12057

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case References	:	**LON/00AU/LSC/2016/0327**
Property	:	**12 Victoria Mansions, 135 Holloway Road, London, N7 8LZ**
Applicant	:	**Ms Elkuna Hendler**
Representative	:	**In Person**
Respondent	:	**Magdalen Properties Ltd**
Type of Application	:	**For the determination of the reasonableness of and the liability to pay service charge and application for dispensation from consultation requirements**
Tribunal Members	:	**(1) Judge Amran Vance** **(2) Mr D Jagger, MRICS**
Date of Paper Determination	:	**6 December 2016 at 10 Alfred Place, London, WC1E 7LR**

DECISION

Decisions of the tribunal

1. The tribunal determines that the applicant is liable to pay, by way of service charge, her due proportion of the costs of additional major works identified as amounting to £109,246 plus VAT. However, for the reasons set out below we are unable to quantify the amount that is payable by her.

2. The tribunal does not consider that it is just and equitable to make an order under section 20C of the Landlord and Tenant Act 1985.

Background

3. The applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to whether she is liable to pay service charges relating to the cost of major works carried out at Victoria Mansions, 135 Holloway Road, London, N7 8LZ ("the Building"). She contends that she is not liable to pay for the costs of additional works that were not anticipated in the original contract specification for these works. Her case is that once the need for such works was identified the respondent should have, but did not, carry out a second statutory consultation exercise under section 20 of the 1985 Act. The respondent denies that there was any need for a second consultation exercise but, if the same was in fact required, makes an application for retrospective dispensation from the consultation requirements.

4. The applicant is the leaseholder of Flat 12, a three-bedroom flat on the second floor of the Building. The applicant states in her application that the Building is a mansion block which consists of 16 flats located above commercial shops. However, we note that in the tender specification document referred to below, the respondent's managing agents, Urban Owners Limited ("Urban Owners"), state that the Building comprises 20 self-contained flats with exterior common parts. This difference has no material impact on this application.

5. The applicant has the benefit of the remaining term of a lease dated 13 February 1984 made between Allypace Limited and Spiritville Investments Limited which requires the landlord to provide services and for the tenant to contribute towards their costs by way of a variable service. Under clause 4(2)(a) of the lease the applicant covenants to pay, on demand, a reasonable advance sum on account of her contribution towards the landlord's costs of complying with its obligations under clause 5 and the fourth schedule of the lease. The applicant has not disputed that the costs of these major works, including the additional works, are recoverable from her under the

terms of her lease or that she is liable to pay an on account payment towards her service charge liability.

6. The respondent company is the freeholder of the Building. It informs us that all the leaseholders in the Building have an equal share in the freehold company.

7. On 3 December 2014, a Notice of Intention to carry out major works was sent to the leaseholders in the Building by Urban Owners. The intended works were identified as:

> *"Full external redecoration works to the whole block, Full masonry repairs, Chimney, Roof and Water outlets and gulley repairs. Repositioning of waste/toilet outlets, Installation of satellite TV. This is also to incorporate the repairs and redecoration of the pillars between the ground floor commercial units. Replacement of lead pipes, New self-lockable yard door, resolve/repair communal crack near 1-3-5 & 7"*

8. The reason why such works were necessary was because:

> *"Externals are long overdue and the external fabric is deteriorating causing masonry defects and water ingress throughout the Building".*

9. There is no indication that the applicant made any observations in respect of the Notice of Intention.

10. On 24 February 2016, Urban Owners wrote to the applicant stating that the early indications were that the costs of these major works was in the region of approximately £350,000 and that her potential contribution would be in excess of £16,500.

11. The major works were then put out to tender based on a specification of works prepared by Urban Owners and on 17 June 2015 a statement of estimates was sent by the respondent to the leaseholders in the Building providing details of estimates received from three contractors. These estimates were in the sum of £290,859.60, £231,462.00 and £226,002.00 respectively. The lowest of those quotes was from a company called Excelsior 4 Ltd ("Excelsior") who was subsequently appointed to undertake the works. In their letter of 17 June 2015 Urban Owners invited leaseholders to make observations in respect of the estimates. Again, there is no indication that any representations were made by the applicant in response.

