Concrete repairs to North Recess Elevations
> Concrete Corrosion management to North Recess Elevations Window Replacement to North Recess elevations
>
> Asbestos Removal works (if required after survey)
> Concrete repairs and review of expansion joints to South Elevation Concrete Corrosion management to South elevation
> Decorations to all elevations using an Anti-Carbonation paint Balcony door and window replacement works
> Balcony terrace and penthouse waterproofing works Alterations to existing services to allow for existing installation Cladding to North and East elevations
>
> Low Level works
>
> And all associated repairs.
>
> South Cliff Tower (Eastbourne) Limited consider that the works are necessary because as the property has suffered numerous cases of water ingress for many years now and there are several areas of concern where concrete defects are present as well as the need to renew of certain materials such as the original timber windows to maintain the building and stop it falling in to disrepair.
>
> The work will be completed as part of a Two-Stage Design and Build Procurement contract and the work will be split in to two phases. More information on this and the full specification will be available to view at a later stage in the consultation in line with Section 20 of the Landlord and Tenant Act (1985) as amended."

41. The Notice of Intention served in February 2019 at [107] contained the

following description of the scope of the works:

> **"SECTION 20 LANDLORD & TENANT ACT 1985 (AS AMENDED) NOTICE OF INTENTION TO CARRY OUT WORK**
>
> It is the intention of South Cliff Tower (Eastbourne) Limited to enter into an Agreement to carry out works in respect of which they are required to consult Leaseholders. (See Note 1)
>
> The works to be carried out under the Agreement are as follows:
>
> **South Cliff Tower External Refurbishment** (See Note 2) to include but not limited to;
> Removal of cladding to West elevation
> Provision of external wall insulation system
> Replacement of windows and balcony doors (exact numbers to be confirmed, subject to tender prices) Installation of sliding doors on the South elevation (exact numbers to be confirmed, subject to tender prices) External redecoration and repairs
>
> South Cliff Tower (Eastbourne) Limited consider that the works are necessary because the property has suffered numerous cases of water ingress for many years now and there are several areas of concern where concrete defects are present as well as the need to renew the original timber windows and to carry out cyclical repairs and redecoration.
>
> The work will be completed as part of a Design and Build Procurement contract and therefore it is the responsibility of the main contractor to design the scope of works, by following the Employers Requirements produced by the Project Manager. More information on this and the full specification will be available to view at a later stage in the consultation in line with Section 20 of the Landlord and Tenant Act (1985) as amended.
>
> This updated notice has been issued further to the first notice issued on 19 January 2018, as the original plans to clad the building have been amended and now the main contractor proposes to install an external wall insulation render system. The planning consents required from the local authorities have also been amended and re-submitted.
>
> We invite you to make further written observations in relation to the proposed works by sending them to Southdown Surveyors Ltd, Friston House, Dittons Business Park, Polegate, BN26 6HY. Observations must be made in writing before the expiry of the consultation period. The consultation will expire on Friday 15th March 2019. (See Note 3)"

42. The Applicants criticise the 2019 Notice of Intention on grounds that the phrase "the works to be carried out under the Agreement are as follows: South Cliff Tower External Refurbishment *to include but not limited to…*" [186-188]), failed adequately to "describe, in general terms, the works proposed to be

carried out". They contend the phrase "to include but not limited to" was "vague and unhelpful". They assert "no reasonable person would consider this to be an adequate description of a proposed course of construction works, nor would they feel at all comfortable entering into a contract on such an open-ended basis" [49].

43. Mr Southon commented "given that qualification, it was very difficult to engage meaningfully with Southdown's description of the works which SCT was proposing to undertake and then re-charge to tenants: (paragraph 23 at [233] in his first witness statement). He said, "In the face of an "unlimited" description of this nature, how can a tenant tell whether he or she is being asked to pay for inappropriate or unnecessary works?". The reference to SCT was to SSL.

44. The Applicants accept that the issue is whether the 2019 Notice of Intention did not comply with the requirement to provide a "general description" of the proposed works in paragraph. 1(2)(a) of Part 2, Schedule 4 to the 2003 Regulations.

45. For the purpose of assessing this issue the Tribunal bears in mind the proposed works were a complex project upon which the advice of structural engineers and others had been sought. Those familiar with work on buildings where access is difficult, or inspection can only be obtained after preliminary or opening up works, will recognise the concern that further or different works might become necessary after additional inspection and access arrangements have been put in place. An example of the kind of unforeseen issue which came to light during the works was the need to carry out work relating to asbestos in the penthouse at South Cliff Tower mentioned by Ms Maguire Wheatley in cross examination. In paragraph 13 of her witness statement at [252] she also referred to the need to change boiler flues to conform with the new render system [252]. This had not been foreseen until the work commenced on site.

