FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00MS/LLC/2019/0004
Property	**:**	Canute's Pavilion, Ironside House, Ocean Village, Southampton, SO14 3TN
Applicant	**:**	James Chalk
Representative	**:**	Not represented
Respondent	**:**	Brigante Properties Limited
Representative	**:**	J B Leitch Solicitors
Type of Application	**:**	Section 20C Landlord & Tenant Act 1985
Tribunal Members	**:**	Judge N P Jutton
Date of Decision	**:**	17 February 2020

DECISION

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1 **Background**

2 The Respondent applied to the Tribunal pursuant to sections 27A and 20ZA of the Landlord & Tenant Act 1985 in relation to proposed works to install a scaffold tunnel and crash deck at the property (case references CHI/00MS/LDC/2019/0041 and CHI/00MS/LIS/2019/0033) (the Substantive Applications).

3 The Respondent applied to withdraw the Substantive Applications on 20 November 2019 and the Tribunal granted consent to withdraw.

4 On 22 July 2019, the Applicant on his own behalf and purportedly on behalf of all leaseholders at the property made an application pursuant to section 20C of the Landlord & Tenant Act 1985 that all or any of the costs incurred or to be incurred by the Respondent in respect of the Substantive Applications before the Tribunal were not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable. Following the withdrawal of the Substantive Applications, the Applicant sought to withdraw his section 20C application. For the reasons set out in Directions made by the Tribunal on 6 January 2020, the Tribunal refused consent to withdraw and made Directions for the application to be determined on paper without a hearing in accordance with rule 31 of the Tribunal Procedure Rules 2013 unless a party objected in writing to the Tribunal within 28 days of the date of receipt of those Directions. No objection was received and the Tribunal therefore proceeds to determine the application on paper without a hearing.

5 In accordance with Directions made by the Tribunal, the Applicants filed with the Tribunal a bundle of documents, which documents include a copy Lease and Statements of Case made by both parties. References to page numbers in this Decision are references to page numbers in that bundle. The Respondent subsequently applied for permission to vary directions to allow it to rely upon a further form of Reply dated 12 February 2020 which was granted on 14 February 2020.

6 **The Law**

7 Section 20C of the Landlord & Tenant Act 1985 (the 1985 Act) provides as follows:

> *20C(1) 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 ..... the First Tier Tribunal, ...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.*

(2) The application shall be made …

(ba) In the case of proceedings before the First Tier Tribunal, to the tribunal.

(3) 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".

8 The Lease

9 There is a copy of the Lease to Flat 16, The Moresby Tower, Admirals Quay, Ocean Way, Southampton, at pages 1-28. The Lease provides that the lessee is to pay the lessor a service charge. Service charge is defined at clause 1.11 to be:

"'Service Charge' means a sum equal to the Service Charge Proportions of the aggregate Annual Maintenance Provision for each Maintenance Year".

10 The term 'Annual Maintenance Provision' is defined at clause 1.1 to be:

"'Annual Maintenance Provision' shall consist of items of expenditure (actual or anticipated) calculated in accordance with the Fourth Schedule Part 3".

11 Part 3 of the Fourth Schedule at 2(i) provides that Annual Maintenance Provision shall comprise *"all of the expenditure estimated as likely to be incurred in the Maintenance Year by the Landlord in providing the Services together with…".*

12 'Services' are defined to mean the services to be provided by the landlord specified in the Fifth Schedule. They include at paragraph 6 of the Fifth Schedule:

"To make provision for the payment of all costs and expenses incurred by the landlord:

a) in the running and management of the Development and …".

13 By clause 4.2 of the lease, the landlord covenants to provide the Services. By clause 3.2 of the lease, the lessee covenants to pay the Service Charge by two equal instalments in advance on the *"half yearly days".*

14 The Issues

15 There are three issues before the Tribunal. They are:

1. The identity of the Applicant. In particular, whether the Applicant is just Mr James Chalk, or whether the application is made on behalf of all leaseholders at the property in particular on behalf of members of the AQARA Residents Association (the Preliminary Issue).

2. Whether the Lease provides that the Respondent is entitled to recover its legal costs incurred in relation to the Substantive Applications as part of the service charge payable by the lessees, and if so;

3. Whether it would be just and equitable in the circumstances to make an Order pursuant to section 20C of the 1985 Act that such costs incurred by the Respondent should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.

16 **The Preliminary Issue**

17 **The Respondent's Case**

18 The Respondent says that the Tribunal can only make an Order pursuant to section 20C in respect of those lessees who are a party to the application. That the Tribunal does not have jurisdiction to make an Order in favour of any person who has neither made an application of their own under section 20C or been specified in an application made by someone else. Although Mr Chalk's application purports to be made on behalf of all the leaseholders *"of Moresby and Hawkins Towers"* the Respondent says that Mr Chalk does not have authority to make an application on behalf of other leaseholders.

