**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case Reference** | **:** | **CHI/00ML/LSC/2023/0012** |
| **Property** | **:** | **79 Denmark Villas, Hove, BN3 3TH** |
| **Applicants** | **:** | **(1) Alison Joseph (Ground Floor Flat)**<br>**(2) Mary Whitehead (First Floor Flat)**<br>**(3) Faye Pitcher (Second Floor Flat)** |
| **Representative** | **:** | **Mary Whitehead** |
| **Respondents** | **:** | **Jeffrey Frederick Hillman &**<br>**Linda Ann Hillman** |
| **Representative** | **:** | **Clare Whiteman of Dean Wilson LLP** |
| **Type of Application** | **:** | **Liability to pay and reasonableness of service charges, Section 27A of the Landlord and Tenant Act 1985**<br>**Dispensation, Section 20ZA L&TA 1985** |
| **Tribunal Members** | **:** | **Judge Paul Letman MBE**<br>**Dallas Banfield FRICS** |
| **Date and venue of** | **:** | **Havant Hearing Centre**<br>**27 June 2023** |
| **Date of Decision** | **:** | **27 July 2023** |

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**DECISION WITH REASONS**

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## Introduction

1. By an application dated 27 June 2022 ('the Application') the Applicant tenants seek a determination under section 27A of the Landlord and Tenant Act 1985 ('the 1985 Act') both as to their liability to pay and the reasonableness of various service charges claimed by the Respondent landlord. The relevant years for which a determination is sought are 2019, 2020, 2021 and 2022.

2. In addition, the Applicants seek an order under section 20C of the 1985 Act limiting their liability for payment of landlord's costs as service charge and similarly, in so far as necessary, under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act') in relation to any liability to pay an 'administration charge in respect of litigation costs,' i.e. contractual costs in a lease.

3. By order dated 27 February 2023 the Tribunal made procedural directions for the preparation of statements of case, witness statements and a hearing bundle. The parties substantially complied with these save in respect of the hearing bundle, with the result that unhelpfully the tribunal was provided with two competing bundles.

4. In the lead up to hearing, it is noted for completeness that an application to adjourn was made by the Respondent due to the unavailability of one its witnesses, namely Philip Hall, of the former managing agents. The application was refused and was not renewed, as it might have been, at the hearing.

5. Further, very belatedly, on 26 June 2023 the Respondent made an application under section 20ZA for dispensation from the consultation requirements under section 20 of the 1985 Act in respect of two items of expenditure incurred in 2020 for allegedly emergency works of repair. By email to the tribunal in response the Applicants stated that they were opposed the application.

## Preliminary Matters

6. At the hearing of this matter, two preliminary matters arose for consideration. The first, raised by the tribunal, was in relation to the fact that the Respondent's representative and her firm had in February of this year instructed the Judge in his professional capacity as a member of the Bar in an unrelated matter (a right to manage appeal in the Upper Tribunal).

7. The Tribunal referred the parties in terms to the test for apparent bias in *Porter v Magill* and invited each party to consider the matter and raise any objection that they wished. Neither party wanted to object, the Applicants stating that they preferred the hearing to proceed and were content for the tribunal as constituted to hear the matter. The Respondents concurred.

8. Secondly, the Tribunal invited submissions from the parties on the late application for dispensation. The Applicants made clear that they opposed the application, but after some clarification confirmed that they were content to deal with the same on the merits without need of any adjournment. Ms Whiteman for the Respondent relied on the fact that 'the [Respondents] have been [legally] unrepresented and unaware of their ability to make such an application.'

9. In the light of the sensible approach taken by the Applicants and the undoubted desirability of dealing with all the issues between the parties in the course of the listed hearing and without delay, the Tribunal duly accepted that the Application should proceed.

10. However, this was despite the fact that as Mrs Whitehead rightly pointed out the Respondents' professional managing agent should at all material times have been fully cognisant of the requirement for dispensation and the need to make an application and the fact that no explanation was even offered by the Respondents for the failure to apply for dispensation at the time its statement of case was filed by its instructed solicitors.

**The Inspection**

11. For the record it is noted that no inspection of the subject premises was required by the tribunal or the parties and none has been made. Although the Tribunal has had the benefit of viewing the premises (virtually) on line and some photographs of the premises were included in the papers.