46. The Applicants and others complained that the words "but not limited to" could embrace works which they were unable to comment upon or were not within the earlier description of the works. They have not identified works which they say fall outside the general description, but should have been referred to, despite the passage of time since the works have been carried out. This complaint argues that the use of the phrase "including but not limited to" in some way dilutes the earlier description. The absence of an identified way in which the broad descriptions given in the 2018 or 2019 Notices of Intention were invalidated or diluted by works that were actually carried out is fatal to this contention. The general description of the works in the Notices was appropriate and accurate.

47. The Applicants next criticise the 2019 consultation process on the ground that the Respondent failed to have regard to the written observations lodged by lessees, in response to the 2019 Notice of Intention, as regards the apparently unlimited scope of the proposed works: see [49] and Mr Southon's witness statement at paragraphs 24-26 at [233-234].

48. Mr Southon says his written "observations" dated 26 February 2019, raised the

issue that the description "Please explain what is meant by "to include but not limited to") was unhelpful: [A/109-110]). He draws attention to the fact that Mrs Simpson another lessee raised the same point: "I have noted that the first line does state "to include but not limited to", but this could mean anything…" [A/119]. The Applicants complain that a specific response to this was not received.

49. Mr Southon also complains that when he "was eventually permitted to attend Southdown's offices, he "was not provided with a general description of the proposed works, but with three brochures for sub-contractors instead": see paragraph 25 of his statement at [234]. The Applicants point out that Ms Maguire-Wheatley acknowledged that "the initial notice [in 2019] provoked queries from a number of residents" (in her witness statement (paragraph 13). They criticise her for asserting that "each of [those] queries was read and considered and an answer provided" [251]. The Applicants say that "none of the answers provided by CBG, on behalf of the Respondent grappled with the key question of what specifically was meant when the scope of the works was described as "to include but not limited to".

50. The Applicants ask the Tribunal to find that – contrary to Paragraph 3 of Part 2, Schedule 4 to the 2003 Regulations – the Respondent failed to have regard to Mr Southon's and Mrs Simpson's written observations regarding the inadequate description of the proposed works in the 2019 Notice of Intention.

51. The Applicants acknowledge in another context that the duty to have regard to observations requires the landlord to "conscientiously consider the lessees' observations and give them due weight, depending on the nature and cogency of the observations.": see Lewison LJ at [38] in *Waaler v. Hounslow LBC* [2017] EWCA Civ 45, Ms Maguire Wheatley describes the 2019 consultation process and the response to observations in the first paragraph numbered 13 in her witness statement at [251-252]. She exhibited at LMW5 a copy of an e-mail from Matthew Kavanagh Clarke the Pre-construction Director of CBG of 25 March 2019 at [303-304] and a further e-mail from him of 02 April 2019 [305-318] providing initial and updated responses to detailed questions raised by lessees including Andrea Bloom [307-308] and Reginald Downs [309-311]. None of this was directly challenged. The only challenge to this part of her evidence was by reference to a lessees' meeting on 19 May 2019 which it was said took place after works commenced on or about 08 April 2019. This challenge does not address or come close to causing the Tribunal to doubt Ms Maguire Wheatley's evidence in the first paragraph 13 of her witness statement.

52. The Applicants say that the absence of a specific response to their question about the meaning of "to include but not limited to" means that it was not considered or not considered properly. The Tribunal cannot draw that inference. The documents exhibited and the evidence of Ms Maguire Wheatley make it clear that very detailed consideration was given to a number of observations made by lessees over a wide range of matters. The substantive comments made by lessees were addressed in writing.

53. The Tribunal accepts Ms Maguire-Wheatley's evidence that the consultation was a full and active process engaging with a number of lessees and their

questions. She says a response was given "where appropriate". Ideally a response in the terms provided at the hearing or in her witness statement to explain the phrase "to include but not limited to" referring to unforeseen or unforeseeable works would have been provided. The Tribunal accepts that the Applicants' observations (if that is what they were) asking what this phrase meant were conscientiously considered by SSL on behalf of the Respondent in consultation with CBG where appropriate. It has no reason to doubt Ms Maguire Wheatley's evidence on this issue having heard and seen her give evidence. This allegation of breach fails.

54. The final allegation of breach of the consultation requirements in 2019 is that following circulation of a section 20 Statement of Estimates on 12 April 2019 ("the 2019 Statement of Estimates"), the Respondent failed to make copies of the specification for the Project and related estimates available for inspection as required. This allegation is limited to the complaint that when Mr Downs and Ms Bloom were permitted to attend SSL's offices on 14 May 2019 to inspect the relevant documents, none of the estimates or specifications for the carrying out of the proposed works were available for inspection.

55. The Applicants say Mr Downs and Ms Bloom were provided with (i) a report from June 2017, (ii) F&G's Stage One Tender Report from March 2018, (iii) F&G's Second Stage Tender Report from January 2019, and (iv) certain "ECD" drawings: see the contemporaneous emails at [123-128].

