RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Sections 20ZA, 27A and 20C Landlord & Tenant Act 1985

DECISIONS & DETERMINATIONS

Case Numbers:	
S.27A	CHI/00ML/LIS/2007/0004
S.20ZA	CHI/00ML/LDC/2007/0013
Property:	59B Clyde Road Brighton BN1 4NN
Applications:	
S.27A	
Applicant:	Miss H Block
Respondents:	Mr & Mrs S J Hope, Mr & Mrs J A Warner Miss C Kenyon
S.20ZA	
Applicants:	Mr & Mrs S J Hope, Mr & Mrs J A Warner
Respondents:	Miss H Block Miss C Kenyon Mrs Azzopardi
Directions:	
S.27A	12 January 2007 01 April 2007
S.20ZA	09 February 2007 27 April 2007 10 April 2007
Hearing:	07 June 2007
Appearances:	Miss H Block Mr S J Hope, Mr J A Warner, Mrs Warner Miss C Kenyon
Decision:	19 July 2007
Tribunal Members:	Ms J A Talbot MA Mr B H R Simms FRICS MCIArb Ms J Herrington

Case Nos. CHI/00ML/LIS/2007/0004 & CHI/00ML/LDC/2007/0013

Property: 59B Clyde Road, Brighton BN1 4NN

Applications

1. There were 2 Applications. The first was made by Miss H Block on 12 January 2007 pursuant to Section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination as to the payability of certain service charges demanded in 2006. The second was made by Hope & Warner Ltd on 1 April 2007 pursuant to Section 20ZA of the 1985 Act for dispensation of all or any of the consultation requirements contained in Section 20 of that Act.

2. Directions were issued on 9 February and 27 April 2007 in respect of the S.27A application and on 10 April 2007 in respect of the S.20ZA application indicating that both applications would be heard together. Both parties complied with the Directions to provide Statements of Case together with supporting documentation.

3. At the date of her application was made, Miss Block had sold Flat B to Miss C Kenyon. In reply to correspondence from Mr Hope and Mr Warner the Tribunal confirmed that nothing in the legislation prevented Miss Block from making the application even though she was no longer the tenant. Miss Kenyon, the current tenant of Flat B, was originally joined as an applicant to the S.27A application but later clarified that she opposed Miss Block's application and supported the landlord. She was therefore subsequently treated as a co-respondent. Mrs Azzopardi, tenant of Flat C, was not a party to the S.27A application, did not apply to be joined and did not respond in any way to either of the applications.

4. At the hearing it emerged that the joint freehold owners of the property were in fact Mr and Mrs S J Hope and Mr and Mrs J A Warner in their personal capacity, and not Hope & Warner Builders Ltd, a separate building company of which Mr Hope and Mr Warner were directors. The applications were therefore amended accordingly.

Jurisdiction

5. The Tribunal has the power, under Section 27A of the 1985 Act, to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (S.18 Landlord and Tenant Act 1985). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.

6. The Tribunal has the power, under Section 20ZA of the 1985 Act, to dispense with all or any of the consultation requirements under Section 20 of the Act in relation to any qualifying works if it is satisfied that it is reasonable to do so.

Lease

7. The Tribunal had a copy of the lease dated 15 February 1983 of the first floor flat known as Flat B. The provisions relating to the calculation and payment of the service charge are to be found at Clause 4. The tenant covenants to pay the tenant's share of one third of the annual maintenance cost by payments in advance on account at the landlord's discretion on 25 March and 29 September each year. The annual maintenance cost is the total of all sums actually spent by the landlord in carrying out his covenants under Clause 5(2), which include an obligation to maintain, repair and renew the main structure of the building.

8. The landlord is further obliged, at Clause 4(3), to produce and serve on the tenant an annual certified maintenance account as soon as practicable after 25 March each year, following which the tenant must pay any balance due. Clause 4(7) provides that the landlord will use his best endeavours to keep the annual maintenance cost at "the lowest reasonable figure consistent with the due performance and observance of his obligations" under the lease.