**The Jurisdiction**

12. As referred to above the present application is made under section 27A of the 1985 Act, which provides as follows:

***27A Liability to pay service charges: jurisdiction***
*(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to—*
*(a) the person by whom it is payable,*
*(b) the person to whom it is payable,*
*(c) the amount which is payable,*
*(d) the date at or by which it is payable, and*
*(e) the manner in which it is payable.*
*(2) Subsection (1) applies whether or not any payment has been made…*
*(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).*

13. Further, the application necessarily engages section 19 of the 1985 Act that establishes a statutory test of reasonableness limiting the recovery of relevant costs making up any service charge as follows:

*'19(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –*
*(a) only to the extent that they are reasonably incurred, and*
*(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;*
*and the amount payable shall be limited accordingly.*
*(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.'*

14. In relation to liability to pay the principal matter raised by the Applicants, as referred to in greater detail below, is compliance with the consultation requirements under section 20 of the 1985 Act and the Service Charges (Consultation Requirements) (England) Regulations 2003. In relation to qualifying works for which public notice is not required, these provide under Schedule 4, Part 2, for service of (1) a Notice of Intention, describing in general terms the works to be carried out (2) a Statement of Estimates (per regulation 4(5)(b)) setting out at least two estimates received and a summary of any observations, and (3) a notice, on entering the contract to carry out the works, explaining the reasons for awarding the contract to carry out the works in every case where the person with whom the contract is made was not the nominated person or did not submit the lowest estimate (see regulation 6). The regulations impose a duty to have regard to observations in relation to the proposed works and the estimates, but no such requirement attaches to the third notice.

15. As regards the application for a section 20C order, the section itself provides as follows:

***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, residential property tribunal or leasehold valuation tribunal or the First-tier Tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application…*
*(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.*

16. The relevant case law in relation to section 20C was reviewed by the Deputy President in the Upper Tribunal in *Conway v Jam Factory Freehold Ltd* [2013] UKUT 0519 (LC) at paragraphs 51 to 59. His review began necessarily with reference to the Court of Appeal decision in *Iperion Investments Corporation v Broadwalk House Residents Limited* (1996) 71 P & CR 34 and the well known passages from the judgment of Peter Gibson LJ, before continuing with detailed

reference to the decision of the Lands Tribunal (HH Judge Rich QC) in *Tenants of Langford Court (Sherbani) v Doren Limited* LRX/37/2000.

17. The Deputy President in *Conway* quoted with apparent approval the following passages from the judgment of HHJ Rich QC in *Doren* relating to the exercise of the 20C discretion:-

*"28. In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise.*

*29. I think that it can be derived from [Iperion] that where a court has power to award costs, and exercises such power, it should also exercise its power under s20C, in order to ensure that its decision on costs is not subverted by the effect of the service charge.*

*30. Where, as in the case of the LVT, there is no power to award costs, there is no automatic expectation of an Order under s.20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct.*

*31. In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under s.20C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust. Excessive costs unreasonably incurred will not, in any event, be recoverable by reason of s.19 of the Landlord and Tenant Act 1985. Section 20C may provide a short route by which a tribunal which has heard the litigation giving rise to the costs can avoid arguments under s.19, but its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant, in circumstances where even although costs have been reasonably and properly incurred by the landlord, it would be unjust that the tenants or some particular tenant should have to pay them.*

18. The review in *Conway* continued with reference to *Schilling v Canary Riverside Development PTE Limited* LRX/26/2005 where HHJ Judge Rich QC reiterated that the only guidance as to the exercise of the statutory discretion which can be given is to apply the statutory test of what is just and equitable in the circumstances. Noting that the observations he had made in his earlier decision were intended to be "illustrative, rather than exhaustive" of the matters which needed to be considered, and adding significantly (at paragraph 13) that:

*"The ratio of the decision [in Doren] is "there is no automatic expectation of an Order under s.20C in favour of a successful tenant." So far as an unsuccessful tenant is concerned, it requires some unusual circumstances to justify an order under s20C in his favour."*

19. A similar point was made by the Deputy President in *Re SCMLLA* [2014] UKUT 58 (LC), where it was noted that an order under s.20C should not be made lightly or as a matter of course, since its effect was to interfere with the parties' contractual rights. Whilst in *Church Commissioners v Derdabi* [2011] UKUT 380 (LC) it was

suggested that there may be circumstances where the landlord should only be prevented from recovering his costs of dealing with issues upon which the tenant succeeded.

