**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case references** | **:** | **LON/00BK/LSC/2020/0482**<br>**LON/00BK/LSC/2020/0044** |
| **HMCTS code (paper, video, audio)** | **:** | **P: PAPER REMOTE** |
| **Property** | **:** | **Flats 1 and 2, 502 Harrow Road, London W9 3QA** |
| **Applicants** | **:** | **Fiorina Fortunato (1)**<br>**Cadenza Properties (2)** |
| **Representative** | **:** | **Mr J Platt FRICS** |
| **Respondents** | **:** | **Harminder Pal Singh (1)**<br>**Baljit Kaur (2)** |
| **Representative** | **:** | **Mr R Bowker of Counsel represented the Respondents at the hearing** |
| **Type of applications** | **:** | **For the cost orders specified in this decision** |
| **Tribunal members** | **:** | **Judge N Hawkes**<br>**Mr T Sennett FCIEH**<br>**Mr J Francis QPM** |
| **Venue** | **:** | **10 Alfred Place, London WC1E 7LR** |
| **Date of decision** | **:** | **11 November 2020** |

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**DECISION**

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## Covid-19 pandemic: PAPER DETERMINATION

This has been a paper determination which has not been objected to by the parties. The form of remote determination was P:PAPER REMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined on the papers. The documents that we were referred to are contained in written submissions dated 14 September 2020, 22 September 2020 and 12 October 2020, the contents of which we have noted. The orders made are described below.

## Decisions of the Tribunal

(1) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 that all of the costs incurred by the Respondents in connection with applications LON/00BK/LSC/2020/0482 and LON/00BK/LSC/2020/0044 are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

(2) The Tribunal makes an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 extinguishing the Applicants' liability, if any, to pay an administration charge in respect of the Respondents' costs of these proceedings.

(3) The Tribunal makes an order under Rule 13(2) of Tribunal Procedure (First-Tier Tribunal)(Property Chamber) Rules 2013 requiring the Respondents to reimburse the Tribunal fees paid by the Applicants in respect of these proceedings.

## The applications

1. Following the receipt of a substantive Tribunal decision dated 14 August 2020, the Applicants made an application dated 8 September 2020 seeking the orders under section 20C of the Landlord and Tenant Act 1985 ("section 20C"); paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("paragraph 5A"); and under rule 13(2) of Tribunal Procedure (First-Tier Tribunal)(Property Chamber) Rules 2013 ("rule 13(2)").

2. On 14 September 2020, directions were given. The Tribunal has received submissions from the Respondents dated 22 September 2020 and submissions in reply from the Applicants dated 12 October 2020.

## The submissions

3. The Applicants' submissions are as follows.

4. The Tribunal has determined that no service charges are currently payable by the Applicants because the Respondents have not fulfilled a condition precedent to liability. The Tribunal has also determined that the Respondents have failed to comply with the statutory consultation requirements in respect of the major works.

5. The Respondents could have avoided both applications being made by providing a balancing statement and final demand, in accordance with the lease, and by having regard to correspondence from the Applicants' solicitor between August 2019 and November 2019 relating to the flawed consultation process.

6. In addition, the Tribunal determined what sums would be payable if the condition precedent were to be complied with. These findings result in significantly reduced sums being potentially recoverable from the Applicants as on account service charges.

7. The Respondents have sought to claim administration charges from both Applicants, variously described as "late payment administration fee" or "court fee". However, on the basis that the Applicants currently have no liability to make any payments, there have been no late payments. The Tribunal accepted the Applicants' contention that all payments have been made under protest.

8. The Applicants state that they have succeeded in their applications and contend that it is just and equitable in the circumstances for orders to be made under section 20C and under paragraph 5A. They also seek an order for the reimbursement of Tribunal fees under rule 13(2).

9. The Respondents' submissions are as follows.

10. By clause 3.5.3 of the Lease, the Tenant is required to pay to the Landlord on demand all costs, charges and expenses (including all legal costs) which may be incurred by the Landlord incidental to the recovery of monies due under the Lease.

11. The main legal principles relevant the exercise of the discretion under section 20C are discussed at §§17-05 to 17-07 of Tanfield Chambers' Service Charges and Management, 4th edition.

