CHI/21UD/LSC/2009/0177
CHI/21UD/LDC/2010/0004

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985 S.27A

UPPER FLAT, 60 MOUNT PLEASANT ROAD HASTINGS EAST SUSSEX TN34 3HS

Applicant: BARRY MARKHAM (Landlord)

Represented by: SIMON SINNATT of counsel, instructed by Meneer Shuttleworth, solicitors

First Respondent: MARK NIGEL SALANSON (Lessee, Top Floor Flat)

Represented by: In person

Date of hearing: 14 April 2010

Members of the Leasehold Valuation Tribunal:

MA Loveday BA Hons MCI Arb

Mr NI Robinson FRICS

Mr JS McAllister FRICS

INTRODUCTION

1. These are combined applications relating to major works to 60 Mount Pleasant Road Hastings East Sussex TN34 3SH. The applications are made by the landlord who seeks a determination of liability to pay for the works under section 27A of the Landlord and Tenant Act 1985 and dispensation from consultation requirements under section 20ZA of the Act. There is also an application under s.20C of the Act that the costs incurred by the landlord in connection with the application should not be added to the service charge. The respondent is the lessee of the top floor flat.

2. Directions were given on 28 January 2010 when it was ordered that the applications should be heard together. A hearing took place on 14 April 2010 where the applicant was represented by Mr Simon Sinnatt of counsel and the respondent appeared in person.

INSPECTION

3. Before the hearing, the Tribunal inspected the property in the presence of both parties. The building is located on the southern side of Mount Pleasant Road and comprises a mid terrace bay fronted late Victorian house on four stories including basement / garden level with rendered and painted elevations under a concrete interlocking tiled roof. At some stage, the property has been converted into two maisonettes, both with independent entrances. There are no internal common parts.

4. The north (front) side of the roof could be seen from the opposite side of the road and appeared in serviceable condition. The roof covering would originally have been of natural slate and has therefore been replaced, probably in excess of fifteen years ago. There is an eight flue party chimney stack on the east side of the front slope and it appeared that some movement had taken place to this at some stage in the past. Some moss growth was noted to the flaunching at the base of the northern chimney pot. The guttering and downpipes would have been of cast iron originally but much had been replaced in plastic, albeit probably many years before. Some vegetation growth was visible in the guttering. The rendering to the front elevation generally

appeared fair but it was particularly noted that the decorations to the timber windows were poor.

5. The rear elevation was accessed through the basement / garden level of the lower maisonette. Inspection was hampered by the presence of scaffolding to the elevation but one could see that whilst some windows remained the original timber, some had been replaced in PVCu. As with the front elevation, the guttering and downpipes were a mixture of the original cast iron and replacement plastic. There was a further set of rear bay windows serving the lower three stories. Both the render and timber windows were noted to be much more weathered than on the northern front elevation.

6. During the inspection, the Tribunal's attention was drawn by both parties to items that were likely to be discussed at the hearing. To the front elevation, these included the new metal handrail up the side of the steps from the basement all the way to the upper maisonette entrance and the open circular ventilation hole into the front basement store area. The handrail forms part of the specification under discussion but has been installed by way of "loan" by the applicant apparently following pressure from the local Environmental Health Department. The specification allows for the open circular ventilation hole to be provided with a PVCu window but at the inspection the applicant agreed that this proposal would be deleted. The Tribunal inspected the top floor rear bathroom window which the respondent noted contained rotten timber and said that he considered it should be replaced as part of the work. Some staining from water penetration was noted to the bathroom ceiling at the west party wall abutment; whilst it was noted that this had only occurred recently, no particular issue was taken with regard to this. From the adjoining rear bedroom, the Tribunal was also shown the head of the rear bay where the respondent had undertaken his own temporary repairs to minimise water penetration but where it was considered that more major repairs should be included in the proposed works. From the rear garden, the respondent drew to the Tribunal's attention that the rendering to the lower two floors appeared to have been renewed previously and

appeared to be in much better condition than to the two upper floors. The respondent also wished the Tribunal to be able to see the condition of the rear party chimney stack which could not be seen from the rear garden but from a private car park to the west. Following consent from the car park occupiers, this was inspected from ground level. Although viewing from a distance of around 100 yards, a vertical crack could clearly be seen to the stack with missing render and exposed brickwork below. Necessary repairs had not been allowed for in the specification. Finally, the Tribunal looked at the rear elevation from Manor Road to the east from where one could see the cornice / string course at the head of the rear bay which matches the other buildings in the row and which helps to throw rain drips away from the wall. The respondent suggested that this need not be replaced in order to save funds when the render was renewed.

