

RESIDENTIAL PROPERTY TRIBUNAL SERVICE  
SOUTHERN RENT ASSESSMENT PANEL  
LEASEHOLD VALUATION TRIBUNAL



**Residential  
Property**  
TRIBUNAL SERVICE

S.27A Landlord & Tenant Act 1985 (as amended)

**CERTIFICATE PURSUANT TO PARAGRAPH 18(2)  
LEASEHOLD VALUATION TRIBUNAL (PROCEDURE)(ENGLAND)  
REGULATIONS 2003 (SI 2003/2099)**

Case Number: CHI/21UD/LSC/2007/0068

Property: Flat 5A, 5 Cloudesley Road  
St Leonards on Sea  
East Sussex TN37 6JN

Applicants: Mr Marco Clementi & Ms Lorraine Edwards (tenants)

Respondent: Mr P Lemcke (landlord)

I certify that there are two errors in the Decision of the Leasehold Valuation Tribunal in this matter issued on 31 October 2007.

1. Paragraph 2: there is a typographical error in the second line of paragraph 2 of the Decision where the word "will" should read "with". The second line is hereby corrected to read as follows:

"Directions were issued on 21 August 2007 and provided for the Respondent landlord, Mr P Lemcke, to produce a written Statement together with all relevant documents".

2. Paragraph 14(d): there is a typographical error in the second line of paragraph 14(d) of the Decision where the date "2007" should read "2006". The second line is hereby corrected to read as follows:

"Mr Clementi and Ms Edwards did not respond to this, but promptly paid the full amount demanded on 30 August 2006 of £6,509.70".

**Dated 21 November 2007**

**Ms J A Talbot MA  
Chairman**

RESIDENTIAL PROPERTY TRIBUNAL SERVICE  
SOUTHERN RENT ASSESSMENT PANEL  
LEASEHOLD VALUATION TRIBUNAL

Sections 27A and 20C Landlord & Tenant Act 1985



**DECISION & DETERMINATION**

Case Number: CHI/21UD/LSC/2007/0068

Property: Flat A  
5 Cloudesley Road  
St Leonard's on Sea  
East Sussex TN37 6JN

Applicants: Mr Marco Clementi and Ms Lorraine Edwards (tenants)

Respondent: Mr Peter Lemcke (landlord)

Application: 30 July 2007

Directions: 01 August 2007

Hearing: 19 October 2007

Appearances: Mr Clementi and Ms Edwards in person  
No attendance for Mr Lemcke

Decision: 31 October 2007

  

Tribunal Members: Ms J A Talbot MA  
Mr N J Cleverton FRICS  
Mr T J Wakelin

**Case No. CHI/21UD/LSC/2007/0068**

**Flat A, 5 Cloudesley Road, St Leonard's on Sea, East Sussex TN37 6JN**

### **Application**

1. This was an Application dated 30 July 2007, made by Mr M Clementi and Ms L Edwards, tenants of Flat A, 5 Cloudesley Road, St Leonard's, East Sussex TN37 6JN, pursuant to Section 27A of the Landlord and Tenant Act 1985, for a determination on the payability of service charges for major works in the year ending 31 December 2006. They also applied for an Order under Section 20C of the Act and for reimbursement of fees under Regulation 9 of the Leasehold Valuation Tribunal (Fees) (England) Regulations 2003.
2. Directions were issued on 1 August 2007 and provided for the Respondent landlord, Mr P Lemcke, to produce a written Statement together with all relevant documents. He failed to comply and indeed made no response at all to the Application apart from a letter received by fax the day before the hearing stating that he was unable to attend "due to unforeseen circumstances".

### **Jurisdiction**

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

### **Background**

4. The tenant of Flat D, Mr Davey, made a similar application to the Tribunal. A hearing took place on 14 May 2007 and a decision was issued on 25 May 2007. The decision records that Mr Davey disputed that the building needed re-painting or re-roofing, that Mr Lemcke was adamant that the works needed to be carried out, but conceded that he had not properly followed the statutory consultation procedure, and had not looked at the law relating to consultation either before having the work carried out or in preparation for the hearing. The Tribunal decided that as Mr Lemcke had failed to comply with the statutory consultation requirements under Section 20 of the Act and accordingly limited the contribution payable by Mr Davey to £250.
5. Mr Clementi and Ms Edwards were aware of that application, but did not join in with it, because they did not dispute the necessity for the works, had paid their contribution of £6,509.70 when demanded as they did not wish to be in breach of their lease, and wanted to await the outcome of the application. On receipt of the decision they contacted Mr Lemcke to the effect that they considered their liability should be similarly limited to £250 and asked for reimbursement of the balance of the sum already paid. Mr Lemcke refused and told them they would have to make a separate application to the Tribunal.
6. The present Tribunal informed Mr Clementi and Ms Edwards that it was not as a matter of general principle bound by the previous Tribunal's determination and would have to make its own findings of fact and decision.

