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**HM COURTS & TRIBUNALS SERVICE  
SOUTHERN RENT ASSESSMENT PANEL  
LEASEHOLD VALUATION TRIBUNAL**

**S. 20ZA of The Landlord and Tenant Act 1985 (as amended) ("the Act")  
(Application to dispense with consultation requirements)**

<b>Case Number:</b>	<b>CHI/21UC/LDC/2012/0020</b>
<b>Property:</b>	<b>Columbus Point Sovereign Harbour South Eastbourne East Sussex BN23 5TP</b>
<b>Applicants:</b>	<b>Frays Property Management (No 5) Limited, Qdime Limited &amp; Dominica Court Freehold Limited</b>
<b>Appearing for the Applicants</b>	<b>Mr Ken Ford and Mr John Bullock</b>
<b>Respondents:</b>	<b>The lessees of the residential flats as set out in the Schedule attached hereto.</b>
<b>Date of Hearing:</b>	<b>31<sup>st</sup> July 2012</b>
<b>Tribunal:</b>	<b>Mr R T A Wilson LLB (Lawyer Chairman) Mr N Robinson FRICS (Surveyor Member)</b>
<b>Date of the Tribunal's Decision:</b>	<b>13<sup>th</sup> August 2012</b>

## **BACKGROUND**

1. This is an Application made by the Applicants pursuant to S.20ZA of the Landlord and Tenant Act 1985 ("the Act") to dispense with the consultation requirements contained in S.20 of the Act.
2. The work covered by this Application comprises in Phases 1 & 2 of the proposed program, of disconnecting the balcony handrails, checking all component parts, removing the rust, repainting and reconnecting. In Phase 3 the same work will be carried out save that the balcony rails will be treated in situ. These works are more particularly described in a Schedule of Works dated April 2012 prepared by JR Bullock & Co and are referred to hereafter as the Works.
3. On the 14<sup>th</sup> June 2012 the Tribunal gave directions for the Applicants to serve on the Respondents a statement of case with copies of documents in support. If any of the Respondents objected to the Application then they were directed to write to the Applicants and the Tribunal stating their grounds for objecting and indicate whether or not they intended to attend the hearing of the Application.
4. The Applicants filed a written statement of case together with a hearing bundle and they attended the hearing to develop their case.
5. None of the Respondents wrote to the Tribunal to oppose the Application but a number of lessees attended the hearing and made oral representations concerning the scope and specification of the Works and the costs of the Application.

## **INSPECTION**

6. The properties comprise part of a large waterfront development at Columbus Point, Sovereign Harbour South at Eastbourne, which comprises of some 369 residential properties. Of these, 236 are leasehold units and the leaseholders of these units are the Respondents. The Tribunal were shown various representative areas including 11-27 Martinique Way where previously NHBC works had been undertaken to the steel columns and balcony supports, but the railings still required maintenance. At Anguilla Court, where NHBC works are to be undertaken to the steel columns and balcony structure, it is also planned to undertake repairs and redecoration to the metal balcony and boundary railings at the cost of the service charge account. The Tribunal also saw Dominica Court and 37-39 Martinique Way where the construction of the balconies is different in that all the balcony steelwork is exposed and therefore not part of the NHBC proposals. The balcony and boundary railings were clearly in need of redecoration and some repair.

## **THE LAW**

7. S.20 of the Act limits the service charge contribution that lessees have to make towards "qualifying works" if the relevant consultation requirements have not been complied with or dispensed with by a Leasehold Valuation Tribunal.
8. Regulation 6 of the Service Charges (Consultation Requirements) (England) Regulations 2003 SI 1987 ("the Regulations") provide that if a lessee has to contribute more than £250 towards any qualifying works then if the landlord wishes to collect the entire costs

of those works the landlord must either carry out consultation in accordance with S. 20 of the Act before those works are commenced, or obtain an order from the Tribunal dispensing with the consultation requirements.

