

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – sections 19, 20, Schedule 4 Landlord and Tenant Act 1985 – compliance with consultation requirements – whether place and hours estimates made available for inspection is reasonable – whether specific service charges reasonably incurred – landlord’s appeal dismissed

**IN THE MATTER OF AN APPEAL AGAINST A DECISION
OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)**

BETWEEN:

**ASHLEIGH COURT RIGHT TO MANAGE
COMPANY LIMITED**

Appellant

and

**(1) MS R DE-NUCCIO,
(2) MR S RAIVADERA
(3) MR N RANDALL
(4) MR I SKIDMORE
(5) MRS S LAMONT SKIDMORE**

Respondents

Re: Ashleigh Court, Solomon’s Hill, Rickmansworth, Hertfordshire WD3 1EA

Before: His Honour Judge Stuart Bridge

Sitting at: Royal Courts of Justice, Strand, London WC2B 2LL

on

27 April 2015

Mr Kendall and Mr Backinsell, directors, appeared on behalf of the Appellant company
Mr Randall, Mr Raivadera and Mrs Lamont-Skidmore all appeared in person

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The following cases were referred to in this decision:

Daejan Investments v Benson [2013] UKSC 14, [2013] 1 WLR 854

Introduction

1. This is an appeal from a decision of the Ft T dated 31 January 2014, permission to appeal having been granted by the Upper Tribunal on 6 June 2014.
2. Ashleigh Court is a single block of 30 flats in Rickmansworth, Hertfordshire. The flats are let on 999 year leases granted in 1967 each of which contains a covenant by the leaseholder to pay a service charge.
3. In 2011 the appellant company exercised rights under Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002 and secured the right to manage the property.
4. In 2012 the appellant decided to take steps to carry out substantial works to the roof of the property and initiated the process of consultation with the tenants in order to comply with the relevant statutory requirements. The appellant also sought to carry out other works to the property and to obtain due contribution from the tenants by invoking the service charge provisions in the leases.
5. On 30 September 2012 the respondents applied to the Leasehold Valuation Tribunal for a determination under section 27A of the Landlord and Tenant Act 1985 as to whether service charges were payable in respect of the flats they owned. Following the transfer of the functions of leasehold valuation tribunals to the Ft T, that tribunal made a determination on 31 January 2014 in relation to a number of issues between the parties.
6. In this appeal, two issues arise, the Upper Tribunal having limited the scope of the appeal in the terms of its permission. The first is whether the Ft T was wrong in law in deciding that the Appellant failed to comply with the statutory consultation requirements contained in Schedule 4 to the Landlord and Tenant Act 1985 and thereby limiting the contribution of each tenant to the sum of £250 pursuant to section 20 of the same Act. The second is whether the Ft T was wrong in law in deciding that two particular charges levied from the tenants were irrecoverable as a result of section 19 of the 1985 Act.
7. The appellant company has been represented in this appeal by two of its directors, Mr Kendall and Mr Backinsell: Mrs Kendall also appeared in the tribunal and made some observations in the course of argument. Three of the respondents, Mr Raivadera, Mr Randall and Mrs Lamont-Skidmore, have appeared in person and have acted as representing the interests of those two respondents who did not appear. I am grateful to them all for their assistance.

The lease provisions

8. The Ft T made reference to the following extracts from the lease of Flat 2 (owned by Mr Skidmore and Mrs Lamont Skidmore, two of the respondents to the current appeal), a lease granted with effect from 1 January 1967 for a term of 999 years.

9. Clause 2 contains, so far as is relevant, the following:

‘2. The Lessees hereby covenant with the Lessor that the Lessees will at all times during the term hereby granted duly observe and perform all the covenants and provisions following that is to say:-

‘(6) Subject to the covenant of the Lessor hereinafter in Clause 4 (2) (i) (ii) (iii) and (iv) contained and to the proviso hereinafter contained to pay one thirtieth part of such costs expenses outgoings mentioned in the fourth Schedule hereto The decisions with regard to such expenses outgoings and matters being made by the Managing Agents of the Lessor... for the time being whose certificate shall be final and binding on the Lessees as to the doing of such matters and the cost thereof

‘The Lessees shall on the signing hereof and on the Second of September in every year throughout the term pay to the Lessor the sum of £25 on account of their one thirtieth part contribution In the event of the costs expenses outgoings and matters aforesaid amounting to less than £750 in any particular year ending on First of January after making suitable transfer of an amount to a Reserve Fund in respect of future anticipated expenditure the Lessees shall be entitled to be repaid or credited with their one thirtieth part of such excess paid by the Lessees as the Lessor’s Managing Agents for the time being shall decide and certify and in the event of the aforesaid costs expenses outgoings and matters amounting to more than £750 in any particular year the Lessees shall forthwith pay to the Lessor a further one thirtieth part of the amount of such excess sum so certified by the Lessor’s Managing Agents.’