20. More recently in *Bretby Hall Management Co Ltd v Pratt* [2017] UKUT 70 (LC) His Honour Judge Behrens referred to the decision in *Conway v The Jam Factory* [2013] UKUT 0592, which he took to contain a full review of the authorities, and summarised the applicable principles as follows:

*"1. The only principle upon which the discretion should be exercised is to have regard to what is just and equitable in the circumstances.*

*2. The circumstances include the conduct of the parties, the circumstances of the parties and the outcome of the proceedings.*

*3. Where there is no power to award costs there is no automatic expectation of an order under s 20C in favour of a successful tenant although a landlord who has behaved unreasonably cannot normally expect to recover his costs of defending such conduct.*

*4. The power to make an order under s 20C should only be used in order to ensure that the right to claim costs as part of the service charge is not used in circumstances which make its use unjust.*

*5. One of the circumstances that may be relevant is where the landlord is a resident-owned management company with no resources apart from the service charge income."*

21. This Tribunal duly relies upon the guidance detailed above in its consideration of the Applicants' application for a direction under section 20C and for completeness in relation to the equivalent and like worded provision in respect of litigation costs claimed as administration charges under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 (although it is not apparent that any relevant claim for costs is made in this regard by the Respondents).

**The Lease**

22. The hearing bundle includes the lease dated 10 April 1986 of the Third Applicant's (Second Floor) Flat made between Mr J F Hillman and Mrs L A Hillman as landlord and Helena Mary Kissane granting a lease ('the Lease') of the second floor flat at 79 Denmark Villas ('the Building') for a term of 99 years from 07 March 1986 on the terms set out therein. The leases of each of the four flats in the Building are understood to be in substantially the same form as the Lease.

23. The Lease terms include an express covenant (at clause 2(24)) on the part of the tenant to pay to the Lessors a Service Charge *'.. in respect of the costs expenses and outgoings incurred by the Lessor in complying with his obligations contained in the Third Schedule as to the matters which are set out in the Fifth Schedule hereto…'*. Whilst by clause 3, the Lessor covenants with the Lessee to observe and perform the stipulations and obligations on their part set out in the Third Schedule.

24. The Third Schedule sets out the Lessor's obligations under 8 paragraphs, including the following:

> *'2. To keep the main structural parts of the Building including the roof roof timbers main walls and external parts thereof and the foundations thereunder and all cellars cisterns tanks sewers watercourses drains pipes wires gutters ducts and conduits not used solely for the purpose of the Flat or the other flats in the Building and the common parts in good and substantial repair and condition throughout the term hereby granted.*
>
> *3. To keep the Building including the Flat adequately comprehensively insured to its full reinstatement value …*
>
> *4. To paint or otherwise decorate adequately all wood and ironwork and where previously painted the stone and outside rending of the exterior …*
>
> *5. To maintain the other flats in the Building in good and substantial repair and condition and in the event of such flats being sold to impose in the Lease thereof covenants mutatis mutandis similar to the covenants herein contained and containing the same Schedules and at the request and cost of the Lessees to enforce such covenants against the owner or occupier of the said flat.*
>
> *6. To comply with the requirements orders or regulations now or hereafter made by any local or other authority …*
>
> *7. To keep or cause to be kept proper books of account of all costs charges and expenses incurred in carrying out this obligation hereunder and of all contributions received by the Lessors or their agents for the time being from the lessees of the flats in the Building in accordance with the covenants in that behalf contained in their respective leases.'*

25. The Fifth Schedule contains, in so far as is presently material, the following expenses and matters in respect of which the Lessee is to contribute twenty-five per centum:

> *'1. The expenses of maintaining repairing and redecorating and renewing (but not so as to include any expenses incurred in modernising or refurbishing the other flats in the Building or as a consequence thereof):-*
>
> *(a) The main structure of the Building and in particular the foundations external walls roof balconies (except in so far as such is the responsibility of the lessee of any of the flats in the Building) balustrading garden walls (except as aforesaid) railing brickwork stacks …*
>
> *3. Any fees paid out by the Lessors to the Managing Agents Accountants Surveyors and legal fees in connection with the management of the Building together with any value added tax or other charge which may be made in respect of services by Statutory Authority.'*

26. The Applicants and Respondents are all currently lessees and the Respondents are now the registered freehold owner of the Block and the Applicants' immediate landlord.

**The Contested Charges**

27. The Applicants' case was presented carefully and ably by the Second Applicant. For convenience each service charge year in issue was taken in turn, with the Respondents replying as appropriate. This decision follows the same pattern, setting out the parties' respective submissions followed by the Tribunal's decision on each contested year.

***1) Service Charge Year 2019***

28. The challenge in respect of 2019 relates to external repair and redecoration works as detailed in the Application (pages 10 and 11 of 13) and in the Applicants' Statement of Case (bundle pages 39 to 41) and their detailed (5 page) Reply. The primary allegation is that the Respondents failed to consult in accordance with section 20 of the 1985 Act in respect of the overspend of £10,785.64 (including a £420 scaffold charge (see below)). The original contract sum being £32,029.50 and the final cost in the sum of £42,815.14.

