SOUTHERN RENT ASSESSMENT PANEL &
LEASEHOLD VALUATION TRIBUNAL

Case No: CHI/29UN/LSC/2010/0081

In the Matter of Section 27A and Section 20C of the Landlord and Tenant Act 1985

Between:

Mr S Tasker (Applicant/Lessee)

and

Mr S Powell (Respondent/Landlord)

Premises: Flat 3 39 Spencer Square Ramsgate Kent CT11 9LD

Date of Hearing: 11 August 2011

Tribunal: Mr D Agnew BA LLB LLM Chairman
Mr R Athow FRICS MIRPM

Background

1. On 1 June 2010 the Applicant applied to the Tribunal for a determination as to the reasonableness of service charges for the years 2007/8 and 2009/10 levied in respect of the Applicant's property which is Flat 3 at 39 Spencer Square Ramsgate Kent CT11 9LD (The Premises). Although he had not applied for an order under Section 20C of the Landlord and Tenant Act 1985 in his application form the Applicant asked the Tribunal for permission to make such an application orally at the hearing.

2. On his application form the Applicant indicated that he challenged the cost of roof works and building insurance in the 2007/8 service charge year and he also challenged general repairs and electrical work for the 2009/10 service charge year.

3. After the application had been issued but before the hearing the Respondent had supplied information to the Applicant which satisfied the Applicant that the amount charged to him for building insurance for the year 2007/8 was an appropriate charge and he no longer wished to proceed with that challenge.

4. Again, after the application had been issued but before the hearing the Landlord agreed to credit the applicant with the amount that he had been charged for roof works that had been carried out badly for which the applicant had been charged as part of the 2007/8 service charge. The

amount of this credit is £2470.84. This did not settle the matter however because in an "account statement" dated 12 July 2010 the landlord was seeking to recover from the Applicant a contribution of £675.00 towards the cost of protecting the property from the elements as a consequence of the incompetent work carried out by the landlord's contractor to the roof (for which the Applicant was to receive a refund). The Applicant challenged that figure of £675.00 as being, he thought, too high.

5. It transpired during the course of the hearing that not only had no service charge demand been made yet for the year 2009/10 but furthermore the cost of works that were supposed to be carried out during the current year and for which a Section 20 notice had been issued had not yet been carried out and any final figure for that work was not yet known. The Respondent also confirmed that he accepted that there was no power under the lease to seek to recover monies by way of interim service charge in advance of expenditure actually having taken place. Accordingly, there was not yet any definite figure for the Tribunal to determine whether, if it were charged, it would be reasonable or not. The Applicant therefore accepted that the Tribunal would not be in a position to make a determination on that issue on this occasion but he would be entitled to issue a fresh application under Section 27A of the 1985 Act once the service charge in respect of that work had been levied if he still wished to challenge it.

6. During the course of the hearing the Applicant raised, for the first time, whether he was liable to pay an outstanding service charge of £144.49 which was outstanding from the invoice issued on 9 April 2010. As the Applicant had made no reference to this in his application the Respondent was taken by surprise by this challenge. He did not have the relevant documentation with him at the hearing to justify those charges. The Tribunal decided that it would be unjust in those circumstances for the Tribunal to agree to hear the Applicant's case in respect of that particular charge on this occasion. As the matter will not have been the subject of a judicial determination there is nothing to prevent the Applicant from including a challenge to that figure in any future application he wishes to make under Section 27A of the 1985 Act.

7. In consequence of the above, the matters that were left for the Tribunal to determine were as follows:-
   a) whether the sum of £675.00 was a reasonable charge for the Respondent to seek to recover from the Applicant for the cost of protecting the building from the elements following the previous defective work carried out in 2007/8
   b) whether a proposed charge of £353.00 (the first instalment of which was included on the "account statement" of 12 July 2010 referred to above) was a reasonable sum for the Applicant to pay in respect of the works carried out to the communal lights
   c) whether the Tribunal should make an order under Section 20C of the Landlord and Tenant Act 1985
   d) whether, in response to an application made by the Applicant at the

commencement of the hearing, the Tribunal should order the Respondent to reimburse the Applicant with the sum of £250.00 being the amount of the application fee paid by the Applicant.