12. In a letter dated 18 January 2016 Urban Owners notified leaseholders that significant defects to the Building, not visible at the time the specification of works was prepared, had been identified. They stated that historical lack of maintenance of the Building had led to more extreme dilapidation than had been expected and that some of the defects, such as unsafe chimneys, needed to be made safe to comply with the respondent's legal obligations. These additional works were expected to increase the total cost of the works to approximately £300,000 plus VAT. However, Urban Owners make clear in their letter that that the final variation costs and the extent of the required works was still being negotiated.

13. The main areas of work that had led to an increase in anticipated costs, and the associated reasons, were identified in the letter as follows:

ITEM	ORIGNAL ESTIMATED COST	NEW ESTIMATED COST	INCREASE	Main Reason
Chimney repairs	£16,887	£27,174	£11,286	Non-inspectable chimneys found to be structurally unsound
Slate repairs/replacement	£4,920	£13,900	£8,980	More slates broken than normal on un-inspectable areas
Brick refurbishment	£15,475	£29,599	£14,124	See below-bricks hidden by render
Repair to render & cornices	£37,875	£104,770	£66,895	Water seeping behind render leaving it at risk of falling off and

				'rotting' the bricks behind

14. In the letter of 18 January 2016 Urban Owners invited leaseholders to attend a site visit on Friday 22 January 2016 where they would be shown the "issues that had been found" and also informed them that they were free to telephone or visit their offices to discuss these issues. They also invited leaseholders to make written observations on the proposed variations by 4 February 2016. It appears to be common ground that the applicant did not take up the offer to attend the site meeting or make any representations, written or otherwise by 4 February 2016.

15. It appears from a subsequent cost breakdown attached to the applicant's statement of case that since the letter of 18 January 2016 was sent some further contract variations occurred namely: (a) the costs of maintaining the rear elevation pipe works and making good increased from £2,980 to £3,460; and (b) the cost of repairs to communal windows increased from £4,860 to £12,340. The total new anticipated cost was therefore £297,581, an increase of £109,246 from the initial estimate of £188,355.

16. The applicant's application was received by the tribunal on 2 September 2016. A case management hearing took place on 27 September 2016 which was attended by representatives of Urban Owners. The applicant did not attend. It was at this hearing that the respondent made its oral application for retrospective dispensation from the consultation requirements.

17. Directions were issued by the tribunal to both parties on the same day as the case management hearing, allocating the application to be dealt with on the papers unless either party requested an oral hearing. No oral hearing was requested and the application proceeded to a paper determination.

The Law

18. The relevant statutory provisions can be summarised as follows.

19. A landlord intending to carry out "qualifying works" must comply with the provisions of section 20 of the 1985 Act failing which the landlord is restricted to recovering £250 per dwelling for any works carried out without satisfying those requirements. The detailed requirements are

set out in the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the 2003 Regulations").

20. Schedule 4 Part 2 of the 2003 Regulations sets out the provisions for stage 1 of the consultation process. It provides that a written notice of intention shall be given by a landlord to a tenant of his intention to carry out the qualifying works. 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 proposed works;

(c) invite the making, in writing, of observations in relation to the proposed works; and

(e) 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.

21. The notice shall also invite each tenant and the association (if any) 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.

22. Schedule 4 Part 2 para 3 provided that the landlord shall have regard to any observations made in response to a notice of intention during the relevant period.

23. Schedule 4 Part 2 para 4(5) provides that 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.

24. Schedule 4 Part 2 para 4(10) provides as that the landlord shall, by notice in writing to each tenant and the association (if any)-

(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.

25. Section 20ZA of the 1985 Act provides that where an application is made to this 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.

The Applicant's Case

26. The applicant does not seek to argue that the initial consultation exercise was flawed or that the initial Notice of Intention was invalid. Nor is it part of her case that the major works, including the works included in the contract variation, were unnecessary or that the costs incurred were excessive.

