FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/23UD/LIS/2021/0008
Property	**:**	3 Wynols Close, Broadwell, Coleford, Glos, GL16 7RR
Applicant	**:**	Two Rivers Housing
Representative	**:**	Mr J Fieldsend, counsel and Birketts LLP
Respondent	**:**	Jacob Edward Sanders
Representative	**:**	
Type of Application	**:**	Determination of liability to pay service charges and dispensation from consultation
Tribunal Member(s)	**:**	Judge D. R. Whitney Mrs J Coupe FRICS
Date of Hearing	**:**	15th June 2021
Date of Decision	**:**	6th July 2021

DETERMINATION

Background

1. The Applicant seeks a determination as to the Respondents liability to pay and reasonableness of service charges for the years 2018/2019 and 2019/2020. The Applicant has also made an application for dispensation from the strict consultation requirements.

2. The Tribunal issued directions on 22nd March 2021. The directions have been substantially complied with. The Applicant has produced a bundle and references in [] are to pages within that bundle.

3. The hearing took place remotely by video. The Applicant was represented by counsel Mr Fieldsend and also Ms Jasmine Ellicot Head of Home Ownership and Sales. Mr Saunders attended in person.

The Law

4. The relevant law is set out in Sections 19, 20, 20ZA and 27A of the Landlord and Tenant Act 1985 copies of which are attached marked Annex A.

Hearing

5. The hearing took place as a remote hearing by video. All parties were content to take part using the technology and all participants confirmed at the conclusion of the hearing that the Tribunal had afforded them every opportunity to make any statements they wished to make.

6. This represents a summary only of the matters discussed and evidence given at the Tribunal.

7. Prior to the hearing an Application had been received from the Respondent seeking to adjourn the hearing. The Respondent within the application invited the Tribunal to order that the Applicants should fund the Respondent obtaining legal advice. He relied on Daejan v. Benson [2013] UKSC 14 which he suggested provided that such a condition could be made by the Tribunal in considering whether or not to grant dispensation.

8. The application was objected to by the Applicant. They suggested that the Respondent had notice within the original directions that he could and should obtain any legal advice and it was too late to make such a request now. Further they suggested the Respondents consideration of Daejan was not correctly applying the principles suggested within the case.

9. The Tribunal refused the application. Mr Sanders explained he had spoken to The Leasehold Advisory Service and tried to obtain solicitors.

The Tribunal considered carefully the representations but was not minded to agree any adjournment. The Tribunal was satisfied that it was in the interests of justice to proceed and determine the case. The Tribunal is an expert Tribunal which is very used to dealing with unrepresented parties and given the issues in dispute we are satisfied that it is reasonable to proceed.

10. Both parties had produced various additional documents. The Tribunal had seen and considered all, and the Tribunal accepted all such documents as additional evidence.

11. Mr Fieldsend explained that the Applicants case had changed. It was not seeking to recover the costs of works required for the removal of asbestos. It accepted these were not recoverable. Further currently it accepted the amounts claimed had not been demanded save that notice of the intention to recover the costs has been given.

12. It was the Applicant's case that it had appointed Snape Contracting Services Limited. These were a contractor who would often be sub-contracted to undertake works under the framework agreement contained in the Supplemental Bundle ("SB") at [1-83]. The Applicant approached them directly and contracted with them to undertake the works on the same rates as provided for within the Framework agreement which had been subject to a Qualifying Long Term Agreement under the consultation requirements. It was the Applicants case that they had not undertaken any consultation exercise and they should have done so.

13. Mr Sanders confirmed he admitted that if he was liable his proportion of the cost under the lease should be 50% of the costs of the works being the subject of the dispute. Further he does not challenge his liability to pay the amounts which are fixed under the lease and are not therefore service charges strictly within the definition under which this Tribunal has jurisdiction.

14. Mr Fieldsend referred to the lease [38-54] made between Forest of Dean District Council and Franklyn William Webster dated 11th April 1994. It was accepted the freehold was vested in the Applicant and the leasehold in the Respondent. He suggested that the demise has the benefit of certain easements, but these are conditional upon payment for certain services. The sums are demanded under the Second Schedule. He suggests it is the intention that payments are due upon demand, but he would suggest 28 days is a reasonable period.

15. The Tribunal raised with Mr Fieldsend what had happened in respect of previous County Court proceedings referred to in the papers. Mr Fieldsend indicated he understood there had been no determination of any matters within those County Court proceedings although they had been transferred to the First Tier Tribunal. Mr Sanders indicated that they had been withdrawn by the Applicant and they had paid his costs.

16. It appeared Mr Fieldsend had not had sight of any paperwork. It was the Midland panel of the Tribunal to whom the case had been transferred by the County Court. The Tribunal expressed concern that if the proceedings were still live that its ability to determine the current matters may be limited.