9. The consultation requirements are set out in the Regulations and it is not proposed to recite these here. However in summary they include the need for the landlord to state why they consider the works necessary and for further statements setting out their response to observations received, and their reasons for the selection of the successful contractor. A tenant has the right to nominate an alternative contractor and the landlord must try to obtain an estimate from such a nominee.
10. Under S.20ZA (1) of the Act, the Tribunal is given discretion to dispense with the consultation requirements. This Section provides:

*Where an Application is made to a Leasehold Valuation Tribunal for a determination to dispense with all or any 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 those requirements.*

11. The test is one of reasonableness. Is it reasonable in the circumstances of the case to dispense with all or any of the requirements? The decided cases have established that it is not necessarily the conduct of the landlord that has to be reasonable rather it is the outcome of making the order which has to be reasonable taking into account all the circumstances of the case. The Tribunal should also have regard to any prejudice that a lessee might suffer in the event of dispensation being granted.

#### **THE EVIDENCE**

12. The relevant evidence submitted to the Tribunal on behalf of the Applicants consisted of the following documents:
  - i. The Application
  - ii. Statement of case
  - iii. Hearing bundle containing consultation documents, copy sample leases, specification of the works, notices, and tender documents.
  - iv. Correspondence with lessees.

#### **HEARING**

13. Mr Ford began his evidence on behalf of the Applicants by summarising the background. The Application related to the Applicants' desire to enter into a contract to undertake external redecoration works on the Respondents' properties at a favourable price. In order to obtain this favourable price, the Applicants' choice of contractor was fettered by external factors: many of the properties have balconies and external metal work such as railings and posts; in or around 2009 the Applicants identified that many of these balconies were suffering from significant metal deterioration; the Applicants' considered that this deterioration was more than should be expected given the age of the properties and accordingly they made a claim to the NHBC to have the remedial works undertaken through the NHBC guarantee scheme without cost to the residents. The claim was made in 2010 but very slow progress with

this claim ensued and it was not until early 2012 that NHBC accepted the claim and agreed to undertake works to the balconies through their guarantee scheme. However the works to be carried out by NHBC only represented some of the necessary work and that further external maintenance and redecoration was necessary particularly to the balcony rails. This presented an unsatisfactory situation for the Applicants; the NHBC would be raising scaffolding to undertake works to the balconies and when they removed this scaffolding, the Applicants would then need to raise further scaffolding to undertake the remaining necessary maintenance works.

14. Mr Ford contended that such a situation would not represent good value for money for the Respondents. Accordingly the Applicants sought NHBC's agreement to have the external maintenance works undertaken in parallel with the NHBC works therefore offering benefits in cost savings for the Respondents. In order to realise these savings, by undertaking works at the same time as the NHBC works, the Applicants would be required to instruct the same contractor as the NHBC. This resulted from the fact that it was highly unlikely, given insurance and management issues, that more than one contractor would be able to access the scaffolding at the same time to undertake unconnected works.
15. Mr Ford told the Tribunal that the Applicants had undertaken formal consultation with the Respondents so far as possible. The Applicants had taken the following steps:-
  - (a) On the 29th March 2012 the Applicants issued a notice of intention to all 236 Respondents.
  - (b) On the 23rd April 2012 tenders had been issued with a return date of 11th May 2012.
  - (c) On the 22nd June 2012 the Applicants issued the statement of estimates, known as the paragraph B statements, to all 236 Respondents.
  - (d) Concurrently with the events outlined above, the Applicants had held a pre-tender meeting with the NHBC at which it was finally determined that the Applicants would undertake the Works using the same contractors as NHBC.
16. The Applicants' preferred contractor for the Works is T & B Contractors who had offered the lowest cost estimate following tender and full appraisal. The NHBC had also contracted for their works to be carried out by T & B Contractors as a result of this company also providing the lowest estimate for the NHBC works.
17. Mr Ford indicated that the Application was made on the basis that, despite the Applicants having undertaken a consultation exercise, the Applicants had effectively been bound to follow the decision of the NHBC this being a joint venture and the NHBC having the larger contract to place. As such, it could be argued that the Applicants' ability to act independently had been fettered. In these circumstances he invited the Tribunal to make a dispensation order in respect of the Works on the grounds that it was in the best interests of the Respondents for the Works to be carried out in parallel with the NHBC works in order to take advantage of the cost savings mentioned above.
18. Mr Russell Cole, a lessee of Anguilla Close made representations at the hearing. Whilst he generally supported the Application he was concerned that leaseholders would not be given the paint process that they had originally been told that they would get. He was concerned that the specification of the Works had been changed during the consultation process to include an inferior process which would deteriorate quickly bearing in mind the exposed location of the properties.