FACTS

7. None of the main facts appear to be in dispute. By a leased dated 23 July 1985 the upper flat was demised to the respondent's predecessor in title. The material provision is at clause 5(2) and requires the lessee to:

> *"Pay to the Lessor in addition to the rents hereby reserved one half of the expenditure incurred by the Lessor in carrying out their obligations under Clause 6 hereof and the other heads of expenditure as the same are set out in the Third Schedule hereto plus a Management fee of 10 per cent thereof and where major items of repair or decoration are to be carried out to pay to the Lessor a reasonable deposit in respect of the Lessee's contribution the amount of such deposit to be decided by the Lessor and to be taken into account when the work has been completed and the subsequent contribution requested."*

8. The applicant landlord first instructed a firm of consulting engineers EAR Sheppard to produce a Specification of Works in September 2005. Notices under s.20 of the Landlord and Tenant Act 1985 were then sent out. It is accepted that those notices were defective. In 2008, the landlord therefore re-started the process again. In late 2008 he obtained estimates for the same works from Ellis Building Contractors (£31,674 + VAT), Hills & Pollington (£23,780.89 + VAT), Coles & Sons (£36,440 + VAT) and South Coast Structures Ltd ("SCS" - £28,499 + VAT). On 11 December 2008, he served a Notice of Intention under paragraph 1 of Part 1 to Schedule 4 to the Service

Charges (Consultation Requirements) (England) Regulations 2003. On 6 January 2009, the respondent replied with observations. These pointed out that the specification was 3 years old and that it needed to be revised. The suggested revisions included further works (complete replacement of box sash windows, repairs to the cracked and leaking bay window roof to the rear, renovation or replacement of the rear chimney stack and hacking off the render to the top two floors at the rear). The respondent also suggested various omissions and variations (the deletion of a new round upvc window in the basement, venting to be supplied to a door and the omission of repairs to the rendering to the lower two floors). The respondent nominated himself as a contractor to do the works.

9. The respondent submitted a tender on 20 April 2009. Following this, it appears that the estimates were further amended. The final figures were:

    1 Coles & Sons: £36,440 +VAT.

    2 Ellis Builders: £31,674 + VAT.

    3 SCS: £28,499 + VAT.

    4 Hills & Pollington: £24,536.89 + VAT.

    5 The applicant: £20,952 + VAT.

10. On 1 June 2009 the applicant sent out a Statement of Estimates and a "paragraph (b) statement" under paragraph 4 of Part 2 to Schedule 4 which referred to the above figures. The statement included a schedule which dealt in some detail with the observations made by the respondent. Without repeating them here, the gist of those responses was that the landlord had no objection to the inclusion or omission of various works from the schedule if extra works were identified or some of the works proved "*unnecessary*". These matters would be considered "*once a contractor has been appointed and the timescales established.*"

11. On 14 August 2009, the landlord submitted a Notice of Reasons under paragraph 6 of Part 2 of Schedule 4. This stated that the applicant had entered into a contract with SCS at a price of £28,499 + VAT. The notice gave reasons for not selecting the lowest tender as follows:

"a) The estimate received from SCS Limited falls just above the lowest estimate received from all contractors
b) The landlord has seen the quality of the work undertaken by SCS Limited and was very happy with the standard"

12. A demand for a 50% contribution to the £28,499 plus VAT of £4,274.85 was made on the same day. On 1 December 2009, a further demand was made for the same basic sum, but with VAT then at £4,987.33 and a 10% *"supervision fee on the estimate"* in the sum of £2,849.90 plus VAT of £498.73.