### **Lease**

7. The Tribunal had a copy of the lease of Flat A. The lease is dated 3 March 1989, and is for a term of 99 years from 25 March 1989 at a ground rent of £75 and rising thereafter.

The Building is defined as 5 Cloudesley Road of which the flat forms part. The Flat is defined in the Second Schedule.

8. The provisions relating to the calculation and payment of the service charge are to be found at Clause 2 of the Fifth Schedule. The tenant is to pay 20% of *"the total expenses authorised by the Ninth Schedule being reasonably and properly incurred by the landlord in each service year (including a reserve for any future expenditure)"*. This is subject to the landlord providing *"a full account of the income and expenditure of the service charge fund during that service year"* which ends on 31 December each year. Interim payments in account are due as estimated by the landlord every half year with any excess payable after service of the accounts.
9. Under the Ninth Schedule the landlord is entitled to charge to the service charge fund the *"costs and expenses reasonably and properly incurred ... complying with Paragraph 1 to 8 inclusive of the Seventh Schedule"*, *"the cost of employing a managing agent or surveyor to manage the building (if any)"* and *"the legal and other proper costs of managing the building"*. The Seventh Schedule includes the landlord's covenant *"to keep in good repair (and to renew as and when reasonably necessary) the structure of the building including all roofs and foundations all load bearing walls all main joists and supports for floors and ceilings and all chimney stacks gutters and drainage pipes"* and *"to decorate the exterior of the building as often as is reasonably necessary"*.

### Inspection

10. The Tribunal members inspected the property before the hearing, accompanied by Mr Clementi and Ms Edwards. It comprised a substantial semi-detached property, situated on sloping ground in a residential area of St Leonard's on Sea, probably constructed in the 19<sup>th</sup> century as a private residence and converted into 6 flats in the 1980's. The building is of brick construction with part pebbledash render under a pitched tiled roof with flat roof additions. There was a balcony and small flat roof area above both the front and rear rooms of Flat A.
11. Externally the walls and window frames had been re-painted. Some of the masonry paint was flaking away and rust stains were visible to some corners. To the side elevation some new plastic guttering was not fixed to the wall and not connected to the overflow pipe. At the rear was a single-storey addition where the guttering had not been replaced and some new guttering was still lying in the garden, indicating unfinished work. All the roofing had been recently replaced with artificial slate to the pitched areas and felted to the flat areas. This appeared to have been carried out to a good standard.
12. Internally the common parts were in fair condition, basic but serviceable with evidence of some recent re-plastering in the ground floor hallway. The Tribunal members inspected Flat A internally. It was a 1 bedroom flat with additional box room, bathroom, kitchen and living area giving access to part of the rear garden. The Tribunal saw that the ceilings under the replacement flat roof balcony areas to front and rear had been replaced with plasterboard but not finished off. Recently part of the wooden window surround in the front room had collapsed revealing a rotten lintel. In the rear room another wooden lintel was visible and had been allowed to dry out having been wet when exposed. Mr Clementi informed the Tribunal that the flat had been nil rated for council tax as it was regarded as uninhabitable due to damp problems.

### Hearing

13. The hearing took place in Hastings on 19 October 2007. It was attended by Mr Clementi and Ms Edwards in person. As indicated Mr Lemcke did not attend.

### Facts

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

- (a) Mr Clementi and Ms Edwards acquired the flat as an investment property at auction in October 2005. Mr Lemcke owns the freehold and 4 of the flats. There is only one other lessee, Mr Davey. On 21 January 2006 Mr Lemcke notified them by letter that major works of re-roofing and exterior decoration were required that would cost in the region of £30,000, and were proposed to start in the spring of 2006. He enclosed a budget account for "basic maintenance" (including an unexplained figure of £1,500 for "general" repairs) which was not before the Tribunal in this application. The applicants have paid the interim service charges separately.
- (b) No works were carried out in the spring and no further action was taken until Mr Lemcke wrote again on 27 June 2006 stating that he had received and would peruse estimates for re-tiling, exterior re-painting and ancillary building works. On 1 August 2007 he sent three typed summaries of estimates for re-roofing, scaffolding and re-decoration, headed up "Landlord and Tenant Act 1987 [sic]: Section 20", to which he had added VAT and an "administration and supervision fee" of 10% of the net cost. There were 3 estimates for re-decoration, 2 being substantially higher at £6,200 and £6,900 than the one selected by Mr Lemcke. The total recommended costs from the cheapest contractors were:

|                     |                  |
|---------------------|------------------|
| Re-Roofing          | £19,600          |
| VAT 17.5%           | £ 3,430          |
| Supervision         | £ 1,960 (no VAT) |
| <br>                |                  |
| Scaffolding         | £ 2,900          |
| VAT                 | £ 507.50         |
| Supervision         | £ 290            |
| <br>                |                  |
| Exterior decoration | £ 3,510          |
| VAT                 | £ Nil            |
| Supervision         | £ 351            |