19 The Respondent refers to rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 which provide:

(1) A party may appoint a representative (whether legally qualified or not) to represent that party in the proceedings.

(2) If a party appoints a representative, that party must send or deliver to the Tribunal and to each other party, written notice of the representative's name and address.

(3) Anything permitted or required to be done by or provided to a party under these Rules, a practice direction or a direction may be done by or provided to the representative of that party except –

(a) signing a witness statement; or

(b) *sending or delivering a notice under paragraph (2), if the representative is not a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation within the meaning of that Act.*

20 Mr Chalk, says the Respondent, is not an authorised person for the purposes of Rule 14(3)(b). That he is unable to give written notice on behalf of the other leaseholders. That as such, the Tribunal only has jurisdiction to make an Order for the benefit of Mr Chalk.

21 **The Applicant's Case**

22 Mr Chalk says that he filed his application in his position as a committee member of AQARA which is he says a resident's association representing various leaseholders at the property. That he subsequently, at the request of the Tribunal, submitted a list of names and addresses to the Tribunal of all leaseholders who were members of AQARA at the time of the application and who authorised AQARA to act on their behalf. That an email was sent to AQARA members on 3 August 2019 (page 61) to confirm that the application was being made on their behalf (albeit the letter provides that members will be represented by default unless they state otherwise). That it has been made clear throughout both to the Respondent and to the Tribunal, that the application was made on behalf of members of the AQARA residents association. That as such, it is now disingenuous for the Respondent to contend that Mr Chalk is not representing the members of AQARA.

23 Mr Chalk also makes reference to rule 8 of the said Tribunal Rules. This he says allows the Tribunal a discretion to waive the requirements of rule 14 and if it is the case that there was a failure on his part to comply with rule 14, he invites the Tribunal to do so.

24 **The Tribunal's Decision**

25 Rule 14 provides that a party may appoint a representative (whether legally qualified or not). That anything permitted or required to be done under the Rules may be carried out by that representative save as provided for in Rule 14(3). Rule 14(3)(b) provides that if a representative is not a person authorised to conduct litigation within the meaning of the Legal Services Act 2007, then that person cannot send or deliver a Notice under paragraph 14(2). Rule 14(2) provides that the representative must send or deliver to the Tribunal and to each other party written notice of the representative's name and address.

26 Accordingly if a party is not an authorised person as defined by the Legal Services Act 2007, they cannot file and serve a notice to the effect that they are the representative of other parties.

27 Section 18 of the Legal Services Act 2007 defines 'authorised persons' as:

> *"(a) a person who is authorised to carry on the relevant activity by a relevant approved regulator in relation to the relevant activity (other than by virtue of a licence under Part 5) or*
>
> *(b) a licensable body which, by virtue of such a licence, is authorised to carry on the relevant activity by a licensing authority in relation to the reserved legal activity".*

28 Schedule 4 of the said Act defines 'approved regulators' to include the Law Society, the General Council of the Bar, the Institute of Legal Executives, and the Association of Law Costs Draftsman.

29 Mr Chalk is not, it would appear for the purpose of this application to be an authorised person for the purposes of the Legal Services Act 2007.

30 He cannot therefore for the purposes of Rule 14 serve and file notice of his appointment as a representative of members of AQARA. The requirement to serve such a notice is mandatory.

31 Can the Tribunal nonetheless pursuant to rule 8 waive the requirements of rule 13? In the view of the Tribunal, it should not. That it would be wrong to do so. Mr Chalk has failed to comply with the requirements of rule 14. He is not able to comply with those requirements. It would in those circumstances, in the view of the Tribunal, be wrong for it to waive a mandatory requirement which Mr Chalk cannot comply with and could not have been complied with.

32 In the circumstances, the Tribunal determines that this application is made solely on behalf of Mr Chalk and not on behalf of other leaseholders who are members of AQARA Residents Association.

33 **The Second Issue**

34 The second issue identified by the parties, in the view of the Tribunal correctly, is whether or not there is provision in the Lease which allows the Respondent to recover legal costs reasonably incurred by it in respect of the Substantive Applications from the Applicant as part of the service charge payable by the Applicant.

35 The Applicant appears to accept that such costs can be recovered as part of the service charge payable by him. He states at paragraph 21 of his Statement of Case (page 56):

"The Applicant accepts that the costs of making an application or applications under the LLT 1985 can be relevant costs under a service charge and that the lease".