17. It was agreed to adjourn so the parties could investigate what if any documents they had, and the Tribunal would make enquiries of Midland panel.

18. Upon resumption various Orders had been sent to the Tribunal which provided that the proceedings had been discontinued. The Tribunal and the parties agreed it would proceed to determine matters.

19. Mr Fieldsend relied upon paragraphs 11, 12 and 13 of his skeleton argument which set out the breakdown of the works claimed. The costs claimed were all in respect of works to the roof. The invoices were at [137 & 138] of the main bundle. The total cost of the works amounts to £6,264.59 which the Applicant says the Respondent is liable to pay 50%.

20. Mr Fieldsend relied on paragraphs 10 and 11 of the Second Schedule to the lease [88 & 89]. At page [92] is the coloured plan showing the area referred to within the lease. He suggested that given there was damage to the stairway and landing caused by water ingress the repairs to the roof were costs which could be recovered under the lease.

21. Mr Fieldsend then called Ms Ellicott. She confirmed that the contents of her witness statement were true and accurate [216-222]. She further confirmed she had signed the statement of case [62].

22. Ms Ellicot explained that the rates paid to Snape for undertaking the works were the National Federation Rates plus an increase of 25% on those agreed in 2008. This was in line with what was agreed within the framework agreement entered into under the earlier QLTA. She agreed the works for which the Applicant was seeking a contribution were those at [168] of SB.

23. Ms Ellicot confirmed on questioning by the Tribunal that the works undertaken were not to the whole roof but that part over the landing and stairwell.

24. Mr Sanders then cross examined.

25. Ms Ellicott agreed that the lease was defective compared to a modern lease. She accepted the lease was unclear and that was partly why application was made to this Tribunal. She referred to having lengthy correspondence with the Respondent which had led to the proceedings. Ms Ellicott suggested that whenever she had tried to speak to Mr Sanders this led to him making a formal complaint. As a result, there had been no meaningful discussions.

26. Ms Ellicott on questioning by the Tribunal confirmed the long term agreement was with Engie. They were based in Newcastle and were aware typically they subcontracted this type of work to Snape. As a result, the Applicant determined it was easier to go to Snape directly and pay them the same rates as under the long term contract. In her opinion these were rates widely used in the industry and were reasonable, it was in her opinion the going rate.

27. Mr Sanders then gave evidence confirming his witness statement was true and accurate [298-300].

28. Mr Sanders was cross examined by Mr Fieldsend.

29. He confirmed he did not live at the Property. He had lived there for a brief period of time in 2018 and at other times the property had been let to tenants. He assumed the works had been undertaken but had no way of knowing. He did not believe he could have undertaken an alternative costing. It was his view that he was not able to obtain a second opinion as to the costs and the reasonableness of the works.

30. He did not accept that the lease allowed recovery of these items.

31. On questioning by the Tribunal Mr Sanders said he would have employed a surveyor to look at the works if consultation had taken place. He explained he was a Welfare Rights Worker and had three buy to let properties including the subject Property.

32. He said his tenants had not complained to him about water ingress. He had not noticed any when he had visited his tenant. He explained he last visited more than 6 months ago and usually before the pandemic would visit quarterly.

33. At this point the Tribunal adjourned for lunch. Upon resumption Mrs Coupe's video feed was not working but she could be heard and could hear what was said. It was agreed the hearing would proceed and Mrs Coupe would notify the Judge if at any point she could not hear.

34. Mr Sanders submitted that whilst the Second Schedule referred to repairs to the stairway and landing [46 & 47] in his opinion the roof is part of the structure and exterior of the building. In his submission it would be a stretch to suggest that repairs to the stairway and landing extend to the roof.

35. Mr Sanders referred to the fact that the Applicant noticed the water ingress supposedly in 2018 and it took 9 months for them to have a survey undertaken in December 2018. He believed they should have been aware of the asbestos and matters were not urgent. In his view any damage to the stairway comes from the Applicants failure to keep the roof in repair.

36. Mr Sanders suggested he had suffered prejudice as he was not able to assess the works himself or employ a professional to assess them.

37. Mr Fieldsend relied upon his skeleton argument.

38. In respect of dispensation, he referred the Tribunal to Daejan. He suggested Mr Sanders had failed to identify any real prejudice. He suggested Mr Sanders had not tried to obtain any alternative quotes and yet he could have done so.

39. As to any terms for granting dispensation Mr Fieldsend accepted the Tribunal could order that the Applicants will not seek to recover their costs. In his opinion they are not entitled to in any event under the terms of the lease.