29. More particularly, the Applicants by their application dispute the following items (comprised within or at least contributing to the overspend), briefly:

- £136 for replacement glass pane to a window in the basement flat,
- £490 for replacement of a sash window which required repeat visits by contractors to correct initial work of a defective standard
- £1,000 spent on 20 sqm of additional render to walls
- £166 spent on the front boundary wall which together with the above item they alleged was carried out to correct earlier defective work
- £4,977 spent on repairs to the external staircase, in excess of the £1,500 contract provisional sum
- £1,320 on lighting for the external staircase, not provided for in the Schedule of Works and an unnecessary extra
- £2,658 for work on the rear dormer flat roof, again substantially in excess of the £500 provisional sum in the Schedule of Work
- £360 spent on joinery over and above the provisions of the contract
- £420 spent in 2021 on additional scaffold charges incurred when the contractors were recalled to rectify defective work undertaken in the original contract.

The Applicants also contest, by their statement of case, the sum of £1,320 for 'Additional scaffolding charges not included in the specification.' They rely as well on the fact that the work was scheduled for completion (including the cancelled Phase 3) within 16 weeks of the 6 May 2019 start date, were not finally completed until 28 September 2021.

30. Thus the Applicants maintain that the contract was allowed to overrun in terms of time schedule and costs. Further, it is said that the Respondents signed off the project and released funds before the work was completed to a satisfactory

standard, with the contactors having to be recalled multiple times to correct poor quality work.

31. The Respondents reject the challenges above for the reasons set out in their Statement of Case dated June 2023 at paragraphs 3 to 17, supported by the witness statements dated of Mr Philip Hall, the surveyor who dealt with the 2019 specification and works for the Respondents and Mr Clive Perry of the managing agents, Ellmans. Mr Perry also gave brief but nonetheless helpful explanatory evidence in person to the Tribunal.

32. Firstly, as regards the requisite section 20 consultation, they maintain that in all material respects there was compliance. Firstly, Notice of Intention dated 13 August 2018 was duly sent out to all lessees, together with a description of the proposed works. This was contained in the Specification and Schedule of Works dated July 2018 prepared by Philip Hall, which as confirmed in evidence before the tribunal was duly attached. No observations were received in response.

33. On 20 September 2018 a Statement of Estimates was then sent to all lessees, referring to the 4 estimates received for the works, namely:

| Contractor | Phase 1 | Phase 2 | Phase 3 | Total | Total inc. fees and VAT |
|---|---|---|---|---|---|
| Deacons Bldg Services Ltd | £11,970.00 | £11,250.00 | £5,180.00 | £27,200.00 | **£37,740.00** |
| Packham Construction | £12,710.00 | £10,260.00 | £5,240.00 | £27,363.70 | **£37,960.99** |
| Bryant Decorators Ltd | £13,005.00 | £11,340.00 | £5,325.00 | £28,186.50 | **£39,071.77** |
| Woodland Construction | £12,960.00 | £11,325.00 | £5,370.00 | £28,913.63 | **£40,053.40** |

In the event it appears that Packham Construction were preferred and awarded the contract, presumably on the basis that theirs was the lowest price for the Phase 1 and 2 works which it was decided were the only 2 phases at that time which were to be carried out.

34. As to the specific challenges raised above, the Respondents expressly concede the charge of £490 for the replacement sash window and the £136 for the glass pane but rejects the others.

35. With regard to the alleged failure to consult in respect of those items of works where the costs significantly increased, the Respondents maintained that these were within the scope of the consultation carried out and that the fact there was an increase in costs does not invalidate the consultation or disqualify the cost. In particular in relation to the challenged items the Respondents submitted as follows:

- £1,000 spent on 20 sqm of additional render to walls; the Respondents relied upon the Specification and Schedule of Works dated July 2018, Item 24 'Rendering' and the provisional quantities thereunder. Also, the unchallenged explanation in Mr Hall's evidence (paragraph 5) that the final costs were based on the square meterage on site and related to the areas already provided for in the specification.

- £4,977 spent on repairs to the external staircase; the Respondents noted that there is no issue the rear external stair was included within the Schedule of Works and referred the tribunal to item 16, 'Rear External Spiral Staircase' and the Provisional Sum of £1,500 thereunder for the overhaul and repair of the stair. The Respondents reiterated the detailed explanation of the costs contained in paragraph 5 of Mr Hall's statement, including the fact that in the event two contractors were asked to price three options and the quote for repairs agreed in liaison with leaseholders.