10. The Lessor’s covenants, contained in Clause 4, are, again so far as is relevant:

‘4. The Lessor hereby covenants with the Lessees:-

‘(2) (i) That (subject to contribution and payment by the Lessee as hereinbefore provided) The Lessor will keep and maintain in good and tenantable repair and renewal the main structure and in particular the main walls roof gutters and rainwater pipes of the “Development” [defined in the recitals as ‘flats and garages.. together with all necessary roads footpaths and garden grounds appurtenant thereto..’] the gas and water pipes sewers drains inspection chambers vents and electric cables television and radio aerials and wires in under and upon “the Development” and enjoyed or used by the Lessees in common with the owners and Lessees of the other flats the main entrance forecourt roadways footpaths passages lifts landings and staircases of the “Development”

‘(iii) That (subject as aforesaid) the Lessor will so far as practicable keep clean and reasonably lighted the passages landings staircases lifts and other parts of the “Development” so enjoyed or used by the Lessees in common as aforesaid and as far as practicable keep the forecourt roadways paths grounds and other parts of the “Development” used in common as aforesaid in good clean and tidy condition

‘(iv) That (subject as aforesaid) the Lessor will so often as reasonably required decorate the exterior of the “Development”.’

11. The Ft T did not expressly make reference to the fourth Schedule which, as indicated in Clause 2 set out above, defines those ‘costs expenses and outgoings’ which can be claimed from the lessees by way of the service charge. It is a characteristically full provision. I do not set it out here. It is accepted that, as a matter of construction of the lease, the lessees are liable to pay by way of service charge those costs (etc.) properly certified by the lessor’s managing agents.

The statutory context

12. Section 19 provides that, in determining the amount of service charge payable for a period, ‘relevant costs’ (as defined in section 18) are to be taken into account:

‘(a) only to the extent that they are reasonably incurred, and

‘(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

‘and the amount payable shall be limited accordingly.’

It is accepted (subject to what I say about the two subsidiary issues below) that the amounts being claimed by the appellants from the tenants fall within the statutory definition of ‘service charges’ contained in section 18 of the Landlord and Tenant Act 1985.

13. Section 20 provides, so far as is relevant to this case:

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

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

(b) dispensed with in relation to the works... by (or on appeal from) the appropriate tribunal.

(2) In this section “relevant contribution”, in relation to a tenant and any works..., is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works...

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

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

(7) Where an appropriate amount is set by virtue of [s.20(5)], the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

14. It is accepted that section 20 applied to the amounts claimed by the appellant for works that were intended to be carried out to the roof of Ashleigh Court: they were ‘qualifying works’ as the ‘relevant costs’ in carrying them out exceeded the ‘appropriate amount’ (that is ‘an amount which results in the relevant contribution of any tenant being more than £250’: SI 2003/1987 reg.6): see sections 20(3), (5). The effect was that, unless the consultation requirements were complied with in relation to the works, the amount recoverable from a tenant by way of service charge was limited to the sum of £250. In this case, the respondents contend that the consultation requirements were not complied with and that the appellant cannot recover in excess of that amount from them.

15. Section 20ZA confers regulation making powers on the Secretary of State, and the consultation requirements are to be found in regulations made in 2003 (the Service Charges (Consultation Requirements) Regulations 2003, SI 2003/1987). Part 2 of Schedule 4 to those regulations contains the provisions relevant to this case: see SI 2003/1987, reg.7(4). I shall refer to those regulations which are material to the issues in due course.

16. By Section 20ZA(1) of the 1985 Act:

Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works..., the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

17. In *Daejan Investments v Benson* [2013] UKSC 14, [2013] 1 WLR 854, the Supreme Court considered the ambit of the dispensation power contained in section 20ZA(1), and a helpful summary of the consultation requirements can be found in the speech of Lord Neuberger of Abbotsbury at [12]:

Stage 1: Notice of intention to do the works

Notice must be given to each tenant and any tenants' association, describing the works, or saying where and when a description may be inspected, stating the reasons for the works, specifying where and when observations and nominations for possible contractors should be sent, allowing at least 30 days. The landlord must have regard to those observations.

Stage 2: Estimates

The landlord must seek estimates for the works, including from any nominee identified by any tenants or the association.