27. Her case is that the original specification of works was under-specified and that when the additional works were identified the respondent should have initiated a further section 20 consultation exercise, as part of which, further estimates should have been obtained from contractors for the additional works. This, she says, was warranted given the substantial increase in the costs of the works from the original estimate supplied by Excelsior of £226,002 including VAT to £300,000 plus VAT.

28. In support of her case she relied upon a report sent to the respondent by RD&D Associates ("RD&D"), chartered surveyors, on 4 January 2016. We note that although the applicant relies on this report it is addressed to the lessee of flat 6 Victoria Mansions. In their report, RD&D state that their inspection, carried out in December 2015, after the major works had commenced, had revealed that the Building was in a very poor condition. In RD&D's opinion the provisional quantities and allowances stated in the original specification of works prepared by Urban Owners were unrealistically low, including the amounts allocated to communal window and render repairs. They also considered that allowances had not been made for obvious repairs such as pipe work repairs at the rear elevation and repairs to demised flat windows. It is likely that their comments led to the further contract variations referred to in paragraph 15 above. RD&D also commented on the breakdown of the estimate provided by Excelsior suggesting that some items were reasonable whilst others appeared excessive. In RD&D's view Excelsior's original estimate was unrealistically low for a building in such poor condition. They also comment on the variation costs, suggesting, in the main, that further explanation of the anticipated additional costs was required before they could identify if these anticipated costs were reasonable.

29. The applicant explains that given the strength of the comments in the RD&D report she was sure that the respondent would carry out a further statutory consultation exercise for the additional works. That, she says, is why, in her words, she "did not pay much attention" to Urban Owners' letter of 18 January 2016 which did not comply with the statutory consultation requirements.

30. As to dispensation from those requirements she asserts that she suffered clear financial prejudice which would have been avoided if consultation had taken place

The Respondent's Case

31. The respondent's position is that there was no requirement for a second consultation exercise because the nature of the works identified in the Notice of Intention did not change. Rather, it was the scale of the works required that changed and which led to an increase in costs.

32. It also submits that Urban Owners went above and beyond what was required under the section 20 consultation process by sending the letter of 18 January 2016 to leaseholders according them the opportunity to make representations which it was not obliged to do. It points out that this invitation was not, at any point, taken up by the applicant.

33. In respect of the dispensation request the respondent contends that the applicant has not met the burden on her to demonstrate how a failure to re-consult has caused her financial prejudice. It is unclear, it says, why re-consulting could have led to the works being carried out at a lower cost. In its view, the opposite was true. If a further statutory consultation exercise had taken place once scaffolding had already been erected the delay would have led to increased costs resulting from the interruption in the works.

The tribunal's decision and reasons

34. In our determination, the applicant is liable to pay, by way of service charge, her due proportion of the costs of the additional major works identified as amounting to £109,246. However, as explained below, we are unable to quantify the amount that is payable by her.

35. We do not consider the respondent was under an obligation to carry out a second statutory exercise when the need for additional works was identified. We have reached that conclusion despite our concern over the dramatic increase in the cost of these major works. We consider there is considerable force in the conclusion reached by RD&D, and advanced by the applicant, that the provisional quantities and allowances stated in the original specification of works prepared by Urban Owners were unrealistically low and that this then fed into initial estimate obtained by Excelsior which has now been substantially increased. Our reading of the original specification is that it was prepared following an inspection at ground level. Whilst this is not unusual as a first step in preparing for a major works exercise we query whether this alone was sufficient before putting the contract out to tender given the obvious very poor condition of the Building as identified in the RD&D report. In our view, it would have been preferable, before proceeding to tender for Urban Owners to gain access to the upper floor of the Building, roof and chimneys in order carry out a full inspection in order to obtain a proper understanding of the condition of the fabric of the building.

36. Despite these concerns, it is our view that a second statutory consultation exercise was not needed because the additional work does not go beyond the works proposed in the 3 December 2014 Notice of Intention. This is clearly one set of works and the additional works identified in the table at paragraph 11 and in paragraph 13 above fall within the works identified in the Notice of Intention. They are not

'additional 'in the sense that they go beyond the scope of works envisaged in the original Notice of Intention. Rather, as the respondent suggests, it is the scale of the works that has changed.