THE STATUTORY PROVISIONS

13. The relevant provisions of the Landlord and Tenant Act 1985 are:

19 Limitation of service charges: reasonableness

(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.

20 Limitation of service charges: consultation requirements

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

(a) complied with in relation to the works or agreement, or

(b) dispensed with in relation to the works or agreement by (or on appeal from) a leasehold valuation tribunal.

...

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

...

20ZA Consultation requirements: supplementary

(1) Where an application is made to a leasehold valuation tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—

"qualifying works" means works on a building or any other premises, and

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

...

27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

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

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

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

(e) the manner in which it would be payable.

14. The relevant provisions of the consultation requirements are at Part 2 of Schedule 4 to the Service Charges (Consultation Requirements) (England) Regulations 2003:

Notice of intention

1. *- (1) The landlord shall give notice in writing of his intention to carry out qualifying works –*
(a) to each tenant ...
(2) The notice shall -
(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;
(b) state the landlord's reasons for considering it necessary to carry out the proposed works;
(c) invite the making, in writing, of observations in relation to the proposed works; and
(d) specify -
(i) the address to which such observations may be sent;
(ii) that they must be delivered within the relevant period; and
(iii) the date on which the relevant period ends.
(3) The notice shall also invite each tenant ... to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

Inspection of description of proposed works

2. *- (1) Where a notice under paragraph 1 specifies a place and hours for inspection -*
(a) the place and hours so specified must be reasonable; and
(b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed works

3. *Where, within the relevant period, observations are made, in relation to the proposed works by any tenant ... the landlord shall have regard to those observations.*

Estimates and response to observations

4...

(2) Where, within the relevant period, a nomination is made by only one of the tenants ... the landlord shall try to obtain an estimate from the nominated person.

...

(5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9) -

(a) obtain estimates for the carrying out of the proposed works;

(b) supply, free of charge, a statement ("the paragraph (b) statement") setting out -

(i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and

(ii) where the landlord has received observations to which (in accordance with paragraph 3) he is required to have regard, a summary of the observations and his response to them; and

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

(6) At least one of the estimates must be that of a person wholly unconnected with the landlord.

...

(8) Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (b) statement relates.

(9) The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by -

(a) each tenant; and

(b) ...

(10) The landlord shall, by notice in writing to each tenant ... -

(a) specify the place and hours at which the estimates may be inspected;

(b) invite the making, in writing, of observations in relation to those estimates;

(c) specify -

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(11) Paragraph 2 shall apply to estimates made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

Duty to have regard to observations in relation to estimates

5. *Where, within the relevant period, observations are made in relation to the estimates by ... any tenant, the landlord shall have regard to those observations.*

Duty on entering into contract

6. *- (1) Subject to sub-paragraph (2), where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, by notice in writing to each tenant ... -*

(a) state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and

(b) where he received observations to which (in accordance with paragraph 5) he was required to have regard, summarise the observations and set out his response to them.

(2) The requirements of sub-paragraph (1) do not apply where the person with whom the contract is made is a nominated person or submitted the lowest estimate.

(3) Paragraph 2 shall apply to a statement made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

THE ISSUES

15. At the outset of the hearing, it was agreed that the only sums in issue were those set out in the demand dated 1 December 2009. The applicant sought determinations under s.27A(3) that if costs were incurred for the works, a service charge would be payable, and if so, the amount which would be payable.

16. The applicant also asked the Tribunal to deal with an application for a determination under paragraph 5 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 in relation to administration charges. These related to legal costs and disbursements of £7,235.43 in connection with the application to the Tribunal. Mr Sinnatt produced a Schedule of Costs in this regard. The Tribunal declined to deal with the application. This further matter had not been mentioned in the application itself or in the directions. It was referred to briefly in the applicant's statement of case dated 18 February 2010, but no specific mention was made of the statutory provisions. The Schedule of Costs was served at the hearing without any explanation and the sums involved were significant. The Tribunal therefore considered that serious prejudice was caused to the respondent. By contrast, there was nothing to stop a specific application being made by the applicant at a future date, so he was not caused significant prejudice. There would be a possible saving of costs (both for the parties and in relation to the resources of the Tribunal) in dealing with the matter on the day, but this did not outweigh the prejudice to the respondent.