Stage 3: Notices about estimates

The landlord must issue a statement to tenants and the association, with two or more estimates, a summary of the observations, and its responses. Any nominee's estimate must be included. The statement must say where and when estimates may be inspected, and where and by when observations can be sent, allowing at least 30 days. The landlord must have regard to such observations.

Stage 4: Notification of reasons

Unless the chosen contractor is a nominee or submitted the lowest estimate, the landlord must, within 21 days of contracting, give a statement to each tenant and the association of its reasons, or specifying where and when such a statement may be inspected.

18. Later in his speech, at [42], Lord Neuberger considered the purpose of the consultation requirements:

It seems clear that sections 19 to 20ZA are directed towards ensuring that tenants of flats are not required (i) to pay for unnecessary services or services which are provided to a defective standard, and (ii) to pay more than they should for services which are necessary and are provided to an acceptable standard. The former purpose is encapsulated in section 19(1)(b) and the latter in section 19(1)(a). The following two sections, namely sections 20 and 20ZA appear to me to be intended to reinforce, and to give practical effect to, those two purposes. This view is confirmed by the titles to those two sections, which echo the title of section 19.

[43] Thus, the obligation to consult the tenants in advance about proposed works goes to the issue of the appropriateness of those works, and the obligations to obtain more than one estimate and to consult about them go to both the quality and the cost of the proposed works. Mr Rainey QC and Mr Fieldsend for the respondents point out that sometimes the tenants may want the landlord to accept a more expensive quote, for instance because they consider it will lead to a better or quicker job being done. I agree, but I do not consider that it invalidates my conclusion: loss suffered as a result of building work or repairs being carried out to a lower standard or more slowly is something for which courts routinely assess financial compensation.

[44] Given that the purpose of the requirements is to ensure that the tenants are protected from (i) paying for inappropriate works or (ii) paying more than would be appropriate, it seems to me that the issue on which the LVT should focus when entertaining an application by a landlord under section 20ZA(1) must be the extent, if

any, to which the tenants were prejudiced in either respect by the failure of the landlord to comply with the requirements.

[45] Thus, in a case where it was common ground that the extent, quality and cost of the works were in no way affected by the landlord's failure to comply with the requirements, I find it hard to see why the dispensation should not be granted (at least in the absence of some very good reason): in such a case the tenants would be in precisely the position that the legislation intended them to be—ie as if the requirements had been complied with.

[46] I do not accept the view that a dispensation should be refused in such a case solely because the landlord seriously breached, or departed from, the requirements. That view could only be justified on the grounds that adherence to the requirements was an end in itself, or that the dispensing jurisdiction was a punitive or exemplary exercise. The requirements are a means to an end, not an end in themselves, and the end to which they are directed is the protection of tenants in relation to service charges, to the extent identified above. After all, the requirements leave untouched the fact that it is the landlord who decides what works need to be done, when they are to be done, who they are to be done by, and what amount is to be paid for them.

19. The relevance of this passage is that it confirms the approach I consider is to be adopted by the Ft T where non-compliance with the consultation requirements has been alleged. The Ft T must simply determine whether or not the landlord has duly complied. The seriousness of the breach alleged is immaterial, as is any prejudice that may or may not have been suffered by the tenants. In the event of the Ft T determining, or the landlord conceding, that the consultation requirements have not been complied with, the landlord may then seek a dispensation order under section 20ZA, and the proper focus of such an application is, as Lord Neuberger explains, the extent to which the tenants have been prejudiced by the landlord's failure to comply with the requirements imposed by statute.

20. That is not however the stage which has been reached in this case. I am therefore solely concerned in this appeal whether the appellant did comply with the consultation requirements, more particularly whether the Ft T, in determining that it did not, erred in law in arriving at that decision.

Did the landlord comply with the statutory consultation requirements?

21. With the exception of Mr Skidmore and Mrs Lamont Skidmore, the respondents have resisted payment of any contribution towards the major roof works that took place in 2012 on the grounds that the appellants failed to comply with the consultation requirements. They contend (and it is accepted) that if there was non-compliance the maximum sum payable by each of them is £250. It is also accepted that it would be open to the appellants to apply under section 20ZA for dispensation from the consultation requirements, but no such application has been made.

22. Stage 1 of the consultation was initiated, following a lessees' meeting the previous month, by a letter from Mr Backinsell on behalf of the appellant company dated 25 February 2012 addressed and sent to each of the lessees. It noted that it had been decided at the meeting 'unanimously to repair/renew/replace the roof' of Ashleigh Court and to carry out other works (which the letter particularised) on and around the roof. Lessees were invited to make observations within 30 days of the letter and nominate contractors from whom tenders might be requested: such observations and nominations were to be made in writing, addressed to the Secretary and received no later than 30 March.