19. Mr Richard Moakes of San Juan Court made representations concerning the costs of the Application. He considered that the Applicants had delayed in making the S.20ZA Application and that the external painting of the balcony rails was well overdue. He invited the Tribunal to make an order preventing any costs of the Application being charged to the service charge in future years.
20. Mrs Elaine Levy of Anguilla Close was concerned at the high level of project supervision costs namely 10% of the contract price. She invited the Tribunal to make an order that the Applicants' costs in relation to the Application should be taken from the project fee and should not be paid by the leaseholders by way of service charge.
21. Mr George Gatland of Dominica Court and also the Chairman of the Dominica Court Residents Association confirmed that his Association wanted the Works to be carried out as soon as possible. Notwithstanding the reservations that some of his members had about the way in which the Applicants had gone about matters, his Residents Association supported the Application and wanted it to succeed.
22. The Tribunal noted that each lessee who gave oral evidence was at pains to point out that although they had concerns relating to the way in which the Applicants had gone about organising the Works, they did not object to the Application and wished the Works to be carried out as soon as possible.

### **CONSIDERATION**

23. In the opinion of the Tribunal the Works do constitute "qualifying works" within the meaning of the Act. As the contribution required from each Respondent pursuant to the service charge provisions in their leases will exceed the threshold of £250, there is an obligation on the Applicants under Regulation 6 to consult in accordance with the procedures set out in the Regulations.
24. The evidence put before us establishes: -
  - (i) The balcony railings are in disrepair and require attention.
  - (ii) Under the leases of the properties the Applicants are responsible for repairing and decorating the balcony rails.
  - (iii) Savings should be available if the Works are carried out by the same contractor as instructed by the NHBC in relation to the guarantee work. For example the same scaffolding can be used for both jobs.
  - (iv) The Savings that are available by joining with the NHBC works are time critical.
  - (v) Full consultation has already been undertaken in relation to the Works.
25. The Tribunal heard evidence concerning the tender process carried out by the Applicants. Out of an initial selection of six contractors, two had declined to tender and one did not submit an estimate in time leaving just three contractors. Of these, two were invited to an interview after a comprehensive tender analysis following which the Applicants proposed to instruct T&B Contractors who had submitted the lowest tender. The Tribunal noted that there had been a significant number of lessee observations received during the first stage of consultation but that no Respondent had exercised his or her right and nominated a contractor from whom the Applicants should invite to tender for the Works.