Inspection

9. The Tribunal members inspected the property before the hearing, accompanied by Mr Warner. Miss Block did not attend. It comprised a substantial 4 storey corner property at the junction of Clyde Road and Warleigh Road, situated on sloping ground in a residential area of central Brighton. It was constructed in the 1870's and subsequently converted into 3 flats. The ground floor was probably originally a shop, with a bay window and mineral felt covered flat roof above. There were 2 entrance doors, one giving access to the ground floor flat and the other to a staircase leading to the 2 upper flats, Flats B and C.

10. To the south side of the property, level with the top of the ground floor bay window, was a horizontal timber beam running along the wall and around the corner ending at the first entrance door. A visible scar showing where the render had been repaired with a cement infill was apparent. Externally the property was in good decorative order. The windows were a combination of original wooden timber sashes and replacement UPVC replacements.

11. Internally the Tribunal members inspected the ground floor flat and flat B. Both were in good condition. The works to replace the timber beam had involved removing and re-instating part of the ground floor flat walls. The work including redecoration was complete. The interior of Flat B had not been disturbed.

Issues in dispute

12. The service charges in dispute concerned structural works carried out in 2006 by Hope & Warner Builders Ltd to replace a timber beam at a total cost of £6,114.70. The amount demanded from Miss Block was one third of this cost, namely £2,038.23. She disputed the reasonableness of the charges.

13. Mr Hope and Mr Warner sought a retrospective dispensation of the consultation requirements in relation to these works.

14. Miss Block sold her flat to Miss Kenyon before the completion of the works and the Tribunal was asked to determine whether she would incur any additional service charge liability as a result of the applications.

Hearing

15. The hearing took place in Hove on 7 June 2007. It was attended by Mr Hope, Mr Warner and Miss Block all in person. Mrs Warner and Miss Kenyon attended in the morning only. Mrs Azzopardi did not attend and was not represented.

Facts

16. On the basis of its inspection, the documents produced and submissions made by the parties at the hearing, the Tribunal found the following facts:

    (a) Mr Hope and Mr Warner were builders who ran their own Brighton based building company, Hope & Warner Builders Ltd. The freehold of 59 Clyde Road was held by Mr and Mrs Hope and Mr and Mrs Warner in their personal capacities. It was their only investment property and managed it under their trade name of Hope & Warner. They had owned it since 2001. They also directly owned the ground floor flat which was usually let on an assured shorthold tenancy. Both upper flats were demised on long leases. Miss Block was the tenant of flat B from September 2002 until 17 November 2006 when the flat was sold to Miss Kenyon.

    (b) There were no certified maintenance accounts. In the papers before the Tribunal was a document headed "maintenance account" covering the period 09/04/2001 to 10/03/2006. This was essentially an informal list showing a running total of income and expenditure items. These were regular payments received of £750, and payments out of insurance and 2 repairs: cleaning and clearing a gully in 2002 and decoration of hallway in 2006. The final entry, marked "total to date", was £6,006.02. The Tribunal was told that the £750 entries referred to annual maintenance payments of £250 per half year for each of the 3 flats but these are not itemized in the list.

    (c) At the hearing Mr Warner produced a maintenance account in similar form for the period 01/04/2006 to 01/03/2007. This showed a higher opening balance of £6,756.02, similar receipts of £750 and also 2 entries for exterior painting costs and "payments received for beam" from Hope, Azzopardi and Block of £2,038.23 each. The painting costs, totaling £5,655.27 were not at issue before the Tribunal. He also produced a maintenance account dated 01/10/2006 showing an "interim payment for decorating" of £4,241.45, structural engineers report of £293.75, "outstanding decorating account" of £1,413.82 and a "third share of building works" of £2,038.23. This equated to one third of the total cost of £6,114.70 as in the Hope & Warner Builders Ltd estimate for the works in dispute (see below).