23. The respondents contended before the Ft T that this notice, which purported to be a Stage 1 consultation notice under section 20 of the 1985 Act, did not comply with the statutory requirements. This contention did not succeed, the Ft T holding (at [30] of its decision) that the notice complied with paragraph 8 of Schedule 4. There is no appeal from this determination, and I need not say anything further about Stage 1.

24. The appellant duly sought estimates, then sent what they referred to as a Stage 2 Consultation Notice on 9 June 2012. Under the formulation proposed by Lord Neuberger (see paragraph 17 above) this was Stage 3, but I shall refer to this as the Stage 2 notice as that is how it described itself and how the parties have subsequently referred to it. The notice was on the appellant's headed note paper, the address being given as:

Ashleigh Court Right to Manage Company Limited, Elm Park House, Elm Park Court, Pinner, Middlesex HA5 3NN

25. The letter, addressed 'Dear Lessee', was headed *Stage 2 Consultation Notice: Roof & Associated Works*. The first two paragraphs read as follows:

This Notice is given pursuant to the Stage 1 Notice of Intention issued on 25th February 2012, the consultation period for which ended on 30th March last. We have now obtained three tenders in respect of the proposed works and from which to select a contractor. The amounts specified in these tenders as the estimated cost of the proposed works are summarised in the attachment. A contingency sum is considered desirable for matters that may be revealed once scaffolding enables a closer inspection to be made. Any unspent contingency monies will be returned to the lessees.

You are invited to make written observations in relation to the estimates by sending them to the Secretary at the Registered Office, the address of which is shown above. The Stage 2 Consultation Period will end on 10th July 2012. The three tenders, specifications and other relevant documents may be inspected at the Registered Officer between 09 00 and 12 00 on any weekday during the consultation period: please contact the managing agents, Messrs Sears Morgan, by phone or email at least 48 hours in advance of your intended visit to ensure someone is available to meet you.

26. The third paragraph of the letter recorded the challenge that had been made (by lessees of Flats 7, 8 and 30) to the validity of the Stage 1 consultation process, stating that the

observations had been carefully considered and a response had been sent. The letter concluded:

The Directors wish to ensure that lessees are satisfied with the proposed works and that these provide value for money. If you have any comments, suggestions or concerns about any aspect of the works please ensure that you respond within the time limit shown above.

27. Attached to the letter was a summary of tenders for the roof works. That summary was, in the view of the Ft T, 'the paragraph (b) statement' (see SI 2003/1987, Schedule 4, Part 2, para 5(b)), and it considered that it was of no consequence that this statement was sent with the 'Stage 2 Notice'. No further issue is taken with this.

28. The Stage 2 notice asked that contact be first made with 'the managing agents' (Sears Morgan) by phone or email at least 48 hours beforehand to ensure that someone was there to meet them. Although no contact details were given for Sears Morgan, it is accepted that Mr Randall did seek to contact them as requested. He sent an email on 19 June stating that the times for inspection were 'inconvenient for lessees who work in the day' and asking them to post or email copies of tenders, specifications and other relevant documents. Having received no response, he emailed again on 24 June explaining fully the position and detailing the possible legal consequences of a failure to respond. This time, he did receive a response:

HI NIC

With regard to the Section 20 Notices, Sears Morgan act as a mere Post Box in this regard, therefore we have very limited responsibility. We would suggest that the Stage 2 Notice to which you refer, forms part of the consultation process, which is totally managed by ASHLEIGH COURT RIGHT TO MANAGE COMPANY LIMITED. Should you wish to question the terms of that process, which are defined by legislation, we suggest that you contact, in writing, the secretary of the RTM company at there [sic] registered office. Sorry we cannot be of further help.

29. In the course of the appeal hearing, I was shown, by the appellant company, some email correspondence between the appellant and the respondents (or some of them) which followed the response from Sears Morgan. It is not clear whether this correspondence was before the Ft T, although no reference was made to it in the terms in which the decision was given. After the hearing before me, Mr Randall sent some brief comments on this correspondence. As will become clear, I do not consider this correspondence is of assistance in resolving the issues I have to decide, and so I shall summarise it very briefly.