26. The Tribunal was told that the statement of estimates (Paragraph B statements) had been submitted to all lessees on 22nd June 2012 showing the prices of three tenders for the Works. The consultation period was stated to last for a period of 30 days ending on the 25<sup>th</sup> July 2012. All observations received during this period had been addressed and accordingly the consultation process had now been completed. As it appeared that full consultation had now taken place it was not obvious to the Tribunal why the Application was necessary.
27. In answer to this point Mr Ford speculated that even though the consultation process had now been completed it could be argued that the Applicants' right and obligation to act independently in the selection of the contractor had been fettered. This was because it might be perceived by the Respondents that the NHBC contractor was the preferred contractor throughout. He accepted that no lessee had nominated a contractor whom the Applicants should seek to obtain an estimate from, but felt this made no difference. It was still open to argument that the process was flawed.
28. The Tribunal noted that no Respondent was on notice as opposing the Application. To be certain that there were no objections the Tribunal asked the lessees at the hearing if anyone contended that the consultation procedure had been flawed or defective in anyway. All lessees confirmed that they made no such assertions but whatever the status of the consultation process they supported the Application, notwithstanding their reservations outlined above. It seems therefore that Mr Ford's concerns as to the status of the consultation process are not founded.
29. The Tribunal carefully considered all the observations made by the lessees and formed the view that most of their concerns, although valid, were not relevant to the Application for dispensation. The exception being the observations made in relation to the costs of this Application, which are addressed below.
30. Setting aside for the time being the issue of whether there has already been compliant consultation, the Tribunal is satisfied that the Application is not vague or open ended, and that the Works have been properly tendered for and are clearly defined. The Tribunal is satisfied that the Applicants have tested the market in terms of selecting a competent contractor and have taken all reasonable steps to ensure that the Works will be carried out at the lowest possible cost. It is fortunate that the preferred contractor has provided the cheapest estimate in respect of both the NHBC work and the Works.
31. Having regard to the above the Tribunal is persuaded that it is in the best interests of the Respondents that the contractor to be used by the NHBC is also instructed to carry out the Works.
32. As to the necessity of this Application, the Tribunal accepts that at the time when it was made, namely the 21<sup>st</sup> March 2012, the consultation process had not yet begun and accordingly the Application had relevance. Stage one of the two stage consultation process commenced on the 29<sup>th</sup> March 2012 with the second stage commencing on the 23<sup>rd</sup> June 2012 and ending on the 25<sup>th</sup> July 2012.
33. For reasons that are not clear, the progress of this Application to hearing has been slow with the hearing being listed for the 31<sup>st</sup> July 2012 some four months after the issue of the Application. Thus the hearing date has turned out to be a week after the end date of the consultation process, which has also taken approximately four months from start to end. The Tribunal considers that this Application could have been withdrawn on the 25<sup>th</sup> July 2012 as on that date the statutory consultation had been completed making a dispensation order unnecessary.

34. If, however, the Tribunal is wrong in these conclusions, because for whatever reason there has been a flaw or defect in the consultation process, the Tribunal is satisfied that no prejudice will be caused to the Respondents if an order is granted dispensing with the consultation requirements. For the reasons set out above the Tribunal is satisfied that it is reasonable to dispense with the consultation requirements in relation to the Works and it so orders.
35. The Tribunal makes it clear that this dispensation relates solely to the requirement that would otherwise exist to carry out the procedures in accordance with S. 20 of the Act. It does not prevent an Application being made by the Respondents under S.27A of the Act to deal with the resultant service charges. It simply removes the cap on the recoverable service charges that S. 20 would otherwise have placed upon them.

**APPLICATION UNDER S.20C (COSTS)**

36. In deciding whether to make an order under S.20C of the Act a Tribunal must consider what is just and equitable in the circumstances. The circumstances include the conduct of the parties and the outcome of the proceedings. Given the circumstances and outcome of the Application the Tribunal is satisfied that it would not be just or equitable for an order to be made preventing the Applicants being able to charge at least a proportion of their reasonable costs to the service charge account.
37. At the time the Application was made, the consultation exercise had not been commenced and therefore the Application had relevance. The Tribunal accepts that negotiations with the NHBC have been tortuous and protracted and therefore it has not been possible to predict the timing of the Works. Whilst it is correct that the redecoration of the handrails is overdue, it is understandable that the Applicants wish to coordinate all the work. The timing of the Works has been influenced by circumstances beyond the control of the Applicants and they are not to be penalized in this respect.
38. It is however debatable as to whether there was a need for the Application to be continued once the consultation period ended i.e. the 25<sup>th</sup> July 2012 and this calls into question the costs of the hearing itself. The Tribunal has concluded that the hearing itself was unnecessary and that the Application could have been withdrawn on the 25<sup>th</sup> July 2012 a week before the hearing, compliant consultation having been completed at this point.
39. For these reasons, the Tribunal makes an order under S.20C of the Act covering the hearing fee of £1.50 and the Applicants costs incurred in relation to attendance of the hearing. No part of these costs are to be charged to the service charge account. The balance of the reasonable and proper costs of the Applicants in relation to this Application are recoverable subject to the leases providing for such recovery, the Tribunal making no finding on this point.