    (d) On 18 May 2006 Hope & Warner Builders Ltd prepared an estimate of £5,655.27 for exterior decoration at the property, to include scaffolding, hacking off and repair of loose render and redecoration of masonry and woodwork. No other estimates were obtained. The tenants agreed this estimate and work commenced in late July when scaffolding was erected and some render repairs carried out. In the course of these repairs the timber beam over the ground floor bay was exposed and discovered to be decayed in parts. Hope & Warner Builders Ltd wrote on 3 August 2006 to the tenants that they had "revealed an old rotten timber beam" and

instructed a structural engineer to inspect and report. They carried on with render repairs pending the production of the report.

(e) Mr Jonathan Ings, structural engineer of Ings Engineering Limited, reported on 24 August. He found that the timber was "present for the full extent of the front (southern) elevation and for a part of the side (east) elevation". Having been "subject to moisture ingress for many years ... some sections of the timber are now very badly decayed". In his view the "extent of decay to the front elevation is considered to be significant in terms of the structural integrity of the building and it is recommended to replace the bay window beam and replace the remaining timber with infill masonry [to] extend down the elevation until sound timber has been discovered". He further commented that as "the remaining section of reasonable timber ... will be subject to further moisture and decay ... it would be worthwhile considering replacing the full extent of the timber incorporating the replacement lintel". Mr Ings attached drawings and detailed load bearing information. Hope & Warner Builders Ltd sent a copy of the report to the tenants.

(f) Meanwhile Miss Block, having also been told verbally on site by Mr Hope and Mr Warner that the beam was rotten and would have to be replaced, wanted to get a second opinion. She asked another builder working nearby to look at the exposed beam. He advised her verbally that the beam could be repaired rather than replaced. On 10 August 2006 she obtained her own report from Stephen Bromley Associates Limited. Mr Bromley was a chartered surveyor, not a structural engineer. His view was that there were "moderately significant areas of decay to the beam along the Clyde Road side together with small areas of decay to the ends of the beam on the Warleigh Road side ... the timber beam in the area of the bay window is in quite good condition and ... massively over sized for the extent of the opening".

(g) Mr Bromley's recommendation was to "cut way the decayed timbers to the Clyde Road side, leaving the beam over the bay window. The work should be undertaken in sections ... and the area infilled with masonry ... the ends of the beam should be thoroughly treated with preservative". Similar repairs were recommended on the Warleigh Road side. Miss Block obtained an estimate dated 22/08/2006 from B Edwards of Carpentry and Building Services based on the required works Mr Bromley's report of £1,389 plus VAT. She sent copies to Hope & Warner Builders Ltd. She did not obtain any alternative estimates for the more extensive work.

(h) Mr Hope and Mr Warner decided it would be preferable to replace the whole of the timber beam with galvanized steel beams in accordance with Mr Ings' report. In their view this was the best way to deal with the problem. Hope & Warner Builders Ltd prepared an estimate dated 31/08/2006 for a total of £6,114.70 broken down as follows:

"cost of above works	£4,829.00
p.c. sum for building notice	£ 150.00
p.c. sum for scaffold	£ 225.00
total including p.c. sums	£5,204.00
VAT @ 17.5%	£ 910.70
Grand total	£6,114.70

(i) At this point a dispute arose between Miss Block, and Mr Hope and Mr Warner. Miss Block took the view that the proposed works were too costly and that full replacement of the beam was not necessary. She therefore did not agree to the work being carried out. Mr Hope and Mr Warner wanted to replace the beam. They did not accept Mr Bromley's report as adequate, although it was not shown to Mr Ings, and neither was the Carpenter estimate, as the firm was unknown to them. They did not obtain any other estimates for the work. They told Miss Block she should get her own structural engineer's report, as in their experience structural engineer's recommendations would be required by the local authority's Building Control.

(j) Several conversations took place on site and unfortunately communication between the parties became somewhat strained. Because of the dispute, and because at around that time Miss Block put her flat on the market for sale, no further steps were taken to progress the work. Miss Block felt that an impasse had been reached and applied to the Lease Mediation service for mediation. Mr Hope and Mr Warner felt that Miss Block's objections and failure to obtain her own structural engineer's report were unreasonable and refused mediation by letter dated 07/10/2006.