The Inspection

8. The Tribunal inspected the premises immediately prior to the hearing on 11 August 2010. 39 Spencer Square is a four storey terraced house constructed in about 150 years ago. It is situated in a square of properties of similar age and character close to a commercial harbour in Ramsgate. It has been converted into six flats. The top floor of the building has suffered some deliberate damage caused by contractors carrying out works to Flat 5. The bay window at this level which had previously been bricked up at some stage had been opened up to the elements and this window was now boarded over.

9. The Tribunal was unable to see much of the roof or roofs of this complicated building because of the height of the front elevation parapet and the fact that access could not be gained to allow a view of the rear of the premises. The Tribunal was able to see one area of flat roofing from a window in the communal stairway. This roof had evidently been recovered at some stage in the last few years and had been the subject of patch repairs. This area of roofing appeared to be in reasonable condition. It was understood by the Tribunal, however, that the source of the main problem with regard to the roof was over Flat 5 due to the works carried out on behalf of the lessee at the property. The Tribunal was unable to view that part of the roof to see the extent of the damage or assess the amount of work that needs to be done to rectify the damage.

10. The Tribunal did see the electrical work that had been carried out in the communal areas in order to replace the ordinary lighting system and to fit an emergency lighting system. The electrical work seemed to the Tribunal on the day of the inspection to be reasonably satisfactory although not prettily done as all the wiring was surface mounted covered in plastic tubing.

11. The front communal entrance door was badly in need of repainting and some work was also required to attend to rusting external ironwork but these items were not relevant to the present proceedings.

The Lease

12. By clause 2 of the Applicant's lease the lessee covenants with the lessor "that he will observe and perform the covenants and obligations on his part contained in the fourth and sixth schedules".

13. By clause 3 of the said lease the lessor covenants with the lessee "that he will observe and perform the obligations in his part set out in the fifth schedule".

14. The relevant provisions of the fourth schedule of the lease are that the lessee agrees to pay to the lessor "an annual charge on the 25th day of March and the 29th day of September in respect of the monies expended by the lessor up to those dates relating to:
i) the cost to the lessor of complying with its covenants contained in the fifth schedule ..."

15. By the fifth schedule to the lease the lessor agrees to "keep the exterior of the building and all additions thereto and structures for which the lessees of the flats are not responsible in good and substantial repair and condition and properly decorated and the common areas staircase property lighted". Additionally the lessor agrees that he will "as and when it is reasonable so to do but in any case within every fourth year of the said term commencing in the year 19 (sic) distemper the external walls and repaint the exterior ironwork gutters pipes and woodwork of the building of which the flat forms part in a proper and workmanlike manner and with suitable materials".

The Law

16. By Section 27A of the 1985 Act it is provided that:-
(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, improvement, 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 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.

17. By Section 20C of the 1985 Act it is provided that "a tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court,

residential property tribunal or leasehold valuation tribunal or the upper tribunal or in connection with arbitration proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application".

18. By Section 20C (3) of the 1985 Act it is provided that "the court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances".

The Hearing

19. The Applicant attended the hearing in person and represented himself. The Respondent also appeared in person but was accompanied by Mr Michael Leigh, representative of Powell and Co Management, the Respondent's managing agents.

The Applicant's Case

20. Mr Tasker was pleased that as a result of making this application he had achieved a refund of the amount he had originally been charged for the cost of the landlord's contractors incompetent roof works in the sum of £2470.82 but he challenged the sum of £675.00 that the landlord now wished to charge instead for works done to protect the building following the dismissal of his original contractors. Unfortunately, however, the Applicant had no real grounds for challenging the figure he was being charged. He had no idea as to the work that was carried out at a total cost of £4050 (of which his share was £675.00) other than the work description which appeared on the contractor's invoice dated 19 March 2008. He did not know what work had been done or to which part of the property. He had not instructed a surveyor to investigate the matter and could only say that he thought the figure was high simply to achieve a temporary situation to protect the building before more major works were carried out.

21. With regard to the electrical works for which he was going to be charged £353.00, he produced photographs showing what he alleged was the poor state of the way the electrical works had been left by the electrical contractor. He said that he was prepared to agree that £1800 would be a reasonable figure to pay for the electrical works if they had been carried out to a reasonable standard. This was the figure that was included in the Section 20 estimates for this work back in 2008. He saw no reason why this figure should now have risen to £2118 and in any event the work had not been carried out to a satisfactory standard. Although he had been complaining about the communal lighting going back to 2007 the work was not done until 2010 by which time the local authority had become involved and an improvement notice was served upon the Respondent. The Respondent then did get the work done quickly.