- £1,320 on lighting for the external staircase; in this regard the Respondents again referred to and relied upon the witness statement of Mr Hall. Specifically, to his evidence that upon electrical contractors inspecting the [existing] installation, they reported that they were not able to sign off the repairs and that a new system would be required. It was accordingly maintained, and Mr Perry confirmed, that the new lighting (at £990) and power supply (at £330) were part and parcel of completing the works to the appropriate standard.

- £2,658 for work on the rear dormer flat roof; it was common ground that the Schedule of Work included (at Item 12) a Provisional Sum for works in connection with the possible repair/renewal to the rear dormer. On inspection, in accordance again with the unchallenged evidence of Mr Hall, it was found that the felt was old and tired and in order to give it an extra 5 years or so of life he instructed an overlay of an additional layer of felt with some work to the dormer cheek. In these circumstances the Respondents again maintained that there had been a valid consultation in respect of these works and that in the absence of any complaint as to the requirement to carry them out or the incurred cost, the costs were reasonably incurred and properly payable.

- £360 spent on joinery over and above the provisions of the contract; as detailed in the Packham final account this is the cost of 4x replacement half cills, again the Respondents contend that these costs were both within the scope of the consulted works (see in particular Scope of Works items 15 and 25 and the provisional quantities and sums included therein) and reasonably incurred.

- £420 spent in 2021 (additional scaffold charges) in relation to remedial work; the Respondents submit that this sum was not (and could not be) part of the final account for the Packham Contractor's works, where the account was dated February 2020. In any event the Respondents referred to and relied upon a deduction of £550 from the final retention in recognition of the fact 'that Packham Construction were not performing as they would have hoped.' Albeit the Respondent went on to submit that this amount could serve only as a general discount. The challenge was rejected accordingly.

- £1,310 for additional scaffolding charges not included in the specification; in this regard the Respondents submit firstly that the costs of scaffold access were covered by the consultation, given that they were referred to in the Scope of Works as a cost in each phase of the works. Secondly, that these costs were reasonably incurred in that following the omission of Phase 3 an additional scaffold walkway was required to get from the front to the rear as it was not practical to obtain day to day access through any of the flats.

36. Given the detailed justifications for each of these specific items of work and increases in cost, the Respondents deny that the work was carried out without consultation and denied that Philip Hall Associates failed to keep proper control of the costs incurred.

*Decision*

37. As set out above (paragraph 14) the consultation requirements for qualifying works (for which public notice is not required) require principally a Notice of Intention describing the proposed work 'in general terms,' followed by a Statement of Estimates setting out the amount specified in at least 2 estimates 'as the estimated cost of the proposed works.' The Applicants do not challenge the fact that these notices were served, nor do they challenge the validity of those notices. Their case is in short that there should have been a further consultation in respect of the increased costs incurred.

38. However, the fact that a final account exceeds the original estimate does not in and of itself give rise to a requirement for a further consultation. The statutory provisions are not exacting. The requirement to describe the works only 'in general terms' is necessarily flexible, so that works that are reasonably within the scope of the description are covered by the consultation. Likewise in relation to costs, the requirement is for estimates only and it would be wholly unrealistic if any variation in the subsequent contract price were to invalidate the prior consultation or give rise to a further consultation requirement if the works remained within the scope of the earlier general description.

39. In particular, it is not unusual for a specification to provide only a provisional or contingency sum for elements of the proposed works, as was done in this case in relation to the render, the external staircase, the dormer roof, the joinery repairs etc. In the tribunal's view a notice is not invalidated because it contains such a provision (and the Applicants did not contend as much) nor will the landlord be prevented from recovering a higher sum if the provisional sum turns out to be insufficient. Provided of course in every instance the increased cost is in itself reasonably incurred, both in terms of the requirement for the increased quantity of work and the reasonableness of the rate or price charged.

40. In the light of the foregoing in our judgement the Applicants' challenge to the 2019 service charges is misconceived, both at a general level and in relation to each of the specific costs mentioned above. Each of those costs are either expressly or reasonably within the scope of the works described in the Notice of Intention and the accompanying Specification and Schedule of Works. Thus, in relation to the lighting system works where there is no express reference, it is clear on the

evidence and we duly hold that these works were required properly to complete the external stair repairs and within scope of the same.

41. Further, where the works were the subject of a Provisional Quantity or Sum, there has been no challenge to the requirement for the increased extent of the works or the reasonableness of the final account charges for those works. The claimed figures are accordingly in our view properly due and payable. The same it seems to us can be said of the sum of £166 for the front wall repair works which, even if linked to some previously failed repairs, were still required works and where no challenge has been raised to the actual cost.