(k) The attitude of the other tenant, Mrs Azzopardi, was not known. Miss Block found there were language barriers in communicating but Mr Hope and Mr Warner said they communicated with a relative who spoke better English. They produced a typed letter dated 29 September 2006 signed by "M L Azzopardi" stating "I have seen the report from the Consulting Structural Engineers Ings Engineering Limited and agree to the remedial work to the building being carried out by them". This wording was somewhat confusing as the work was to be done by Hope & Warner Builders Ltd and not by Ings. The accounts dated 01/02/2007 recorded a payment of £2,038.23 received from Mrs Azzopardi on 15/12/2006.

(l) Hope and Warner Builders Ltd eventually carried out the full replacement work during November and December 2006. Their tenant moved out of the ground floor flat in early November as vacant possession was required given the nature and extent of the works. In answer to questioning from the Tribunal, Mr Hope and Mr Warner explained that their firm's quote for the work itself was based on the cost of 4 employees over 10 working days at £160 per day inclusive of all materials. It was intended to be a reasonable and competitive quote. The work was spread over several weeks in sections. It was signed off by the Building Control Inspector in January 2007.

(m) Miss Block found a purchaser for her flat, Miss Kenyon. The sale was completed on 17 November 2006. As part of the pre-contractual negotiations Miss Block's potential liability for the repair works was identified and dealt with, according to the financial completion statement (attached to a letter dated 15 November 2006 from Ms Block's conveyancing solicitors Zeckler & Co) by way of a retention of £3,000 from the sale price of £165,000. At the hearing Miss Block confirmed that she had accepted liability for payment of her contribution towards the works to enable the sale to proceed. On 15 December 2006 Miss

Kenyon's solicitors, Arc Property, requested a cheque for £2,038.23 "in accordance with the contract" following receipt of a "final invoice" from Hope & Warner Builders Ltd confirming completion of the works. The retention sum was accordingly released and acknowledged by Arc on 4 January 2007. Miss Kenyon said her concern and reason for being joined in the proceedings was to ensure that she had no liability to make any further payments for the works, which she thought had been dealt with in the course of the sale and purchase.

(n) Miss Block's case in essence was that although she had moved and paid for the works well before making her application, she had applied to the Tribunal on a point of principle. She felt that the landlords had not acted properly or in accordance with the correct procedure. When the dispute arose, she had found out about the statutory consultation procedure, of which she was not previously aware and which she contended had not been followed. She argued that the full replacement work was not necessary and that a cheaper repair, as recommended by her surveyor, would have sufficed. She, not Miss Kenyon, had paid for the work out of the retention of the sale price.

(o) Miss Block further contended that the method by which Mr Hope and Mr Warner took payments direct from the maintenance fund was irregular. For example, on 30/08/2006 they had paid themselves, as Hope & Warner Builders Ltd, £4,241.45 as part payment towards the exterior painting costs, from the funds in the account. This was 80% of their firm's estimate. In Miss Block's view, the decoration work had only just commenced and was not 80% complete. The available funds should have been used to defray the cost of work to the decayed timber beam.

(p) Mr Warner and Mr Hope's case was that they had always acted reasonably in good faith in the best interests of the property, which was an investment for them and their wives. They had managed the property on a relatively informal basis and had tried to act in agreement with the tenants and keep them fully informed. Under questioning from the Tribunal, they admitted that in the summer of 2006 they had paid little attention to the lease terms and been unaware of the statutory consultation procedure. Since the application was made they had sought legal advice and made the retrospective Section 20ZA application.

(q) In relation to the timber beam replacement work, Mr Hope and Mr Warner contended that it was reasonable to undertake this work rather than a less extensive repair and reasonable for them to rely on their structural engineer's report especially in light of their experience the local authority's Building Control requirements.