22. With regard to the Section 20C application the Applicant's case was that had it not been for making this application he was getting nowhere with the landlord in obtaining information to enable him to obtain information with regard to the insurance charge or with regard to the true picture as to what the landlord had expended in regard to the initial unsatisfactory roof works. He was therefore entirely justified in bringing the proceedings and it would not be reasonable for the landlord to be able to claim any costs with regard to the tribunal proceedings by way of future service charges.

23. With regard to his application for reimbursement of fees by the Respondent the same arguments applied as for the Section 20C application.

The Respondent's Case

24. The Respondent was unsure of what works had to be carried out to which part of the building which led to the invoice being received from his contractor General Maintenance and Building Services for £4050.00 dated 19 March 2008. He had not been to the property to inspect the work. He did produce, however, the invoice where the description of the works was as follows:-
    1. Complete renewal of flat roof.
    2. Rebuild dorma (sic) and roof.
    3. Rebuild and render parapet walls adjoining both properties.
    4. Replace ridge tiles.
    5. Replace broken slates.
    6. Replace lead flashing.
    7. Repaint stack.
    8. Render side of dorma (sic).
    9. Remove all debris and rubbish from the property.

    His point was that the Applicant had produced no evidence that that invoice was unreasonable notwithstanding that he had invited the Applicant to have his own surveyor inspect the work.

25. The Respondent agreed that there had been no separate Section 20 notice issued in respect of this work. A Section 20 notice had been issued, however, in respect of the original roofing works and the work that has now been charged was simply to make the property reasonably wind and watertight as a temporary measure following the defective work carried out by the original contractor.

26. The Respondent said that major work still had to be carried out with regard to the roof largely as a result of the damage that had been caused by the lessee of Flat 5. He had been in litigation with that lessee. He had recently settled the case on the basis that that lessee would pay all arrears of service charge and would pay £1000 by way of damages. Although this was considerably less than the amount claimed he settled the case on that basis as a pragmatic measure because there were difficult legal issues involved in the claim and the

costs were getting out of hand. He said that he would be bearing all the costs of that litigation and that none of it would be passed on to the lessees. Although a Section 20 notice had been issued in respect of the prospective roof works the work had not yet been put in hand and the final costings were not yet known. No service charge demands have yet been made in respect of those costs and indeed the Respondent accepted that under the lease there was no power given to the landlord to collect interim service charges before expenditure had actually been incurred. Thus the work will be carried out and service charge demands would be sent out retrospectively.

27. With regard to the electrical works no formal demand has yet been made but the amount was known, namely £353.00 per flat. The Respondent accepted that unless and until a formal service charge demand with the statutory notice of tenants' rights and obligations attached is served on the Applicant then the Applicant is not liable to pay this sum.

28. The Respondent explained that the difference between the estimate of £1800.00 and the amount actually charged, (£2118.00) was probably because the electrician found that there was more work to be done than was anticipated when the estimate was given. However, the whole house was rewired and he thought the charge was reasonable. The Applicant had produced no evidence to show that this invoice was unreasonable.

29. The Respondent accepted that he had not complied fully with the Section 20 procedure in respect of the work to the lighting. Although this work had been included in the first notice under Section 20, a second notice was not issued when the estimate was obtained. This was because the Respondent was under considerable pressure from lessees and also the council and it was therefore an emergency and he just had to get on and do it.

30. With regard to the quality of the electrical work, he said that the Tribunal would have seen this and would be able to assess this for themselves but he considered that the work had been done to a reasonable standard.

31. With regard to the Section 20C application, the Respondent accepted that there was no power in the lease for him to charge the costs of the tribunal proceedings to the service charge and therefore no such charge would be sought.

32. With regard to the application for reimbursement to the Applicant of the Tribunal fees the Respondent objected to this on the basis that he considered that he had been very reasonable in trying to settle this matter with the Applicant so that the hearing would have been unnecessary but the Applicant has proceeded unreasonably in his view

and it could be said that the Applicant had acted frivolously or vexaciously.