37. Given this conclusion there is no need for us to determine the respondent's cross-application for dispensation from the consultation requirements. Nevertheless, it is appropriate for us to record that if our conclusion that there was no need for a second consultation exercise is wrong, that we would have granted dispensation.

38. In *Daejan Investments Ltd v Benson* [2013] 1 WLR 854 the majority of the Supreme Court set out guidance as to the purpose of the 2003 Regulations. The majority opinion was that the purpose is to ensure that lessees are protected from (a) paying for inappropriate works, or (b) paying more than would be appropriate. The Court considered that when considering dispensation requests, the tribunal should focus on whether the lessees were prejudiced in either respect by the failure of the landlord to comply with the Regulations (relevant prejudice) and that the factual burden of identifying some relevant prejudice is on the lessees.

39. In our view the applicant has not discharged that evidential burden. Whilst she has asserted that she has suffered clear financial prejudice which would have been avoided if consultation had taken place she has not explained or quantified that prejudice and, in our view, none is evident. If she is asserting that the costs incurred by the respondent would have been lower had consultation taken place there is no substantive evidence before us to support that assertion. She has not produced any estimates from alternative contractors to support such a contention and there is no substantive evidence before us that these additional sums are unreasonable in amount. It is true that in their report RD&D suggest that the additional amount allocated to chimney repairs appeared to be excessive but this is not a point advanced in the applicant's statement of case and, in any event, there is a degree of speculation in RD&D's comments.

40. Whilst not mentioned in her statement of case there is a suggestion at paragraph 10(b) of the RD&D report that the lessee who commissioned the report has been deprived of the *"comfort of having competitive quotes obtained from various contractors for this additional work"*. In our view the comfort of having competitive quotes does not amount to relevant prejudice.

41. We also bear in mind that the applicant appears to have made no observations at either the stage 1 or 2 of the consultation process and by her own concession made no observations in response to the letter from Urban Owners of 18 January 2016 in which details of the bulk of the additional works, and the reasons for the additional costs, were set out.

She was expressly invited to make observations in response to the letter of 18 January 2016 and if she considered that she would be financially prejudiced by the failure of the respondent to carry out a second consultation exercise that was an opportunity for her to express that view. She did not do so and we do not consider her explanation for her failure to do so to be a good one. By their letter of 18 January Urban Owners invited consultation albeit that this was not a statutory consultation and the applicant did not avail herself of the opportunity to make observations. In our view, she suffered no evident prejudice. She has never stated her wish to nominate a contractor nor, in her statement of case, does she challenge the need to carry out these major works, including the additional works.

42. We are satisfied that no relevant prejudice has been established and would therefore have granted dispensation.

Concluding Remarks

43. The reason why we are unable to quantify the amount that is payable by the applicant is because of the way this application has been brought and because of the limited information before us.

44. Our jurisdiction in this case is derived from section 27A of the 1985 Act which provides that an application may be made to this tribunal for a determination of whether a service charge is payable and, if it is, as to the amount which is payable.

45. However, the applicant's liability to pay service charge under the terms of her lease only arises following service of a service charge demand.

46. In her application, the applicant makes no reference to a service charge demand and we have not been provided with a copy of any demand. It appears from the applicant's service charge statement of account, as provided by the respondent, that a service charge demand in the sum of £17,000 was sent to the applicant on 13 July 2015. The relevant entry identifies this demand as relating to external works and structural cracks and we presume that the demand was based on the initial estimate of £350,000 identified in the letter from Urban Owners of 24 February 2015. A later entry dated 30 March 2016 refers to an external major works demand in the sum of £5,973.85.

47. It would appear, therefore that whilst an initial on-account demand for a contribution towards the costs of the major works exercise has been sent to the applicant this obviously did not take into account the additional works identified in late 2015/early 2016.It is possible that the 30 March 2016 demand related to the additional costs.

48. There is no indication that the actual costs of the major works have yet been demanded from the applicant, which is unsurprising given that the works appear to have completed within the last two months.