42. As for the £420 in respect of snagging works apparently carried out in 2021, we accept the Applicants argument that this is referrable to defective works or at least works that were not carried out to a reasonable standard and should be deducted from the 2019 totals. However, it seems clear that this has in effect already done by virtue of the £550 deducted from the retention, assuming a reduced final account figure was charged to the service charge account. **The Applicants will, therefore, be entitled to credit for the fact they have paid the £420 amount in 2021.**

***2) Service Charge Year 2020***

43. The subject of the Applicants' challenge in respect of this service charge year is the costs incurred in the remediation of a leak to the rear of the building that occurred on 16 December 2019 causing damage to a bedroom. The invoiced costs of the remedial works comprise three invoices; an invoice dated 24/12/10 from MAC Scaffolding Services in the sum of £1,200 (albeit actually charged to the 2019 service charge account), an invoice (undated) from Sussex Decorators in the total sum of £1,720 and it is said by the Respondents a further invoice from Philip Hall dated 17 February 2020 in the sum of £810 for investigation of this and a subsequent leak.

44. Two grounds of challenge are raised by the Applicants. The first is that the works were in relation to earlier defective works; in which respect the Applicants rely upon an email dated 06 March 2020 from the managing agents that states 'the cause of the leak was due to an external defect in the fabric of the building…'. Secondly, the Applicants rely upon the fact that there was no consultation in respect of these repair works, so that the landlord should be limited to the statutory limit of £250 per apartment.

45. The Respondents deny that the works arose out of any earlier failed or defective work. At paragraph 20 of its Statement of Case, it states that 'it was found specifically that the dormer flat roof at the rear was not leaking,' the latter being the subject of the Packham works considered above. Paragraph 10 of Mr Hall's witness statement is to the same effect. Moreover, the Respondents note that there is no evidence that these works were either defective or unnecessary. As for the works being 'temporary' the Respondents stressed that this should not be misunderstood, but referred to them being limited repairs rather than the more comprehensive remedial works carried out subsequently in 2021.

46. As to the absence of any consultation, the Respondents acknowledged that there had been none. The work had, so Mr Hall explains in his evidence, been carried out on an urgent basis shortly before Christmas to remedy the leaks and resolve the matter for the occupier for the holiday period. The Respondents accordingly relied on their dispensation application. In this regard it was submitted that no evidence had been adduced by the Applicants, on whom the factual burden lies, identifying any prejudice to them which they claimed they would not have suffered had the consultation requirements been fully complied with but they would suffer if an unconditional dispensation were to be granted (see in this regard *Daejan v Benson*). In the premises, the Respondents maintain that no grounds for refusing dispensation were made out.

*Decision*

47. The Respondents' first-hand evidence from Mr Hall that the contested costs related to a fresh roof leak and were found specifically to be unrelated to the works to the rear dormer carried out by Packham Contractors is categoric and relatively compelling. Against this there is no clear contrary evidence from the Applicants that the cause of the leak was a failure in the Packham works. The email of March 2020 does not link the leak to any prior defective works. In the circumstances, the tribunal prefers the Respondents' factual account in this regard. In any event though it is common ground that these works were required.

48. As to whether these limited remedial works were carried out to a reasonable standard, this was queried by the parties including the Respondents themselves in October 2020 (their email of 28 October 2020 refers) when there had been further water ingress to the rear. But the Respondents' statement of case makes no admissions in this regard and there is no detailed or sufficient other evidence upon which on our view we can make a finding to condemn these works or to justify applying any discount to the costs incurred.

49. The issue of payability turns, therefore, on whether dispensation under section 20ZA should be granted or not. In this regard, in accordance with the decision in *Benson*, it is not enough merely for the Applicants to establish non-compliance, that is admitted. The burden rests with the Applicants to identify some prejudice to them resulting from the failure to consult. However, no evidence was adduced by them at all in this regard. Accordingly, there is no tenable basis upon which the tribunal can properly refuse the application for dispensation, which is therefore granted, albeit necessarily upon the condition that no costs of or connected with the application for dispensation may be recovered from the leaseholders in service charges or otherwise.