THE APPLICANT'S CASE

17. Mr Sinnatt relied on his skeleton argument and further developed his arguments in oral submissions to the Tribunal.

18. As far as the s.27A application was concerned, the applicant stated that there was no dispute that the sum of £18,417.47 demanded on 1 December 2009 was recoverable as an interim service charge under clause 5(2) of the Lease. He submitted that the main issue related to Part 2 of Schedule 4 to the Service Charges (Consultation

Requirements)(England) Regulations 2003. There was no question about the form of the Notice of Intention dated 11 December 2008 or the form or timing of the Statement of Estimates dated 2 June 2009 or the Notice of Reasons dated 14 August 2009. The respondent had replied to the Notice of Intention on 6 January 2009 and his response included perfectly valid "*observations*" under paragraph 1((2)(c) of Part 2. He had however, also nominated himself as a "*person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works*" under paragraph 1(2)(3) of Part 2. There was no case law on whether this was a proper "*nomination*", but on a strict construction there was an obligation to obtain an estimate from the lessee. The applicant had therefore sought an estimate from the respondent and one came in on 20 April 2009. That estimate had been considered along with the others and appeared in the Statement of Estimates on 2 June 2009 and the Notice of Reasons dated 14 August 2009. Some slight changes had been made to the figures in the two notices but these were trivial and minor. As for any question of reasonableness, the landlord had not simply gone ahead and carried out the works, it had paused to consider the tenders and estimates and to include or exclude certain items of cost. That made the process more reasonable, not less. Furthermore, the landlord had not rejected the observations made by the respondent. On 1 July 2009, the applicant's agent wrote to say that the contractor would not proceed with any of the items mentioned by the respondent until the applicant had the chance to inspect each item raised by the respondent - and if in doubt, to seek advice from a building surveyor. It was within the landlord's discretion not to call in a building surveyor to do a new schedule of works in 2008, or to look at changes to the 2005 specification at a later stage. In relation to the landlord's duty to have regard to observations under paragraph 3 of Part 2, Mr Sinnatt referred to ***Woodfall*** at para 7.198:

> *"The landlord is clearly not bound to adopt such observations. He is not, however, free to disregard them entirely. It is thought that he is obliged to consider the observations in good faith and to give to them such weight as he thinks fit. Provided he comes to a conclusion to which a reasonable landlord in his position could have come, he will have complied with the statutory requirement even though a reasonable landlord might equally have reached a different conclusion."*

In terms of the obligation to have regard to observations, what is "*reasonable*" is therefore considered solely from the landlord's perspective – as opposed to the test adopted under s.19 of the Act.

19. The applicant gave evidence to support these submissions and referred to a witness statement dated 8 March 2010. He is a retired police officer with a portfolio of over 50 properties of various types (including 6 multi occupancy properties), and he usually employed managing agents. He explained that he had initially started the process for carrying out major works to the exterior of the property in 2005. As part of this, he obtained a specification of works from surveyors EAR Sheppard in September 2005. Although he did start consultations in 2005, it was clear that those consultations did not comply with s.20 of the 1985 Act. The applicant therefore instructed solicitors to prepare notices, and these are referred to above. The respondent raised a number of queries in relation to specific parts of the specification of works, but each and every observation was dealt with by return. As for the process of choosing the contractors, the applicant immediately discounted the two highest tenders, Ellis Builders and Coles & Sons. The estimate from Hills & Pollington Ltd was discounted because it did not include all the matters listed in the specification. Although the respondent provided the lowest estimate, the applicant discounted this because there was a long standing dispute between the landlord and the respondent and he felt it would be "*untenable for us to work together in relation to works to the property*". He "*felt that a third party, wholly detached from the Property, should be instructed.*" He therefore appointed SCS, whom he had experience of working with on a £200,000 project elsewhere, and who had proved more than satisfactory.