(r) As to why the work had not commenced earlier, Mr Warner and Mr Hope said that they were waiting for Miss Block to obtain her report and quotes. Once it was clear she had sold the flat they waited for the sale to complete. With the change of weather they had been concerned about dampness affecting the ground floor flat although they had not thought of using tarpaulin earlier to protect it. They accepted that the property was not structurally unstable and that they had not treated the works as urgent between August and November or December 2006.

(s) On the question of payments, Mr Hope and Mr Warner said that they had taken payments for Hope & Warner from the maintenance fund in accordance with their estimates for the decoration and repair works. In reply to questions from the Tribunal it emerged that they had not raised invoices from their building firm to themselves as landlords. They had not obtained alternative estimates. In their view, 80% of the decoration works had been completed by the time they received Mr Ings report, and it was reasonable for Hope & Warner Builders Ltd to receive payment of this proportion of the cost in accordance with the estimate. The final cost as charged was the same as the estimate.

Decision

17. The Tribunal carefully considered all the written and oral evidence and the facts found. Generally the Tribunal found that there was a lack of awareness on the part of both Mr Hope and Mr Warner, and Miss Block, about their rights and responsibilities as landlords and tenant respectively under the terms of the lease.

18. In particular, Mr Hope and Mr Warner appeared not to appreciate the distinction between their role as landlords, owning the freehold in their personal capacities along with their wives, and their role as directors of Hope & Warner Builders Ltd. For example, they did not raise invoices from their firm to themselves as landlords but simply paid themselves out of the maintenance fund for work done by their firm as and when they thought it appropriate. Although there was no question of bad faith, the Tribunal found this practice irregular. Similarly, they failed to keep proper certified accounts in accordance with the lease terms and had not sent out service charge demands. This may well reflect their lack of experience in owning and managing leasehold properties. The Tribunal accepted that they felt they were acting in the best interests of the property, but this did not relieve them of their obligation to act in accordance with the terms of the lease and the statutory requirements.

19. In relation to the exterior decorating and the disputed repair works, Miss Block appeared to be under the mistaken impression that as a tenant she had some control or decision making power in relation to the nature and scope of the repair works and payments made from the maintenance fund. She felt she was under some responsibility to produce her own report and estimates when this should in fact be the landlord's responsibility under the consultation procedure. Mr Hope and Mr Warner contributed to this confusion by delaying the repair works and expecting Miss Block to obtain a further structural engineer's report and estimates, when this was not her responsibility.

20. In the Tribunal's view, Mr Hope and Mr Warner were entitled to rely on their own structural engineer's report and their own experience as builders in deciding whether to replace the decayed timber beam or carry out less extensive repairs. Both courses of action were possible and would have been reasonable solutions to the problem. It is for the landlord to decide how best to meet his repairing obligations under the terms of the lease, subject to the reasonableness requirements. It is settled law that when faced with a choice of action a landlord is not obliged to take the cheapest option, although the cost for the works to which the service charges relate must be reasonably incurred. The Tribunal concluded that Mr Hope and Mr Warner's preference for their structural engineer's report over Mr Bromley's survey report was reasonable, and the replacement of the beam was also reasonable, even though it was more expensive.

21. In terms of whether the Hope & Warner Builders Ltd estimate was reasonable, the Tribunal was satisfied on balance with Mr Hope and Mr Warner's evidence on the cost of labour and materials, taking into account the need for acrow props and struts, the replacement beam, additional rendering repairs and necessary making good to the interior of the ground floor flat.

22. However, the Tribunal was not satisfied that it was reasonable in all the circumstances to dispense with the statutory consultation requirements. Mr Hope and Mr Warner admitted that they were unaware of these provisions and had not, at the material time, taken any legal advice or other steps to inform themselves of their statutory obligations. Although they kept the tenants informed by sending a copy of the Ings report and their own Hope & Warner Builders Ltd estimate, they did not obtain any other competitive estimates. The Tribunal did not accept that the works were so urgent that they had to be carried out before any consultation could take place. There was no immediate risk to the structural integrity of the building. Indeed when the dispute arose, Mr Hope and Mr Warner simply failed to progress matters. They first told Miss Block she should get her own structural engineer's report and then waited until she had sold her flat before starting the timber beam replacement works.