### *3) Service Charge Year 2021*

50. The disputed charges in this year as addressed by the parties' respective statements of case amount to the sum of £3,450 for various scaffolding costs. These comprise 4x invoices from J Q Construction as follows:

| | Invoice No. | Invoice Date | Amount | Description |
|---|---|---|---|---|
| (1) | 399 | 09/02/21 | £420 | To erect scaffolding to window snags as per report from Philip Hall 26th November. |
| (2) | 0084 | 20/10/20 | £1,980 | To erect scaffold to the rear of the building<br>To install a handrail around the flat roof |
| (3) | 447 | 15/03/21 | £600 | Cost of scaffold hire to the end of March 2021 |
| (4) | 590 | 14/07/21 | £540 | Cost of scaffold hire for April, May and June 2021 |
| | | | | |

51. The first of these invoices is disputed for reasons already considered and decided upon above. As for the remaining invoices for erecting and retaining a rear scaffold, the Applicants' allege that the scaffold was initially erected to facilitate 'Flat Roof Works' costing £10,020 proposed by the Landlord but not pursued. As for the continuing hire, the Applicants allege that there was no reasonable justification for these costs and they were not reasonably incurred. Further, they submit that the Respondents failed to consult pursuant to section 20 and are limited accordingly to £250 per lessee.

52. The Respondents' Statement of Case explains that these further scaffold costs were incurred following an incident on or about 24/25 September 2020 when there was water ingress into the building (at the rear) following so it seemed the collapse of a satellite dish which fell from the north chimney stack.

53. Mr Hall's evidence appears incorrectly to conflate this incident and these costs with the earlier December 2019 leak the subject of Sussex Decorators costs. However, nothing appears to turn on his explanation, given that in the event the Respondents have credited (the y/e 2020 accounts refer) the principal invoice in the sum of £1,980 for erecting the scaffold and installing the hand rail. What remains in issue before us, rather, is simply the continuing scaffold hire costs from about December 2020 through to June 2021.

54. The Respondents allege that the scaffold was erected and thereafter retained merely in order to investigate the leaks/collapse of the dish and rather than for the purpose of carrying out works. In this regard they refer to and rely upon the MacConvilles' report dated 23 February 2021 and their inspection of the roof over the rear of the building utilising the subject scaffold. Further, given that the purpose of the scaffold was not the carrying out of works but for access to inspect and diagnose the issues with the roof, the Respondents contend that no consultation was required under the terms the 1985 Act.

*Decision*

55. On the basis of the evidence referred to above the tribunal is satisfied that whatever the initial justification for the scaffolding, it was retained primarily for the purposes of facilitating inspection by MacConvilles, if not others, and hence the

continued hire charges with which we are concerned were incurred for the same reasons. It seems clear also that the scaffold was removed when MacConvilles concluded that it was not suitable for the purposes of carrying out the required repair works to the roof, ultimately carried out by Holford Building Services (see the y/e 2022 service charges in issue below).

56. In these circumstances, the Respondents are correct in law that there was no requirement to consult in relation to these charges. The consultation applies only in the case of qualifying works. The full sum of £1,140 is, therefore, potentially recoverable (rather than the Respondents being limited to 4x £250). However, in our judgement no adequate explanation of the extended period of hire has been provided and we find this to be excessive. Whilst some further time might reasonably have been required following MacConvilles' report, it seems to us the scaffold ought to have been struck by the end of April and **we accordingly disallow the hire for May and June 2021 (@£150 +VAT pcm).**

***4) Service Charge Year 2022***

57. The principal issue in respect of the service charges for this year relates to the consultation for the repair works carried out and completed on 13 May 2022 by Holford Building Services. No issue arises in relation to the works themselves. On the contrary the Applicants approved both the scope, standard and effectiveness of these remediation works. However, they contend that the consultation was 'fundamentally flawed' because it transpired that one of the only two contractors named in the consultation and from whom an estimate was obtained was unable to carry out the works.

58. The two contractors named in the second notice (the statement of estimates) dated, were Holford Building Services, whose tender was in the sum of £27,414) and JQ Property Services whose tender was £27,210.00. But in the event JQ Construction was refused permission to erect scaffolding by the owners of the adjacent property, so as to be 'disallowed from carrying out the work on the property.' In these circumstances the Applicants contend that the Respondents should have procured an alternative quote, and that their failure to do so rendered the section 20 notice invalid.

59. The Respondents disagree. They contend that the Applicants' submission (above) is misconceived, the consultation was valid when made and cannot in principle be invalidated by subsequent events.

60. Additionally, an issue arises in respect of legal fees of £261 plus VAT charged in this year's accounts. The invoice relates to advice given to the freeholder concerning an alleged loss of rent claim made by Ms Pitcher as a result of water ingress. The costs represent 54 minutes of time at an hourly rate of £290, for reviewing the claim, advising the Landlord on their position and drafting the letter dated 02 August 2021 denying liability for the various reasons set out therein.

61. The Applicants contend that such costs are outside the scope of the service charge provisions of the Lease. The Respondents submit the contrary, arguing that these

are clearly '*legal fees in connection with the management of the Building…*' and recoverable.