30. On 30 June 2012 (some 10 days before the consultation period was due to close), Mr Backinsell sent an email to a number of recipients including all the respondents to this appeal (Mr Randall, Mr Raivadera, Ms De Nuccio, Mr Skidmore and Mrs Lamont Skidmore) asking that anyone who wanted to receive 'soft copies' of the relevant documents should please contact one of the directors. Two days later, following a request from Mr Raivadera, Mr

Backinsell sent copies of documents to Mr Randall, Mr Raivadera and Ms De Nuccio. There was some further brief correspondence between Mr Randall and Mr Backinsell, following which the Company received a two-page letter from Mr Randall dated 7 July 2012 containing observations ‘made with the help of and submitted on behalf of Mr Raivadera (Flat 30) and Ms De Nuccio (Flat 8).’

31. Mr Randall’s letter of 7 July (received by the appellant on 9 July, the day before the consultation period closed) comprised 18 numbered paragraphs. Throughout the letter, Mr Randall made the point that the current consultation may be invalid, referring to the fact that the previous consultation was still open; that neither phone nor email details for Sears Morgan had been provided; that documents had not been made available for inspection despite the terms of the 9 June letter (the email from Mr Worsfield being mentioned); and that although now in possession of some documents the lessees had been ‘restricted in time needed to have [the documents] checked by our legal advisors before the deadline’. The letter does contain a number of substantive comments upon the consultation, but it concludes:

The observations made in response to Stage 1 and Stage 2 show that we have been put at a disadvantage that may affect us financially. It may become necessary for us to make an application to the LVT for a decision as to whether the correct legal process has been followed and whether the full costs are payable.

32. Mr Backinsell replied to Mr Randall by letter of 17 July, contending that the appellant company had complied fully with the legislation in specifying ‘a reasonable place and hours at which all the estimates may be inspected.’ He gave as the intention for suggesting that lessees first contact Sears Morgan- to ensure that someone was available to meet them- was ‘to avoid inconvenience to lessees, not to make any visit conditional’. He went on to say ‘We make no comment on interactions you claim to have had with a third party’ - a clear reference to the email received by Mr Randall from Sears Morgan.

33. The Ft T decided (at [33]) that this stage of the consultation process was defective for the following reasons:

a) The hours specified in the Stage 2 Notice of 9 to 12 are not sufficiently convenient. The Tribunal considers that the documents ought to be available within normal office hours.

b) The requirement for 48 hours prior notice is unreasonable.

c) Even if it were reasonable, for the leaseholders to exercise their right to view the tender documents, it was necessary that adequate contact details were given. The Stage 2 Notice gives no contact details.

d) The Notice presupposes that the leaseholders would know that the Registered Office of the RTM company is the same as the business address of Sears Morgan Property Management Limited. They may or may not have known this, but it is clear that the arrangements for inspection were not properly set up, as when Sears Morgan

were contacted by Mr Randall [one of the respondents], Mr Worsfield, by his email dated 26th June 2012, directed Mr Randall to apply in writing to the Registered Office of the RTM Company.

e) The Tribunal finds that the intention of paragraph 11 [of the regulations]... is that the notice should specify a location where the leaseholders can, within the period specified, visit a convenient location, to inspect the estimates, and they should be able to make copies, or have them supplied, at no cost to themselves. The Stage 2 Notice in the present case clearly fails this test, the more so as the address actually given is (on Mr Randall's evidence, which the Tribunal accepts, but also on Mr Backinsell's admission) confusing and difficult to find.

34. In relation to the consultation requirements, the Ft T concluded as follows (at [34]):

It is the Tribunal's determination, therefore, that the consultation requirements under section 20 of the Act were not complied with and that accordingly the respective contributions of each of the [respondents] to the works the subject of the Stage 2 Notice are limited in accordance with section 20(3) of the Act and Regulation 6 of the Regulations to £250.

35. The appellant RTM company challenges this determination of the Ft T. In the terms of its skeleton argument, and as developed orally, it submits that it had done its best to comply with the terms of the legislation and that the Ft T failed to give sufficient weight to the importance of all parties sharing the responsibility to make the consultation process work. The appellant contends that the facilities that were arranged to allow inspection of relevant documents were perfectly adequate and sufficiently convenient to all parties.

36. The respondents seek to support the determination of the Ft T by reference to a number of factors which were before the Ft T. They contend that the hours for inspection were not sufficiently generous, that restricting inspection to 9am to 12 noon on week-days did not give adequate accommodation for those who worked full-time. The address of the Company's registered office was not valid, and, as the Ft T found as a fact, 'confusing and difficult to find'. Moreover, in requesting that enquirers give 48 hours' notice to the managing agents to ensure that the facilities for inspection were available was unreasonable not least because the agents did not themselves appear to be aware of their role in the consultation exercise.