20. In cross examination, the applicant denied that he had never had the intention of appointing anyone other than SCS as the contractor. He had discounted the respondent's tender because there was a "*conflict of interest*". The applicant referred to a history of disputes over water penetration. However, he had not made up his mind to choose SCS as contractor until the tender process was under way. He had discounted the respondent's estimate because of a lack of trust which resulted from a refusal to pay service charges over many years. When asked about SCS, the applicant

accepted that they were not in the phone book, and that they were mainly steel fabricators. They had, however, dealt with both large and small building projects. His personal experience of their work came from works to repair fire damage at another block owned by the applicant at 48 Nelson Road Hastings. The value of that contract was £150,000 and the works were completed in December 2009. He accepted that when he converted the lower parts of 60 Mount Pleasant Road, he did not use SCS, but that was because those works were a very minor matter (about £12,000 worth of work). The applicant was then asked about the decision not to prepare a fresh specification rather than relying on the 2005 schedule of works. He accepted that he could have prepared a new specification which incorporated the observations made by the respondent, but his feeling was that the works had already dragged on for some years and he needed to proceed. As far as the observations were concerned, he assured the respondent that nothing would be done to the chimney without obtaining additional estimates either during the works or at a later stage. When asked by the Tribunal about the use of civil engineers to prepare the specification (as opposed to surveyors), the applicant stated that the person who prepared the schedule within the practice was in fact a surveyor. Only one tender had provided a priced specification although all had provided written estimates. He was satisfied that SCS were suitably qualified to do the work. The tenders had been sent to the managing agents although he could not remember whether he considered them all together or piecemeal as they came in. He had discussed the tenders with an independent firm of designers and surveyors called Pumphouse Designs Ltd, and they had agreed with the choice of contractor. He certainly did consider the tenders referred to above together, but he honestly could not recall at what stage he discounted the respondent's tender. The supervision fee was necessary because of the size of the project. It was not the same as the costs incurred for the work carried out by EAR Sheppard. It would be paid to Pumphouse Designs Ltd and Complete Health & Safety Ltd for Contract (Design and Management) Regulations 2007 ("CDM") co-ordination, preparation of health and safety policy, a Construction Phase Health & Safety Plan and COSHH Assessments. A lot of time was required to attend to inspectors etc on site, and a 10% charge was not excessive.

21. In his closing submissions, Mr Sinnatt first dealt with the section 20C application. The applicant was justified in employing solicitors since the consultation regulations could be complex even for experienced lawyers. The respondent had also employed solicitors which "*upped the ante*" and they had represented the respondent until very recently. The legal arguments in this case raised an unusual point without binding authority. This justified the use of solicitors and counsel. Furthermore, he provided a sealed copy of further documents to the Tribunal which he stated were relevant to the exercise of its discretion under s.20C. Mr Sinnatt invited the Tribunal to consider them after the Tribunal made its determination on the other issues. The respondent did not object to that process.

22. As for the substantive matters, there was one main issue. Under the regulations, the applicant contended that the question was whether one had to appoint a contractor who provides the cheapest estimate, even if that person was also a lessee. There was also the linked issue of whether it was reasonable under s.19(2) to incur costs in this situation. Mr Sinnatt submitted that paragraph 6 of Part 2 to Schedule 4 of the consultation regulations plainly indicated that one could properly choose not to pursue the lowest estimate. The regulations only required the landlord to state his reasons if he chose another contractor. The test was what a reasonable landlord would do and in this case, it was perfectly reasonable not to choose the respondent. The nomination was highly unusual in that the respondent placed himself in a clear conflict of interest situation. If he did not do the work properly, as contractor he may not get paid, but as tenant he could bring an action against the landlord for disrepair. The reference in regulations to obtaining independent contractors suggested that independence was an important consideration (although he accepted the regulations only mentioned independence from the landlord). As for reasonableness, the applicant was uncomfortable with the choice of the respondent as contractor because of a history of disputes, and that was enough. If it was not enough, there was an obvious conflict of interest. The applicant chose the middle of five priced estimates and the costs were therefore within a reasonable range.