Signed \_\_\_\_\_  
Mr. RTA Wilson LLB

Dated 13<sup>th</sup> August 2012

**BLOCK**

**CURRENT LEASEHOLDER**

**San Juan Court**

Natasha Maxwell  
Peter William Wallace  
Hugh Spiers & Peter Lainchbury  
Alan Maxwell  
Annette C Kelly  
John Chubb & Catherine Chubb  
Jeffrey Brain & Wendy Ann Brain  
Brian & Pamela Bowden  
Kim Stephen Hunter  
Geraldine Jones  
Mr B C Jones & Mrs S N Jones  
Mr J J O'Brien & Mrs Y S O'Brien  
Robert & Linda Lowes  
Norman & Paul Britland  
Richard Harris  
Mr C Kirkham  
Ranjit & Ruth Ameresekere  
Maxine Sullivan  
Pauline & Robert Gower  
Hugh Spiers & Peter Lainchbury  
David & Lesley Smith  
Martin Langhorst  
Susan Bennett  
John Rogers  
Colin & Joan Baxter  
Khalid Ebrahim  
Roy Summers  
Keith & Valerie Blair  
Stephen Brazier  
Mr MC Crewe  
Gerald & Susan Sweet  
Jeremy & Caroline Millington  
Ms J Pazowski  
Joseph W Boston & Jessie C Boston  
Terence Folwell  
Michael J P Steel & Rosemary Steel  
Ms J G Seldis  
Peter & Deborah Morley  
Mrs J A Kennerson  
Benjamin Morley  
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Mr B Monk  
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Mr B Hurst  
Mr A Spencer  
Mr A Spencer  
Susan Louisa Haseler  
Mr Kumarasamy & Ms Baladas  
Mark & John Gray  
John Brettell & Christina N Lukhezo  
Susan Newns deceased  
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Mr Murphy & Mr Huet  
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Mr D & Mrs K Pugh  
Mr C Duncan & Ms B Kimsa  
Robert W Ford & Karen A Ford  
John Johnston Ponsford & Anne Maree Ponsford  
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D & M Kilpatrick  
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Mrs M M Marchant  
David & Sylvia Stephens  
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Mr GP Smit & Mr BP Henning  
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Mr KR McAndrew & Mrs DA McAndrew  
Mr & Mrs Alagaratnam  
Mr GP Smit & Mr B Henning  
Ms Gill Dow  
Mr GP Smit & Mr BP Henning  
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Ivan Ronald White & Rebecca Dorothy Georgiou  
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Mark James Fleet  
Mr J A Williams  
Juliet Anne Markland  
Mr & Mrs Chatfield  
Mr P S Mullarkey & Mrs M J Mullarkey  
Hilde Annemarie Beamish  
Mr S M Renals  
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Mark Chester & Sarah M Chester  
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Christine Janet Bateman  
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A C Hughes  
Gary James and Janet Doreen Buxton  
Philip & Irene Goddard  
Michael & Jennifer Skinner  
Mr P Gooch & Mrs J Gooch  
Mr KJ Connolly & Mrs T Connolly  
Mr & Mrs T F Roche  
George & Jean Gatland  
Mr R D Wittenberg & Mrs E Wittenberg  
Mr & Mrs K King  
H A Spiers & P Lainchbury  
Mr Norman Lintott  
Suzanne & James Pullum  
Mrs McCrum  
Steven Bonny  
Mark D G Brown & Susan M Brown  
Christopher John & Susan Mary Mottershead  
Mark S Jones

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Mr S C Coorsh

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Paul Botham & Della Donna Botham  
Barry Hurst  
R J Cole  
Nicholas & Linda Stanley  
Janet & John Campbell  
Nick Thornburn  
Stephen Pick  
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Sadrudin & Francis E Lalani  
Tarek Abdelhak Kamel Dabash  
Paul, Mark & Joseph Graimes  
Derek Hedley  
Shirley Anne Smith  
James & Sheila Douds  
Michael John McEvoy & Barbara Lilian McEvoy