37. The appellant has emphasised that, whatever failings there may have been in the consultation process, the respondents did in fact obtain the information they sought before the end of the consultation period. It contends that the contents of Mr Randall's letter of 7 July may be treated as a response to consultation, and if so the respondents cannot say that they have suffered any significant prejudice as a result of any defects there may have been in the consultation process.

38. I note the observations made by the Deputy President on 6 June 2014 when granting permission to appeal:

The [appellant] has a realistic prospect of success in showing that the Ft T was in error in its conclusion that the consultation requirements had not been complied with. It is arguable:

that whether hours are reasonable should have regard to the nature and resources of both the giver of the notice and the receiver, and that in these circumstances the limited hours stipulated were not unreasonable;

that by asking itself whether the hours were ‘sufficiently convenient’ the Ft T asked the wrong question; and

that the need for ‘contact details’ rather than an address, and the relevance of how easy or difficult the chosen address was to locate, were non-statutory considerations which the Ft T was not entitled to take into account.

39. The Tribunal directed that the appeal would be dealt with by way of a review, and after giving Directions, the document concluded:

The parties should be aware that the hearing of the appeal before the Tribunal is unlikely to take place for at least 12 months, and that an application to the Ft T for dispensation from the consultation requirements (to the extent necessary) is likely to be determined considerably sooner, and may render the greater part of the appeal unnecessary.

40. The concluding reference to an application to dispense was directed at the appellant company, but the suggestion has not been accepted: no application under section 20ZA of the 1985 Act has been made.

41. The specific requirement imposed upon the appellant is to be found at paragraph 4(10) in Part 2 of Schedule 4 to the Regulations (referred to by the Ft T as ‘Regulation 11’):

(10) 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.

42. By paragraph 4(11), paragraph 2 of the same Part of the Schedule is to apply to estimates being made available for inspection. That provision reads:

(1) Where a notice... specifies a place and hours for inspection—

- (a) the place and hours so specified must be reasonable; and
- (b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

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

43. The Ft T held that, in stating that the estimates would be available for inspection between 9am and 12 noon on week-days during the consultation period, the appellant did not comply these requirements: those hours were not ‘sufficiently convenient’.

44. On this point, I agree with the reservations expressed by the Deputy President in granting permission to appeal. That is not the question asked by the regulations. The question which the Ft T should have asked was whether the place and hours specified for inspection were ‘reasonable’. I also agree with the Deputy President, having heard argument from both parties, that in determining what is reasonable the Ft T should have regard to the nature and the resources of both landlord and tenant. It does appear that, in stating its reasons in this manner, the Ft T had regard principally if not solely to the position of the tenants.

45. That said, I consider that the approach articulated by the Ft T at [33] e) is broadly correct: that the notice should specify a location which the leaseholders can, within the period specified, visit in order to inspect the estimates. The location must be relatively convenient to them, otherwise the purpose of inspection would be frustrated, but the tenants must be reasonably accommodating themselves. If, for instance, as I understand is the case here with at least one of the respondents, a tenant lives some distance away, it would still be reasonable for the landlord to offer facilities that give most tenants the opportunity to visit at times reasonably convenient both to them and the landlord and to offer some alternative means of inspection for tenants who could not visit at those times.

46. The Ft T went on to hold that the requirement for 48 hours prior notice was unreasonable; and that even if it were reasonable, the Notice gave no ‘contact details’ so that the leaseholders could exercise their right to view, and further the arrangements for inspection were ‘not properly set up’, as became clear when Mr Randall received the email from Mr Worsfield of the managing agents.

47. On this point too, I agree with the reservations expressed by the Deputy President that the need for ‘contact details’ (rather than an address), and the relevance of how easy or difficult the address given was to locate, are not considerations set out in the regulations. However, I do consider, with due respect to the Deputy President’s comments, that, in determining whether paragraph 2 has been complied with, the Ft T must consider all the information that is provided by the landlord in the course of its Stage 2 notice.

48. The difficulty with the landlord's notice (that is, the letter of 9 June 2012) is, as the Ft T conclude, it sought to offer to the tenants arrangements for inspection which had clearly not been communicated to their own managing agents. Sears Morgan, those agents, were, according to the inspection arrangements publicised in the letter, the key-holders. The tenants were requested to give 48 hours' notice of their intention to inspect by phone or email 'to ensure someone is available to meet you'. The location of the documents, as explained to me during the hearing of the appeal, some 8 to 10 miles away from Ashleigh Court itself, was such that tenants would not go to the trouble of travelling that distance if there was a possibility that the office was not open and the documents not therefore available for inspection. It may therefore have been sensible of the landlords to make the suggestion that they did. However, it is abundantly clear, from the email received in due course from Mr Worsfield of Sears Morgan, that the agents had not been given the requisite authority: as far as they were concerned, the consultation process was being 'totally managed' by the RTM company itself.