23. Mr Sinnatt referred to the decision in ***Daejan v Benson*** [2009] UKUT 233(LC), where the Lands Tribunal decided that the issue was whether the landlord had closed its mind to any new observations (see judgment of Carnworth LJ at apar 56). The regulations did not require the landlord to accept all the observations made by the respondent and the passage in ***Woodfall*** referred to above supported this contention. The applicant was only required to give the respondent's observations due weight, which the applicant had done. The changes to the scope of works proposed by the respondent were quite trivial and it was disproportionate to expect the landlord to obtain a detailed report about them. The applicant was still prepared to consider a variation of the scope of the works (which Mr Sinnatt described as a "*guarantee*") but it was quite proper not to start over again with a completely new specification of works.

24. If contrary to the above, the landlord had breached the regulations by failing to take into account the observations properly, they were so trivial that the Tribunal ought to dispense with the consultation requirements. There had been no prejudice to the lessees. The initial notice bound the landlord, and he could not amend it or do works outside the scope of the notice. However, he was willing to do more and had said so.

25. Management fees were provided for in clause 5(2) of the lease at a fixed percentage of 10% of the cost of the works. They were not "*qualifying works*" within the meaning of section 20 of the 1985 Act. In any event, the costs of the CDM and health and safety consultants etc were not excessive.

THE RESPONDENT'S CASE

26. The respondent is a builder who owns the upper flat as an investment. He relied on his statement of case and on a statement entitled "*Respondent's Response to Applicant's witness statement*" (which had been served but which he signed and dated at the hearing).

27. The respondent contended that the landlord had failed to comply with the consultation regulations. The applicant had given no adequate explanation about the

choice of SCS as contractor or its refusal to consider two lower estimates than SCS. The eventual choice was 53% higher than the lowest tender submitted by him. It was also argued that the estimates provided by the respondent had been "inflated" to £20,952 + VAT, when in fact he had submitted an estimate for £18,650 + VAT. Similarly, the landlord had wrongly increased the estimate submitted by Hills and Pollington from £23,780 + VAT to £24,536.89 + VAT. This had the effect of making SCS's tender appear more competitive. The only reason given by the landlord for not choosing the respondent to carry out the works was a *"longstanding dispute"*. The only dispute had arisen from the applicant's failure to comply with s.20 in the past. If the landlord decided not to choose him as contractor because of the connection, he ought properly to have said so early on and allow the respondent to nominate another contractor. Even if there had been problems working together, the contract manager was there to oversee the works.

28. Furthermore, the landlord had failed to take note of the observations made by the respondent about the addition or inclusion of items from the specification – and although he appeared to agree with the observations, the applicant had failed to amend the specification or obtain new estimates. The extra works/deletions could easily be ascertained before the works started. It would be extremely difficult to subject the extra works to a competitive bidding process once the works commenced.

29. The appointment of Pumphouse Designs Ltd and Complete Health and Safety Ltd had not been tendered as they should have been. In any event, the involvement of such consultants was not appropriate for such a small project. The landlord could not rely on clause 5(2) of the lease in this regard, since the costs were not for management of the project.

30. When cross examined at the hearing, the respondent admitted that his price omitted the usual 10% profit element. This was because he had taken the view that he would have taken his *"profit"* by the increase in the value of his flat as an investment. He had no idea how much extra the additional items in his observations would cost. However, some of the extra items (e.g. the windows, the cracks and the leaking bay roof) could

be tendered without a formal specification. His preference was, however, for the section 20 consultation procedures to start again. His estimate had been priced by a quantity surveyor (who worked for the Ringway Group of contractors). The respondent had no formal qualifications. He had been a toolmaker who moved into the building trade c.25 years ago. He also did his own CDM drawings (but not building regulations drawings). He felt he could work with the applicant, and hoped to "*wipe the slate clean*". The respondent stated that he did not receive any notice of variation of the specification, although he was asked to submit an amended tender which he did (although that was not in the bundle). He accepted that the applicant had taken him to Brighton County Court over unpaid service charges 4-5 years ago. The respondent submitted that the matter was really one about whether the costs were reasonable. As far as s.20C was concerned, there was nothing in the case that could not have been done by competent managing agents.