It is presumed that the reference to 'LLT 1985' is to the 1985 Act and the wording 'and that the lease' is intended to indicate that the Applicant accepts that the costs sought by the Respondent can be recovered as a service charge under the terms of the Lease.

36 The Tribunal agrees. In particular, paragraph 6 of the Fifth Schedule includes within the definition of the 'Services' to be provided, all costs and expenses incurred by the Landlord in the running and management of the property. In the opinion of the Tribunal costs incurred by the Respondent in making an application for dispensation from the consultation requirements set out in section 20 of the 1985 Act in relation to proposed works to the property, are part of the costs of running and managing the property. Such costs include those incurred in respect of both successful and unsuccessful legal proceedings or applications properly brought in respect of or in connection with the management of the property.

37 The Tribunal therefore determines that the legal costs incurred by the Respondent in respect of the Substantive Applications to the Tribunal are recoverable from the Applicant (more particularly his proportion of those costs) as part of the service charge payable by him, provided that such costs are reasonable.

38 **The Third Issue**

39 Should the Tribunal nonetheless exercise its discretion as provided for by section 20C of the 1985 Act to order that all or any of the costs incurred by the Applicant in respect of the Substantive Applications are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant if it considers that it is just and equitable to so order in the circumstances?

40 **The Applicant's Case**

41 The Applicant says that the Tribunal should exercise its discretion in his favour. That the costs incurred by the Respondent in relation to the Substantive Applications were not reasonably incurred. That the

Substantive Applications were misconceived, premature and not based on adequate specialist expert advice. That the Substantive Applications were based upon a report from one Malcolm Broomfield. That Mr Broomfield was not an expert in matters of glazing. That it was incumbent upon the Respondent to have first obtained expert evidence or advice from a glazing expert. That despite the Respondent's contention that the need for the works which were the subject of the Substantive Applications to be carried out was urgent for health and safety reasons, that in the event the recommendations of Mr Broomfield were not implemented prior to or concurrent with the application for dispensation.

42 The Applicant says that Mr Broomfield's advice was flawed. That there was a failure on the Respondent's part to enter into a consultation with the Applicant (and no doubt his fellow lessees) which caused prejudice to him. That it was only when the Respondent took advice from a glazing specialist in September 2019 that the Substantive Applications were withdrawn. That had the Respondent consulted a glazing specialist from the start, then there would have been no need for the Substantive Applications. That because the Respondent always intended to pass on the costs that it incurred to the Applicant and his fellow-lessees as part of the service charges payable, that it failed to give sufficient thought or consideration to the costs that it incurred or to apply appropriate focus as to whether or not it was undertaking a reasonable course of action by making the Substantive Applications. That as such, in all the circumstances, by making the Substantive Applications and thereby incurring costs, the Respondent acted unreasonably. That in the circumstances, it is unreasonable to expect the Applicant and his fellow lessees to pay for costs that were associated with works which in the event were not pursued and in respect of proceedings before the Tribunal which were withdrawn.

43 The Applicant therefore says that the Tribunal should make an Order pursuant to section 20C of the 1985 Act that the costs incurred by the Respondent in relation to the Substantive Applications should not be regarded as relevant costs to be taken into account in determining the amount of service charge payable by him. Alternatively, the Applicant says that the Tribunal should limit the amount of costs which the Respondent seeks to recover as part of the service charge in relation to the Substantive Applications to a sum that it considers to be just and equitable.

44 **The Respondent's Case**

45 The Respondent says that under the terms of the Lease, it is contractually entitled to recover its costs through the service charge. That it should not be deprived of that contractual right unless it is clearly just and equitable to do so.

46 The Respondent says that it conducted itself reasonably. That it was reasonable for it to rely upon the advice of a professional health and safety expert. That a lessor should not be discouraged from withdrawing an application to the Tribunal where it is appropriate to do so merely because of a fear that in such circumstances it may not recover its costs.

47 The Respondent says that it was reasonable for it to rely upon the expert evidence that it obtained at the time that it made the Substantive Applications. That it was reasonable for it to take advice from Malcolm Broomfield Safety Consultants and to seek to implement the recommendations that it received. That it was advised by the safety consultant of the steps that it should undertake, (and which were the subject of the Substantive Applications), as a matter of urgency potentially 'to save lives'. That in the circumstances, it reasonably wrote to the lessees notifying them of its intention to implement the measures recommended by the health and safety expert and of its proposal to seek disposition from the consultation requirements of section 20. That as the application progressed, the Respondent commissioned further specialist advice from a glass safety expert and once that was received and having considered further health and safety advice, it applied to withdraw the Substantive Applications. That in all the circumstances, it would be inequitable to deprive the Respondent of the costs that it says it reasonably incurred simply because it relied upon professional advice and in doing so took steps to ensure the protection and safety of leaseholders, occupiers and visitors to the property.