Section 20ZA Application

33. In view of the Respondent's acceptance that he had not followed the complete Section 20 consultation procedure with regard to the charge for the electrical works the Tribunal asked whether he wished to make an application for dispensation of the requirements under Section 20ZA of the 1985 Act. The Respondent said that he did. His justification for proceeding with the works without obtaining dispensation was that it had to be done urgently and that there was not time to seek an order from the Tribunal. He did not consider that in those circumstances it was necessary to apply for dispensation retrospectively. The Tribunal disabused him of that view. Consequently the Respondent undertook to submit a Section 20ZA application to the Tribunal within 14 days of the hearing. The Tribunal agreed that if he did so then it would consider the application before reaching its final determination.

The Determination

34. With regard to the temporary roofing works for which the Respondent seeks to charge the Applicant £675.00 the Tribunal was in some difficulty because of the dearth of evidence on either side. However, the Respondent had produced an invoice detailing the work that had been done and although the Tribunal had been unable to see for itself the extent of the work carried out bearing in mind that this is a complicated building and that scaffolding would have been required the Tribunal in its own experience of such matters considered that the overall cost of £4050 was likely to be within the band of reasonableness for such work. As the Applicant was unable to put forward any evidence at all that this figure was unreasonable the Tribunal decided to give the Respondent the benefit of the doubt and is prepared to decide that the figure of £675.00 was a reasonable amount for the Applicant to be charged. However, this would not become due and payable until the Applicant receives a formal demand accompanied by the statutory notice of tenants' rights and obligations.

35. With regard to the electrical works, the Tribunal considered that by the time of the inspection any defects had been remedied and that the work was of a reasonable standard bearing in mind the age and character of the building in question. The Tribunal noted that the Applicant had been prepared to agree that £1800 would have been a reasonable figure for the works done had they been carried out to a reasonably satisfactory standard in 2008. There had been only a modest increase between that figure and the amount actually charged in 2010 of £2118.00. The Tribunal considered that the difference in the figures was likely to be accounted for by the general increase in prices between 2008 and 2010. On the face of it, therefore, the Tribunal was prepared to determine that the amount proposed to be charged to the

Applicant of £353.00 was reasonable. However, on the Respondent's own admission, the Section 20 consultation procedure had not been completely followed and therefore unless the Tribunal was prepared to grant retrospective dispensation from the Section 20 requirements the landlord is restricted to claiming £250.00 from the Applicant in respect of this item.

36. The Respondent has submitted an application under Section 20ZA in the time granted by the Tribunal and the Tribunal has considered this application but rejects it. If this was an emergency situation it was an emergency of the Respondent's own making. The Respondent had been aware from representations made by the Applicant as long ago as 2007 that the lighting required attention and the Applicant had subsequently complained that nothing had been done about it. It was only when the local authority was on the point of serving an improvement notice that the Respondent took action to have the work done. If he had done the work in 2008 when he received the estimate the Respondent would not have been under such pressure and there would have been time to have undergone the Section 20 procedure properly. The Respondent cannot claim that he was unaware of the Section 20 procedure because he was undergoing that procedure for other work. Accordingly, the Tribunal is not prepared to find that it would be just and equitable to dispense with the consultation requirements in this regard. It follows that when any formal demand is made with the accompanying statutory notice of tenants' rights and obligations the Respondent will be restricted to recovering £250.00 from the Applicant in respect of the electrical works.

37. With regard to the Section 20C application, the Respondent has conceded that he is unable to claim the costs of the Tribunal proceedings through any future service charges as there is no provision enabling him to do so under his lease. Had that not been the situation the Tribunal would have made an order under Section 20C as it considers that the Applicant was justified in making his application. It was only after the Application was issued that information was received from the Respondent which enabled him to satisfy himself with regard to the charge for the insurance premium for 2007/8 and it was only after the application was issued that the Respondent credited the Applicant with the charge for the first abortive roofing works. For these reasons it would have been just and equitable to have made an order under Section 20C.

38. With regard to the application for reimbursement by the Respondent of the Applicant's tribunal fees of £250 the Tribunal decided that the Respondent should reimburse the Applicant £125.00 (one half of the fees that the Applicant has incurred). Whilst the Applicant has achieved some success as a result of issuing his application as indicated in the last preceding paragraph of these reasons he has not succeeded in achieving a reduction in the charge for the temporary roof works and has only achieved a partial reduction in the amount of the

charge for the electrical works. In all the circumstances, therefore, the Tribunal decided that it would be fair and reasonable for both parties to share the tribunal fees equally and so determines that the Respondent shall reimburse the applicant with the sum of £125.00.

Dated this 31st day of August 2010

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D. Agnew BA LLB LLM
Chairman