FINDINGS

31. The Tribunal reminds itself that the works have not been carried out and no relevant costs have as yet been "*incurred*" and that its jurisdiction is therefore under s.27(3) of the 1985 Act.

32. Choice of contractor. The first issue relates to the choice of contractor. If there has been a breach of the 2003 regulations in this regard, the relevant contribution of the respondent towards the works is limited to £250: see s.20 of the 1985 Act and regulation 6 of Schedule 4 Part 2 of the regulations.

33. The main contention by the lessee is that the choice of contractor was a breach of the regulations. There is little doubt that the landlord has complied with the majority of the requirements under Part 2 of Schedule 4 in relation to the choice of the contractor. Under paragraph 1(3), the landlord was required "*to invite each tenant ... to propose ... the name of a person from whom the landlord should try to obtain an estimate*". That requirement was been complied with in the notice dated 11 December 2008. Under para 4(2), the landlord was required "*to try to obtain an*

estimate from the nominated person". That requirement was also complied with, resulting in the estimate provided by the applicant.

34. It is a notable feature of the regulations that at no point do they purport to regulate the landlord's choice of contractor directly. Paragraphs 10 and 12 require the landlord to have regard to observations at two stages of the process. Paragraph 13 states what the landlord must do if it selects certain contractors to undertake works (including a requirement to state the reasons for doing so). The landlord in this case chose a contractor in strict accordance with Schedule 4. The Tribunal therefore concludes that the procedure adopted by the applicant for choosing the contractor was not in breach of the regulations.

35. The choice of contractor is a relevant consideration under section 19 of the 1985 Act. The Tribunal was not addressed on whether the relevant subsection is s.19(1) (costs "*reasonably incurred*") or s.19(2) (costs which are "*reasonable*"). In both subsections, the Tribunal must consider both the landlord's processes for arriving at the relevant cost, and then to consider whether the cost itself is excessive.

36. In respect of the landlord's process, the ordinary rule is that the landlord is not bound to choose the cheapest contract. It may properly take into account other factors, such as the quality of workmanship, solvency of the contractor, guarantees and its experience of the contractors during the tender process. There is some evidence that in this case the applicant sought advice from professionals about the decision. In any event, the landlord took proper factors into account and his evidence was not shaken on these points under cross examination.

37. The remaining question, which is at the heart of this application, is whether it was wrong to discount the respondent's tender, even though that tender would produced a lower price for the works. In this regard, one objection to the respondent was that there had been disputes between the parties about service charges in the past, but this argument was not reinforced with any documentary evidence put before us. However, of more significance is the objection that a conflict of interest would have

arisen if a lessee were to be selected as contractor. There is certainly some suggestion in the 2003 regulations that Parliament was alive to potential conflicts of interest where a landlord chooses a connected contractor, although the regulations do not expressly regulate the choice of a contractor connected with the lessee. Nevertheless, the Tribunal considers that it is self evident that such a potential conflict exists where a contractor is also liable for a service charge. The respondent is not liable to pay 100% of the costs of the contractor through the service charge, and the nature and quality of the works might therefore affect others in the building who are to pay the remainder of the contractors' bills. The obligation under the lease is for the landlord to repair (not the lessee) and the lessee could end up bringing an action against the landlord for breach of covenant arising from his own failure to complete the contracted works properly. Similarly, difficult issues could arise about whether the contractor could offset claims against him under the construction contract against contractual claims in relation to covenants under the lease. The Tribunal is not saying that in all cases it would be reasonable to refuse to employ a lessee to carry out works to a building for which it was to contribute through the service charge (for example, very minor works might not give rise to significant conflicts of interest), but in this case a conflict did arise.

38. Furthermore, the eventual price which the procedure produced was not excessive. As stated above, the selected contractor was at the mid-point of five estimates. No evidence was produced to suggest the cost was excessive other than by reference to the respondent's tender, and this admittedly excluded any profit cost element.