- (c) The covering letter stated: "You have one month to register your views on the proposals. Individual accounts will be submitted on the 1<sup>st</sup> September and payment will be required by return. The work has been 'pencilled in' to start during the second week of September thereby giving one week to collect the money". Mr Lemcke indicated that any extra costs for "unforeseen matters" would be met by the reserve fund.
- (d) Mr Clementi and Ms Edwards did not respond to this but promptly paid the full amount demanded on 30 August 2007 of £6,509.70, being 20% of the total estimated costs of £32,548.50. This was receipted by Mr Lemcke on 11 September. They paid in good faith because they had no reason to dispute that the works were necessary and did not want to be in breach of their lease. At that stage they were unaware of the nature and extent of their statutory rights to consultation. The scaffolding went up in September 2006 and the re-roofing works commenced. Mr Clementi regularly attended at the property to keep an eye on his investment. He saw the roofers and decorators on site but never saw Mr Lemcke or any signs of anyone supervising the works.
- (e) In October 2006 Mr Clementi discovered a hole in the ceiling of the rear room under the balcony area and a pile of rubbish on the carpet directly underneath. The Tribunal saw contemporaneous photographs, from which it appeared that the hole, a neat rectangle, may have been deliberately cut from above to allow the rubbish to drop through. Ms Edwards reported this by email to Mr Lemcke and also requested copies of the original contractors' estimates, which he duly supplied. These estimates, from Bolingbroke Roofing, R&R Decorators, and Street Scaffolding Services, matched the summaries supplied on 1 August 2006.
- (f) At this point Ms Edwards also contacted the Leasehold Advisory Service and was advised of the two-stage consultation procedure under Section 20 of the Landlord and Tenant Act 1985. On 23 October 2006 Mr Lemcke informed them of additional

expenditure not included in the estimate of £568, in the form of a statement from R&R Decorators, but it was not clear whether this was simply an additional estimate or an invoice for work carried out. No further service charge demands have been sent. Mr Lemcke had not provided any service charge accounts for the year ending 31 December 2006.

- (g) Mr Clementi and Ms Edwards submitted that their reasons for making the application were that Mr Lemcke failed to carry out the correct consultation procedure under Section 20. He had not given two 30 day notice periods, he had not stated in writing that they could nominate contractors from whom he should try to obtain estimates, and had not given them the opportunity to comment on the estimates. In relation to the standard of the work, they observed that guttering at the side of the patio of their flat had not been renewed and that the new guttering was still in Mr Lemcke's side of the rear garden, that patches of exterior masonry paint had flaked off after approximately 10 months, and that rust from angel beading had come through to the surface even though the decorators were supposed to have treated the areas with anti-rust primer.
- (h) Mr Clementi and Ms Edwards further submitted that the lease did not entitle Mr Lemcke to charge supervision fees as an unqualified person, and that even if it did, no supervision had actually been carried out, as evidenced by the unfinished guttering work, the behaviour of the roofers and the apparently inadequate preparation work as the paint should not be flaking after such a short time.
- (i) In relation to reimbursement of fees, Mr Clementi and Ms Edwards argued that they had been forced by Mr Lemcke to apply to the Tribunal as he had refused to pay back any of their overpaid service charges following the previous Tribunal's decision. Regarding Section 20C they did not believe it was reasonable for Mr Lemcke to recover as service charges any costs he may have incurred in connection with their application.