49. The application before us does not expressly ask us to determine whether the sum demanded by the respondent by way of an interim demand is payable by the applicant. Instead, the applicant's challenge is to her liability to pay towards the costs of the additional works for which we she may or may not have received a service charge demand. The position is unclear.

50. As we have no evidence before us as to the service of a service charge demand seeking an on-account payment we are obviously not able to determine whether the amount of such a demand is payable by the applicant. Nor do we consider this to be appropriate given that the applicant has framed her application as a challenge to the failure to consult rather than as a challenge to the quantum of the amount demanded from her.

51. As such we are unable, at present, to determine the amount payable by the applicant towards either the on-account or the actual costs of the major works exercise.

52. If either party wishes the tribunal to make a determination in respect of the on-account costs demanded by the respondent they should provide written notification of this request to the tribunal and the other party within six weeks of the date of issue of this decision. The tribunal will issue directions on receipt of any such a request so as to facilitate such a determination.

53. However, it seems to the tribunal that rather than seeking a determination in respect of the on-account costs, the applicant may prefer to wait until the actual costs have been determined by the respondent and demanded from her before bringing any challenge to this tribunal. By that date the applicant will be in a better position to assess the total cost of the works and will be able to raise any concerns over the standard of the works or the amount of costs incurred. If either party wishes to apply to this tribunal to seek a determination in respect of the applicant's liability to pay service charge in respect of the actual costs of the major works this will require a fresh application to be issued.

Application under Section 20C

54. The applicant sought an order that the costs incurred by the respondent in connection with these proceedings should not be regarded as

relevant costs when determining the amount of service charge payable by her.

55. When exercising its discretion as to whether to make a section 20C order the tribunal must have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the degree to which the applicant has succeeded in this application.

56. Having regard to these factors, and the fact that the applicant has been unsuccessful in her application, the tribunal does not consider that it is just and equitable in the circumstances to make such an order.

Name: Amran Vance **Date:** 7 December 2016

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BG/LSC/2016/0361**
Property	:	**14 Turner Street, London, E1 2AS**
Applicant	:	**(1) Mr Mohammed Foyjul Hasan Khan** **(2) Mr Mohammed Abjul Ali Khan**
Representative	:	**In person**
Respondent	:	**London Borough of Tower Hamlets**
Representative	:	**In house legal representatives**
Type of Application	:	**Liability to pay estate rent charges**
Date of Decision and Venue	:	**6 December 2016 at 10 Alfred Place, London, WC1E 7LR**
Tribunal	:	**(1) Judge A Vance** **(2) Mr D Jaggers, MRICS**

DECISION AND ORDER

Background

1. On 3 October 2016 the applicants issued an application under section 27A Landlord and Tenant Act 1985 ("the 1985 Act") seeking to challenge their liability to pay what they considered to be service charges demanded by the respondent in respect of the four-bedroom house at 14 Turner Street, London, E1 2AS ("the Property").

2. The freehold interest in the Property was purchased by the first applicant and Hajera Khanom in 2003. They were registered as the freehold owners under title number EGL372086 on 21 February 2003. The tribunal is unclear as to the second applicant's interest in the Property but it may be that there has been a subsequent transfer of title into the names of both applicants given that the office copy entries that accompany the application are dated 21 February 2003. The respondent's skeleton argument before us confirms that the applicants are the freehold owners of the Property.

determination. However, the sums demanded by the respondents for each relevant year are not large and the applicants' liability to pay estate rent charges appears to be clear from our perusal of the documents in this case. The applicants may well have arguments to raise over the amount of the charges demanded but the tribunal suggests that attempts to resolve such arguments should be made through negotiation between the parties in the first instance rather than litigation. It may be that the respondent has a mediation service available and if it does we recommend that the applicants avail themselves of that service. We therefore encourage the parties to seek a negotiated settlement to this dispute and if such settlement is reached to notify the county court accordingly.

Order

12. This application is transferred to the applicants' home court, Clerkenwell and Shoreditch County Court, pursuant to rule 6(n) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Name: Amran Vance **Date:** 6 December 2016