39. Observations. This obligation arises under paragraph 3 of the 2003 regulations and the Tribunal adopts the passage in ***Woodfall*** set out above as establishing the test that it must apply. In this instance, there are some concerns about the landlord's approach. The starting point was the Specification of Works which, by the time it went to tender, was three years old. It was plain on inspection that some of the works in that schedule had been overtaken by events. The chimney required attention and there had been repairs to the bay window roof at the rear. The observations made by the respondent on 6 January 2009 were directed to these differences, and they were not really

challenged by the landlord. However, the obligation on the landlord is not to accept reasonable observations, but to "*have regard*" to such observations. In this case, it is plain from the schedule to the statement of estimates that the landlord did "*have regard*" to them, or as it is put in the passage in ***Woodfall*** set out above, that it considered them in "*good faith*". The landlord's good faith is supported by the repeated assurances in correspondence, which Mr Sinnatt expressed as a "*guarantee*", that the suggested changes to the specification of works would be taken up with the contractors when chosen. We do not consider it would be proportionate to require a new specification of works for such modest scheme of works, which would presumably require the s.20 consultation process to start again and delay the start of what are obviously necessary repairs to the building. The Tribunal therefore finds that the cost of the works was not limited by the consultation requirements of Schedule 4.

40. Section 20ZA. For the reasons given above, we do not find it necessary to determine the application under s.20ZA. The consultation regulations have been complied with and there is no need to dispense with them.

41. Supervision fees. A 10% Management Fee is provided for in the lease and the first question is whether such a fee is covered by the consultation regulations. The Tribunal finds that it is not. The regulations and s.20 apply to qualifying works, which are defined in s.20ZA(2) as "*works on a building or any other premises.*" This definition appears to relate solely to contractors' costs for carrying out the works, rather than professional fees. Still less can the definition be applied to the landlord's management fees or the costs of supervision, which do not involve "*works on*" the building or other premises at all.

42. The next issue is whether such a fee is reasonable under s.19 of the Act, and the Tribunal finds that it is. In this instance, the landlord intends to apply these fees to discharge the costs of CDM, health and safety and other consultants. The quantum unreasonable in itself. Using its own experience, such fees can easily amount to 10% of a modestly valued contract of this kind.

43. Section 20C. The Tribunal was not addressed on whether there was a provision in the lease which might entitle the landlord to recover the costs incurred before the Tribunal as part of the service charge. In the event that the landlord is contractually entitled to recover such costs, the Tribunal is asked to make an order under section 20C of the 1985 Act. Having regard to the guidance given by the Lands Tribunal in ***Tenants of Langford Court v Doren*** LRX/37/2000 the Tribunal considers that it is not just and equitable to make an order under s.20. The applicant has succeeded in its arguments. The applications relate to issues which are not altogether straightforward. In particular, the tender by the lessee is a highly unusual feature which it was proper for the landlord to consider with legal assistance. It was not unreasonable for the landlord to employ solicitors and counsel in this instance. There is nothing in the landlord's conduct of the proceedings which was involved unnecessary or excessive costs.

44. The Tribunal considered the sealed additional documents provided by the applicant in a slightly unusual procedure. In particular, these documents included an offer to settle the matter by the applicant on 29 October 2009. The additional documents did not affect the Tribunal's decision under s.20C, which is made on the grounds above.

CONCLUSIONS

45. For the reasons given above the Tribunal therefore determines under section 27A(3) of the Landlord and Tenant Act 1985 that if costs were incurred for the works set out in the Specification of Works dated September 2005, a service charge would be payable for those costs. Furthermore, the Tribunal finds that that service charge would be payable by the respondent to the applicant. The amount of the service charge payable would be one half of the sum of £36,834.94 (namely £33,486.33 plus a 10% "*supervision fee*"). This is the sum demanded by way of interim service charge on 12 December 2009.

Signed
Mark Loveday BA(Hons) MCIArb
Chairman
21 May 2010