49. The Ft T made a finding of fact that the address given for inspection was 'confusing and difficult to find' and that the arrangements for inspection had not been properly set up. These were findings that cannot be impugned in this review process. The effect of the confusion and difficulties occasioned is that the respondents had to make repeated attempts to secure inspection of the estimates, and their enquiries eventually had to be directed to the appellant company when the company's agent indicated that it was not able to assist. The appellant company was finally obliged, in the last fortnight of the consultation period, to engage in what can only be described as a damage limitation exercise, sending the estimates and other relevant documents electronically to those tenants who, through no fault of their own, had not been able to inspect them previously.

50. Considering the decision of the Ft T as a whole, it is clear to me that the tribunal was of the view that the regulations had not been complied with. In my judgment, that view was entirely consistent with the evidence before it, and I am satisfied that in arriving at its conclusion the Ft T did not err in law. There are two specific breaches of the consultation requirements that were apparent. First, 'the place and hours' specified in the Stage 2 notice for inspection of the estimates were not reasonable. Secondly, those estimates were not in fact 'available for inspection, free of charge, at that place and during those hours.'

51. In the course of the appeal, the appellant has argued that it did its best, that it substantially complied with its statutory obligations, and that the respondents were not seriously prejudiced by such failures as there may have been in the process of consultation.

52. The difficulty with that argument is that substantial compliance, even if established, is not enough. The question for the Ft T was whether the appellant complied. Its answer was that it did not. The Ft T was not entitled to consider whether there was any serious prejudice suffered by the respondents as a result of the appellant's failure to comply, that being a material consideration only if the landlord made an application under section 20ZA to dispense with the consultation requirements. The appellant company has not taken up the

suggestion, made in the grant of permission to appeal the decision of the Ft T, that an application to dispense, if made, might have rendered a great deal of this appeal unnecessary.

53. I am therefore of the view that, the appellant company having failed to comply with the statutory consultation requirements, its appeal must be dismissed on the principal issue.

Whether specific service charges payable

54. There remain two further discreet issues arising from the determination of the Ft T which are the subject of an appeal.

55. The respondents had applied to the Ft T for a determination under section 27A of the 1985 Act as to whether certain service charges claimed by the appellant were payable. The Ft T made a determination accordingly, from which determination the appellant sought permission to appeal. Permission was granted in respect of two items only, and it is to those that I now turn.

Weathershield works

56. These works are dealt with by way of a schedule, described by the Ft T as a ‘Determination table’, in this case for the period from 18 October 2010 to 31 March 2011.

57. The ‘item and amount’ claimed by the appellant is recorded as ‘Weathershield Building works and ground works £4,952.40.’

58. In the second column, the respondent states:

‘Some of the amounts on this account were challenged:

Eradicate wasps nest £60 (not necessary)

Lowering brickwork on 16 manholes £1,600 (also not necessary)

Lay weed membrane, gravel board and gravel £1,521... not necessary

Gardening works £130 (we already pay a gardener) and temporary roof repairs £350.

The latter was only required because of the failure of the first section 20 process.

59. The appellant responded in the third column:

‘All of the disputed items were considered necessary and were reasonably incurred. The items arise from a Schedule of prioritised works prepared by the [appellant] and Sears Morgan on 21.04.2011.’

60. The Ft T recorded, in completing the Schedule:

‘The Tribunal agrees with the [respondent] that the weed membrane and gravelling at £1,521 was not necessary and this element is disallowed. All of the remaining items are reasonably incurred. Pest control is essential, as were the manhole lowering and the roof repairs.’

61. The Ft T made its determination accordingly.

62. Permission to appeal was granted in relation to this item as follows:

The Ft T asked itself whether the weed membrane and gravelling which comprised part of the Weathershield ground works in 2011-12 were ‘necessary’, but identified no basis for the adoption of that test. It is improbable that the lease limited the service charge expenditure to that which was strictly necessary and for expenditure to have been reasonably incurred does not require that it be necessary.

63. It is clear to me from the oral submissions I heard in the course of this appeal that the issue between the parties is whether the works in question were necessary. I have been shown photographs of the area concerned and it is evident from those photographs that as a result of the works there has been some improvement to the appearance of the gravelled areas at the foot of the building, although it is impossible to tell from those photographs whether the effect of the works is more than merely cosmetic.