### **Decision**

15. The Tribunal reminded itself, as it had informed the applicants, that it was not bound by the previous Tribunal's decision mentioned above (# 4, 5 & 6). That said, it could not disregard Mr Lemcke's concession that he had not complied with the statutory consultation procedure, especially as he had not made any representations to the contrary in response to the current application.
16. Under the terms of the lease, the Tribunal noted that the landlord is not entitled to raise a service charge demand in advance except by interim demands on account twice a year. He can only recover the balance of any actual expenditure incurred at the year end, after serving the annual accounts. Mr Lemcke has not done this. The correct way to budget for high expenses on major works is by building up a reserve fund. It is not clear whether the £32,548.50 represents the actual expenditure or simply the aggregate of the chosen estimates.
17. The Tribunal had no difficulty in concluding that Mr Lemcke had failed to follow the statutory consultation procedure. That procedure is set out in Section 20 of the 1985 Act (as amended) and in the Service Charges (Consultation Requirements) (England) Regulations 2003. In brief this is a two stage process requiring service of a notice of intention to carry out qualifying works, describing the works and the landlord's reasons for considering them necessary, and inviting observations from the tenants within 30 days together with the right to propose a contractor from whom the landlord should obtain an estimate. The landlord must have regard to any observations and then obtain estimates and in the second stage of the consultation set out the costs of at least 2 estimates and make them available for inspection.
18. None of Mr Lemcke's letters complied with these requirements. Only one letter, of 1 August 2006, contained summaries of estimates prepared by him and although it invited observations, it would appear he did not intend to pay any regard to them, as he had already selected his preferred contractors and intended to start the works and issue

service charge demands as soon as possible. Indeed the demand sent to Mr Clementi and Ms Edwards was dated 30 August 2006.

19. The works themselves appear to have been completed, apart from the guttering, some of which was not replaced and some of which is not affixed properly. The roof works have been carried out to a good standard. The re-painting appears generally adequate but the Tribunal agreed with Mr Clementi that the flaking masonry paint and rust staining would indicate a lack of adequate preparation. However, this may be not altogether surprising in that the decorators engaged by Mr Lemcke put in a much lower estimate than their competitors who may have carried out a more thorough job albeit at a higher price. On balance the Tribunal concluded that the overall cost of the works was not unreasonable.
20. However, the outcome of the failure to comply with the statutory consultation requirements is that the maximum contribution payable by the Mr Clementi and Ms Edwards towards the cost of the works by way of service charges is limited under the Regulations to £250. This means that Mr Clementi and Ms Edwards have overpaid service charges to the tune of £6,259.70. The Tribunal does not have the power to order Mr Lemcke to repay them but would comment that given the sums involved it would be reasonable and fair for him to do so.
21. Finally the Tribunal took the view that there was no entitlement under the terms of the lease for Mr Lemcke to charge supervision fees at 10% of the net cost of the works. He was only entitled to charge the costs of employing a managing agent or surveyor, or other "proper costs" of managing the building. This does not extend to Mr Lemcke charging for his own services as landlord. The Tribunal noted with some surprise that Mr Lemcke had not instructed a surveyor to prepare a report or Specification for such major works. In any event the Tribunal accepted Mr Clementi's evidence that there had been little or no actual supervision carried out either during or at the end of the works.

#### **Determination**

22. The Tribunal therefore determines in accordance with Section 27A of the 1985 Act that the service charge payable by Mr Clementi and Ms Edwards in respect of the major works for the year ending 31 December 2006 is limited to £250.

#### **Section 20C**

23. Mr Clementi and Ms Edwards sought an order pursuant to Section 20C of the 1985 Act that the costs incurred by the landlord in connection with the proceedings before the Tribunal should not be regarded as relevant costs to be taken into account in determining the amount of the service charge payable by the tenant. The 1985 Act provides that the Tribunal may make such order on the application as it considers just and equitable in the circumstances. The Tribunal is concerned with the merits rather than the quantum of these legal costs.
24. Having carefully weighed the evidence the Tribunal concluded that it would not be just and equitable for the landlord to recover his costs in connection with the proceedings before the Tribunal through the service charge. As Mr Lemcke did not respond in any way to the application it is unlikely that he has incurred costs in any event.
25. The Tribunal therefore makes the order under Section 20C as sought.

#### **Reimbursement of Fees**

26. The Tribunal agreed with the submissions made by Mr Clementi and Ms Edwards (#14(i) above). Mr Lemcke was plainly well aware of the outcome of the previous Tribunal and knew that he had not complied with the statutory consultation requirements. Arguably it should not have been necessary for Mr Clementi and Ms Edwards to make a separate application but Mr Lemcke insisted that they should do so. The matter could have been

resolved without further recourse to the LVT. The Tribunal was not impressed by Mr Lemcke's failure to respond in any substantive way to this application.

27. The Tribunal therefore orders that Mr Lemcke must within 14 days of the date of this Decision reimburse the fees paid by Mr Clementi and Ms Edwards in connection with this application, namely the application fee of £350 and the hearing fee of £150, total £500.

**Dated 31 October 2007**

A handwritten signature in black ink, appearing to read 'J Talbot', with a stylized flourish at the end.

**Ms J A Talbot  
Chairman**