48 **The Tribunal's Decision**

49 The Tribunal has had the opportunity of considering the documents contained in the bundles that were filed with the Tribunal in relation to the Substantive Applications. The Respondent found itself facing potentially a very serious problem at the property occasioned by the apparent failure of glazing panels resulting in such panels or parts of those panels falling to the ground. At the time the reason for the failure of the panels was unknown and further investigation work was required. The Respondent was clearly conscious of its duty to take steps to mitigate the risks inherent in glass falling potentially from a great height. It took advice from specialist safety consultants. It was advised by the safety consultants that certain interim steps were required for safety reasons. The nature of those works, the installation of a scaffold tunnel and crash deck were such that the costs incurred would trigger the statutory need to consult with the lessees pursuant to the provisions of section 20 of the 1985 Act. Because there was a degree of urgency to the matter, the Respondent submitted an application for dispensation from those consultation requirements pursuant to section

20ZA of the 1985 Act (together with an application pursuant to section 27A as to the payability and reasonableness of the works associated with the installation of the scaffold tunnel and crash deck).

50 As that application progressed, the Respondent continued with its investigations. Those investigations included seeking advice from a glazing specialist albeit not the Applicant says until September 2019. Having obtained advice from a glass safety expert, the health and safety position was considered further and it was determined that cheaper alternative short term options were available to the Respondent, alternative to a scaffold tunnel and crash deck. As a consequence, the Respondent concluded that it no longer needed to proceed with its application for dispensation and applied to withdraw the Substantive Applications.

51 The Applicant's primary criticism of the Respondent is that the Respondent should have sought advice from a glazing consultant far sooner. Had it done so, it would have received (the Applicant says) at a far earlier date advice that there was no need for a scaffold tunnel and crash deck and thus it would have saved itself the time and costs of the Substantive Applications. That as such it would be unreasonable for the Applicant and his fellow lessees to have to pay via their service charge contributions the costs that the Respondent incurred in respect of the Substantive Applications.

52 In the view of the Tribunal, and with respect to the Applicant, the primary argument relied upon by him is made with the benefit of hindsight. The Tribunal agrees with the Respondent that the question is whether or not it was reasonable at the time they were made for the Respondent to make the Substantive Applications. In the view of the Tribunal, it was. Faced with the risk of glazing panels failing and glass falling to the ground, it was not unreasonable in the view of the Tribunal for the Respondent to seek advice from a safety consultant. It was not unreasonable for the Respondent to rely upon the advice it received and on the back of that advice, make the Substantive Applications. Although there appears to have been some delay in progressing and in the conduct of the proceedings, the Respondent did not leave matters there but subsequently sought advice (possibly following some pressure from the lessees) from a glazing consultant as well as further health and safety advice. These were complex issues. The Respondent had to act in a way which it considered to be in the best interests of the lessees. Once it had obtained the advice from the glazing expert and further health and safety advice, it sought to withdraw the Substantive Applications (and thus save some further costs). It was reasonable in the view of the Tribunal for it to do so.

53 In all the circumstances, having considered the parties' submissions very carefully, the Tribunal is of the view that it would not be just and equitable

to make an Order pursuant to section 20C of the Landlord & Tenant Act 1985 that the costs incurred by the Respondent in connection with the Substantive Applications should not be regarded as relevant costs to be taken into account in determining the amount of service charge payable by the Applicant.

54 The Applicant makes reference to sections 18 and 19 of the 1985 Act and to the question of whether the costs incurred by the Respondent were reasonably incurred. There is no application before the Tribunal for it to address that question (more particularly whether the costs were reasonable in amount). Even if there were it would be unable to do so. It has no details of those costs. It does not seek to suggest that the costs incurred were unreasonable but nor can it say that they were. If the Applicant, or his fellow lessees, subsequently take the view that the Respondent's costs in relation to the Substantive Applications were not reasonably incurred in the sense that they are not reasonable in amount, then it remains open to them to make an application pursuant to section 27A of the 1985 Act to the Tribunal in that regard. To be clear they are neither encouraged to do so nor discouraged from doing so. It is entirely a matter for them. If the Applicant or his fellow lessees were minded to make such an application, they are encouraged to first seek a resolution with the Respondent by negotiation and/or by a suitable form of alternative dispute resolution such as mediation.

55 **Conclusion**

56 The Tribunal declines to make an Order pursuant to section 20C of the Landlord & Tenant Act 1985 that the costs incurred by the Respondent in respect of the Substantive Applications should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.

Dated this 17th day of February 2020

Judge N P Jutton

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the

First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.