56. The Applicants contend Tony and Maureen Giddings, of Flat 8A experienced "similar difficulties" and refer to an e-mail of on 29 April 2019: [356].). The Applicants refer to Ms Maguire-Wheatley's response in paragraph 12 of her statement that "I have seen the email traffic of May 2019 and would dispute Mrs Bloom's contention that she did not have sight of the documents".

57. The Applicants rely upon that Ms Maguire Wheatley's statement to the effect that "in respect of the second consultation exercise in 2019, I confirm that all of the requisite documents … were left in the lobby at South Cliff Tower for the weekend of 31 January 2020 to 04 February 2020, to enable the lessees to inspect them and ask for such copies as they required". The Applicants point to the Respondent's Statement of Case, where it said that "following calls from some leaseholders, the entire project works bundle (some 300 pages in all) was left on a table in the foyer at South Cliff Tower for a week…" [149]. The Applicants invite the Tribunal to infer from these statements and the procedure for inspection of estimates adopted in 2020 that a proper procedure for inspection of estimates had not been followed in 2019 and lessees had not had access to estimates.

58. The Applicants acknowledge the issue is whether the Respondents made "all of the estimates available for inspection" during the course of the 2019 consultation exercise as to Paragraph 4(5)(c) of Part 2, Schedule 4 to the 2003 Regulations required.

59. As indicated, the Tribunal regards it as unsafe to infer from the fact that documents and estimates were made available in the foyer in 2020, that they were not made available previously. The Tribunal paraphrases some of the

answers given by Ms Maguire Wheatley when asked about this issue. This was a complicated complex and long running project involving large sums where lessees would have regular questions and concerns, some of which were mentioned in the minutes of the lessees' meeting in May 2019. The availability of estimates and other documents in the foyer of South Cliff Tower in 2020 was clearly a helpful and sensible attempt to respond to ongoing questions and concerns.

60. The Tribunal finds that the estimates themselves were not made available to Andrea Bloom and Reginald Downs when they inspected on 14 May 2019 as the e-mail of that date at [127] confirms. The failure to provide the estimates on that date was a breach of Paragraph 4(5)(c) of Part 2 of Schedule 4 to the 2003 Regulations when read with Paragraph 2 of Part 2 of Schedule 4 to the 2003 Regulations.

61. The Tribunal does not however find that all of the documents requested by Andrea Bloom and Reginald Downs referred to in their e-mail of 14 May 2019 at [127] were the "estimates" within the meaning of Paragraph 4(5)(c) of Part 2 of Schedule 4 to the 2003 Regulations. In particular the Tribunal cannot find that the "estimates" which were required to be available for inspection included all of the drawings referred to or the stage 1 tender report dated 23 March 2018. These documents have not been seen by the Tribunal. The Tribunal makes no finding about when these documents were seen by Andrea Bloom or Reginald Downs. Ms Maguire Wheatley's uncontested evidence on this issue was that the appointment for Ms Bloom and Mr Downs to inspect had been postponed to enable the Respondent to seek legal advice about whether the Respondent's position would be prejudiced if inspection went ahead as there were claims to arrears of service charges against Ms Bloom and Mr Downs in April/May 2019.

62. The Tribunal cannot reach a finding about whether estimates were made available to Tony and Maureen Giddings within the time agreed for inspection based upon the e-mail of 29th April 2019 at [356]. The Tribunal has not heard any evidence from them and they have not provided witness statements. Ms Maguire Wheatley was not asked about when or whether arrangements were made for them to inspect.

63. No findings can be reached about the availability of estimates for inspection by other lessees within Paragraph 4(5)(c). In particular, the Applicants did not allege that they were unable to inspect the estimates at the place and time made available. Mr Southon's witness statement of 7th August 2020 [227-238] does not complain of this. He simply points to the failure to provided estimates to Andrea Bloom and Mr Downs at the appointed time. He says the documents evidence the documents were provided to them on 14 June 2019 (paragraph 30.9) [237]. This is insufficient for the Tribunal to draw any conclusions or findings about when estimates were made available for inspection to other lessees.

Next steps

64. The Tribunal will give directions for the dispensation hearing which will

include inviting all lessees to see if they object to dispensation being granted, (or the terms of such a grant) subject to submissions by the parties to these proceedings

65. This assumes that these proceedings cannot be compromised or addressed by mediation.

66. This has been a remote hearing which has been consented to or not objected to by the parties. The form of remote hearing was Cloud video Platform. A face to face hearing was not held because it was not practicable and no-one requested the same or it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are in a bundle of 380 pages (Applicants' Bundle) and 134 pages (Respondent's Bundle numbered B1- B134), supplemented by the minutes of the Respondent's AGM and lessees' meeting of 19 May 2018 provided after the hearing.

Due to the Covid 19 Pandemic communications to the Tribunal MUST be made by e-mail to rpsouthern@justice.gov.uk . All communications must clearly state the Case number and address of the premises

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.