23. In fact, during the time between discovering the decayed timber beam and obtaining the Ings report and actually carrying out the work – i.e. 24 August and December 2006 – Mr Hope and Mr Warner would have had ample time to follow the consultation procedure. The statutory scheme is clear and is set out in the Service Charges (Consultation Requirements) (England) Regulations 2003. It consists of a 2 stage process. The first stage is to serve a notice of intention to carry out works with a 30 day response period for tenants to make observations, to which the landlord must have regard, and to suggest if they wish the name of a person from whom the landlord should try to obtain an estimate; the second stage requires the landlord to obtain estimates, at least one of which must be from a person wholly unconnected with the landlord, to supply these to the tenants and again invite observations within a further 30 day period.

24. The Tribunal took into account the fact that this was a relatively small property with only 2 tenants to be consulted and that Mr Hope and Mr Warner had informally kept them informed. However, the Tribunal gave weight to the fact that Miss Block had clearly indicated her opposition to the works at an early stage and that the consultation procedure exists to protect the interests of both the landlord and the tenant in such circumstances, but primarily the tenants, who would have to pay for the works through the service charges. Mrs Azzopardi took no active part in the proceedings, but was arguably equally disadvantaged by failing to have the opportunity to be consulted and make observations. The Tribunal also took seriously the fact that Mr Hope and Mr Warner failed to obtain any alternative competitive estimates from anyone unconnected with them; their only estimate was of course from their own building firm.

25. As a result, therefore, although the charges were reasonably incurred, the maximum amount Mr Hope and Mr Warner could recover from each tenant by way of service charges for the work to the timber beam in accordance with Section 20 of the 1985 Act and the Regulations was £250. If Miss Block were still the tenant, under the terms of the lease at Clause 4(3) of the lease, "any amount repayable to the tenant" would be applied at the option of the landlord towards future payments due. As she is no longer the tenant, the difference of £1,788.23 between the amount actually paid of £2,038.23 and the maximum payable of £250, should be refunded to her.

26. The matter was complicated by the sale of Flat B on 17 November 2006. Normally, in accordance with the terms of the lease, any balance payable at the end of the accounting year in relation to service charge expenditure in excess of payments on account would be payable immediately after the service of the certified accounts, which were due as as soon as practicable after 25 March 2007. As regards the sale of Miss Block's flat to Miss Kenyon, the fact that the works were eventually completed after the sale did not affect Miss Block's contractual liability to pay the service charges. There was clear evidence from correspondence between the conveyancing solicitors and from the final sale accounts that the contract provided for Miss Block to pay the service charges for the repairs and that this was dealt with in the normal way by means of a retention from the proceeds of sale. There was therefore no question of Miss Kenyon being liable or indeed being entitled to any reimbursement as a result of this decision.

Section 20C

27. Miss Block made an Application under Section 20C for an order that any costs incurred by the landlord in connection with these proceedings should not be regarded as relevant costs to be included in any future service charges payable by the Applicants. At the hearing, Mr Hope and Mr Warner confirmed that they did not intend to charge any costs to the service charge account. Accordingly, it was not necessary for the Tribunal to make any order under Section 20C.

Determination

Section 27A

28. The Tribunal hereby determines, for each and every reason stated above, that the sum of £6,114.70 for repairs and replacement timber beam was reasonably incurred and would be payable as service charges for the acounting year 2006-2007 were it not for the effect of the S.20ZA determination below.

Section 20ZA

29. The Tribunal hereby determines, for each and every reason given above, that it is not reasonable retrospectively to dispense with the consultation requirements in respect of these works.

30. Therefore the contribution payable by Miss Block in respect of these works is £250.

Dated 19 July 2007

Signed

Ms J A Talbot
Chairman