64. Clause 2(6) of the lease provides that the decisions with regard to costs expenses and outgoings are to be made by the Lessor’s Managing Agents whose certificate is to be final and binding on the Lessees. This provision is qualified by section 19 of the 1985 Act (excerpted above at paragraph 12) which limits the charges recoverable to those that are ‘reasonably incurred’. On a true construction of the lease, it is clear that necessity is not the test and that the correct question was whether the expenses were reasonably incurred.

65. In reviewing the decision of the Ft T on this matter, I must consider the terms in which the decision has been expressed, but in doing so I must look at the decision in the round. It is perhaps unfortunate that the Ft T records its agreement with the respondents that the works ‘were not necessary’ without going on, in the same sentence, to add that the works were not reasonably incurred. Considering the decision as a whole, however, it seems to me that the Ft T did address the question of reasonableness in relation to all the Weathershield works. I arrive at this conclusion as a result of the sentence which immediately follows the statement that the weed membrane and gravelling works were not necessary, that is ‘All the remaining items are reasonably incurred’. The inference that I draw from those words is that

when considering the Weathershield Building works claimed for this period as a whole, the Ft T asked itself the correct question: whether those works were ‘reasonably incurred’. In relation to all items except for the weed membrane and gravelling it concluded that the items were reasonably incurred. It follows that it concluded that the weed membrane and gravelling were not reasonably incurred.

66. I am therefore of the view that the Ft T did direct itself properly as a matter of law and that this ground of appeal fails.

Building maintenance charge

67. Permission to appeal was granted in relation to this item as follows:

No sufficient reason was given by the Ft T for its reduction of the building maintenance charge of £4,638 in 2012, as paragraphs 30-32, to which reference was made, do not appear to relate to these charges.

68. It is apparent that there is an error in the Ft T’s reference to paragraphs 30-32 and that the Ft T should have referred to paragraphs 44-45 of its decision. The Ft T there considered the sum of building maintenance for the period from 1 April 2012 to 31 December 2012. The Ft T stated, in the relevant paragraphs of its decision:

‘[44]... There are no invoices in the original bundle showing how this sum was made up. At the Hearing Mr Backinsell said first, when attempting to reconcile the higher figure of £11,101.00, that it was made up of £4,638 miscellaneous repairs, £2,682 for replacing the extractor fans on the roof, £268 project management fee for the fans and £192 for signage. As to the remaining two or three thousand, he would provide reconciliation immediately after the Hearing. In the event this reconciliation was never received. A further 80 invoices were supplied by Sears Morgan, but there was no information provided which assisted the Tribunal in determining whether the sum of £4,831 was reasonably incurred. The Tribunal does not know whether the invoice in respect of the fans is within the £4,831 or whether it (along with the project management fee) is part of the roof works total of £102,384. The Tribunal suspects it is the latter, as it is properly a roof work.

‘[45] On the basis that, on the balance of probabilities, some maintenance work took place which was not related to the roof works, the Tribunal’s determination, in the absence of any supporting invoices that the sum shown in the accounts, is only reasonably incurred as to fifty per cent of its total, *i.e.* £2,415.50.’

69. I have heard further oral submissions about these items in the course of the appeal. The appellant concedes that it was not until the third day of the hearing before the Ft T that any relevant invoices were produced to support the claims being made in respect of these works, hence the reference in the decision to the lack of invoices in the original bundle. It also appears that the appellant did not provide an entirely satisfactory reconciliation of the

figures at any stage, and in the course of the appeal the company sought to apportion blame to those who had been advising it at the time. The respondents, largely through Mr Randall, have emphasised the failures of the appellant in providing them with the information necessary to enable them to assess the charges that were being made.

70. It is clear to me that the reference to paragraphs 30-32 is an error, and that this issue is in fact fully dealt with in paragraphs 44-45. The approach taken by the Ft T as explained in those paragraphs is an approach which cannot in itself be criticised. In my judgment, the Ft T did consider the costs of these specific services, took into account the respondent's failure to produce satisfactory proof by way of invoices and reconciliation of the sums incurred, and then substituted a reduced charge as it was entitled to do. It is clear, on an analysis of paragraphs 44-45, that the conclusion reached was adequately reasoned and that the Ft T did ask itself the correct question, namely whether the charges were reasonably incurred.

71. It follows that the appeal in relation to the two subsidiary issues, as well as the appeal in relation to the principal issue, must be dismissed.

Dated:20 May 2015

A handwritten signature in black ink, appearing to read "Stuart Bridge". The signature is written in a cursive, flowing style.

His Honour Judge Stuart Bridge