40. Mr Fieldsend suggested that if you do not repair the roof you do not repair the stairwell. There is a causal link. He referred the Tribunal to Dilapidations: The Modern Law and Practice 6th Ed. He suggests we need to look at matters in a broad way.

41. As to the figures themselves Mr Sanders had not adduced any alternative evidence. The figures were based upon the rates in the framework agreement and approved by the National Housing Federation.

42. The hearing concluded with both parties confirming they had said everything they wished in respect of the applications.

Determination

43. The Tribunal thanks both parties for the helpful way they presented their respective cases.

44. In reaching its determination the Tribunal has had regard to all the documents presented including the bundle, supplemental bundle, skeleton argument and bundle of authorities. The Tribunal read and considered everything contained within the documents. In particular we had regard to the lease [38 to 54]. Attached to this decision marked Annex B are the relevant clauses from the lease [40, 41, 46, 47 and 50].

45. Turning firstly to the question of dispensation. The case advanced at the hearing was different from that understood from the papers. The Applicants candidly explained they had not actually awarded the contact under an existing QLTA (which would have allowed limited rights of consultation). The subject works should have been subject to a complete section 20 major works consultation. They were not.

46. Mr Sanders suggests he would have instructed a surveyor. This may have been the case but ultimately the decision would have been one for the Applicant. No evidence was bought challenging the actual need for

roof repairs or suggestions that the costs were unreasonable. Ms Ellicott was able to explain how the rates applied by Snape were reached and as to how she believed these were reasonable.

47. On the evidence we heard we are satisfied that dispensation should be granted. Such dispensation is however conditional upon the Applicants not looking to recover any of the costs of this application from the Respondent. Mr Fieldsend suggested his client could not do so in his submission but we are satisfied that it is reasonable to impose such condition on granting dispensation. We impose this condition as it was the failure by the Applicants to consult which has led to the application.

48. We have considered the costs of the work. Again, we note no real evidence was adduced by Mr Sanders to suggest the costs are unreasonable. We note the costs have been calculated by reference to rates approved by the National Housing Federation. The costs are in line with the framework agreement upon which the Applicant had undertake a qualifying long term agreement consultation in the past.

49. On balance taking account of all the evidence before us, notably that given by Ms Ellicott, we are satisfied on a balance of probabilities that the costs of the works are reasonable.

50. We turn now as to whether these are costs which may be recovered from the Respondent under the lease.

51. As was accepted in evidence the form of lease is far from typical. The Tribunal agrees that the amounts set out in clause 3 of the lease [40] are not variable service charges and so these are not matters over which the Tribunal retains jurisdiction. We observe however that the payment in clause 3(ii) specifically refers to the payment covering costs of repair maintenance and renewal of the external decorations.

52. At clause 9 of the lease [43] the Applicant covenants to keep in repair the structure and exterior and to make good any defects to the structure. It is clear from this that the Applicant has in our judgment an obligation to maintain the roof in good repair.

53. The Applicant relies upon the Second Schedule and paragraphs 10 and 11 [46 and 47]. We have also considered paragraphs 7, 8 and 9 all of which have been referred to in correspondence between the parties.

54. We remind ourselves that the test we must apply is one of applying a natural meaning to the words and if there is an ambiguity this ought properly to be resolved in favour of the Respondent in this case being the party not seeking to rely upon the terms.

55. Paragraph 11 of the Second Schedule provides "..subject to the payment of one half of the expense of maintaining and keeping the whole of any parts of such stairway or landing in repair". Mr Fieldsend suggests that given it was the disrepair to the roof that caused damage to the stairway

and landing necessitating repair it must be reasonable that such costs can be recovered. He refers to what says is the law relating to damp proofing and an extract from Dilapidations: The Modern Law and Practice referred to above. He suggests a broad meaning as to what costs may be recovered should be applied.

56. We do not accept Mr Fieldsend's submissions.

57. In our judgment it is for the Applicant's predecessor's draftsman to have been clear. What is clear is that the Applicants are required to maintain the roof and keep it in repair. We suggest it is settled law that simply because a party has such an obligation this alone does not entitle them to recover the costs. The lease must be clear to allow recovery and here it is not.

58. The clause relied upon is part of the lease granting rights to the Respondent leaseholder. In our opinion a narrow interpretation should be applied and the costs recoverable are only those relating specifically to repairs and maintenance of the areas as defined in the plans. In our judgment as a matter of fact this does not include the roof.

Conclusion

59. We grant the Applicant dispensation from the consultation requirements in respect of the roof works conditional upon the Applicant not seeking to recover any of the costs of these proceedings.

60. We determine the amounts incurred are reasonable.

61. In our judgment the sums are not recoverable under the terms of the lease and particularly under the Second Schedule.

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