*Decision*

62. As regards the challenge to the consultation, in our judgment the Respondent is correct. The statement of estimates in relation to the proposed works properly named two contractors from whom estimates had been obtained (as well as naming two others who had failed to tender) and was plainly in accordance with the Regulations and valid when made. It would be wrong in principle, if not perverse, if a valid consultation could be retrospectively invalidated as claimed and we have no hesitation in rejecting this submission.

63. As to the solicitor's costs, this raises a point of construction of the specific terms of the Lease. In this regard we remind ourselves that questions of construction are nonetheless fact sensitive, in that the meaning of the words use in the lease must be considered in their documentary, factual and commercial context applying the necessary commercial common sense as explained by the Supreme Court in *Arnold v Brittan* [2015] UKSC 36.

64. More particularly in relation to costs in connection with the management of the building, it is noted that in *Conway v Jam Factory Freehold Ltd* [2013] UKUT 0592 (LC) the Deputy President held that the costs of dealing with an application under section 24 of the Landlord and Tenant Act 1987 for the appointment of a new manager (based upon allegedly poor current management) were costs incurred 'in the management of the building.'

65. To like effect also the earlier decision in *Iperion v Broadwalk House Residents* (1995) 27 HLR 196 where the Court of Appeal held that the costs incurred in an unsuccessful, but properly brought, forfeiture action were within the scope of a service charge provision enabling recovery of 'the proper cost of management of [the Building].'

66. More recently again *Bretby Hall Management Co Ltd v Pratt* [2017] UKUT 70 (LC), it was held that the costs incurred in defending threatened legal proceedings threatened by a tenant fell within the scope of a 'sweeper clause' which allowed recovery of 'All other expenses (if any) incurred by the Manager in and about the maintenance and proper and convenient management and running of the development.'

67. Nonetheless, it is borne in mind that the authorities are not necessarily all one way. For example, in *Fairburn v Etal Court Maintenance Ltd*. [2015] UKUT 639 (LC) the Upper Tribunal rejected the landlord's contention that legal costs incurred in unsuccessfully defending proceedings brought by a tenant for breach of the landlord's repairing covenant were costs incurred in the 'proper management administration and maintenance of the blocks of flats …'.

68. In the present case, however, the relevant costs clause must be construed in its own context and on its own terms. Notably, these are markedly different from any of the clauses with which the above 'management' decisions are concerned. Here the

lead schedule is the Third Schedule, this defines the acts or things to be done by the landlord in respect of which it can then recover its costs under the provisions of the Fifth and Sixth Schedule. The latter are, therefore, necessarily circumscribed by the terms of the Third Schedule.

69. On this basis it is clear in this case that the reference to legal costs in connection with management, is limited to management in the performance of the landlord's obligations in the Third Schedule. Those obligations do not include meeting or responding to the claims of tenants arising out of alleged breaches of the landlord's obligations or indeed otherwise. **The particular legal costs claimed by the landlord in this instance are not therefore in our judgement within the scope of paragraph 3 of the Fifth Schedule and are not recoverable, due or payable**.

**Section 20C/Paragraph 5A**

70. In the light of the above, it is also the case in our judgment that the costs of these proceedings to the landlord are not legal costs that are recoverable under the terms of the service charge provisions in the lease. Were it otherwise, however, and for completeness, the tribunal would have made only a limited direction under section 20C.

71. As will be clear from the foregoing, the Applicants have achieved only relatively limited success in their application; two concessions made before the hearing by the Respondents, a minor discount on the further scaffolding costs (where the Respondents have already credited £1,980) and a reduction in respect of the legal charges of £261 plus VAT.

72. In the light of the principles and case law referred to above (see paragraphs 15 to 21 above), and having regard to the outcome, in our judgement in the circumstances it would only be just and equitable to make an order under Section 20C, and for completeness also under Paragraph 5A, depriving the Respondents of 20% of their costs incurred in connection with these proceedings.

73. In reaching this conclusion we note of course that the Respondents are also a tenant and would have to meet 25% of the costs in any event. But that in our view is not a relevant consideration. It has no impact on the level of costs which the Applicants would be required to meet and is separate from the assessment of what is just and equitable as between them and Mr & Mrs Hillman in their capacity as landlords.

74. **The tribunal accordingly directs, for completeness, that 20% of the costs incurred by the Respondents in connection with these 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 Applicants, and equally under Paragraph 5A makes an order limiting the Applicants' liability if any to pay an administration charge in respect of any such costs to 80% of those costs. Subject always to our conclusion (above), that such legal costs are not recoverable as service charges in any event.**

## 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 by email to rpsouthern@justice.gov.uk 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.

Dated as above.