12. The Respondents submit that they ought to be able to recover the costs of these proceedings, or a proportion of the costs to reflect the measure of their success. The Respondents further submit that the correct measure of success in these proceedings is to compare issues raised by the Applicants with the outcome at the final hearing on each of those issues. The Respondents have identified the following issues.

13. The Applicants argued that final accounts should be considered by the Tribunal. The Respondents argued that they should not. The Tribunal determined this issue in the Landlord's favour.

14. As regards the major works, the Applicants argued, in the alternative, that (a) only £250 per tenant was due or (b) the value of the work was £13,365 + VAT (£16,038). The Tribunal found that the value of the work was £25,000. Accordingly, the Respondents have succeeded by defeating the Applicants' primary case and in establishing that the value of the work was substantially more than the sum for which the Applicants contended.

15. Furthermore, the Applicants' case was expressed inadequately in their schedule. It had to be re-pleaded and further evidence served half-way through the final hearing in order for the Respondents properly to understand what was being alleged.

16. The Applicants argued that Mr Reed had acted dishonestly by creating site inspection reports and the Hammer & Chisel breakdown after the event so as falsely to create the impression they were contemporaneous. The Tribunal found that it was not necessary to make findings of fact about the allegations.

17. The Applicants raised the issue of the 2020 on-account service charges in their schedule but abandoned this issue at trial.

18. The Applicants made a late application for permission to rely on expert evidence. The Respondents responded in detail, asking for the application to be granted only on conditions. The Tribunal allowed the application on the conditions stipulated by the Respondents. The Applicants then abandoned any reliance on expert evidence.

19. The Applicants served statements from four witnesses of fact they decided at the final hearing not to call, without explanation. The Respondents had prepared to cross-examine each of these witnesses.

20. Further, the Respondents state that in respect of the out of hours helpline, accountancy costs; management set up fee; insurance valuation; insurance; cleaning; fire equipment maintenance; health and safety/fire risk assessment, the Applicants argued that the charge was not reasonably incurred. The Tribunal found in the Respondents' favour.

21. The Respondents submit that these are important issues in respect of which the Tribunal rejected the Applicants' case and found in the Respondents' favour, or in respect of which the Applicants changed or abandoned their case. It was, therefore, necessary for the Respondents to litigate and they enjoyed a substantial element of success.

22. In response, the Applicants state as follows.

23. In respect of the major works, the Respondents were seeking to recover £42,540, plus supervision fees of £4,254. The Tribunal determined that "£25,000 in total" is recoverable. The amount recoverable in respect of supervision fees was determined to be £nil. The Applicants therefore disagree that this element of the Tribunal's determination represents a victory for the Respondents.

24. Further, the Applicants state that the Respondents have conflated two separate applications. As part of the application under section 27A of the Landlord and Tenant Act 1985, the Tribunal determined that the statutory consultation requirements had not been complied with. The recoverable sum was, therefore, limited to £250 per Applicant in accordance with the legislation. The Applicants were, therefore, entirely successful.

25. The Respondents then applied for dispensation from the statutory consultation requirements under section 20ZA of the 1985 Act and dispensation was granted subject to the recoverable sum being limited to "£25,000 in total". Further, it was condition of granting dispensation that "the Respondents' costs of the dispensation application shall not be recoverable from the lessees through the service charge."

26. The Tribunal has, therefore, in effect already determined that the Respondents cannot recover costs of the dispensation application. In considering the section 20C application, therefore, the Tribunal is only concerned with the section 27A determination, where the Applicants were entirely successful.

27. The Applicants do not accept that they made a late application to rely on expert evidence. They state that they actually requested permission to rely on expert evidence by letter dated 5 February 2020, within one week of Mr Platt being engaged by the Applicant to undertake a management audit. A copy of the relevant letter was supplied with Mr Platt's submissions.

28. The Applicants state that the Respondents chose not to provide Mr Platt with any of the documents which he had requested until 20 April 2020 and that it was this delay which prompted the Applicants' further request on 4 May 2020 to rely upon expert evidence. The Applicants state that their decision not to rely on expert evidence was entirely the result of the Respondents' delay in providing documents.

29. As regard the witnesses of fact who were not called, the Applicants set out their reasons for this and state that by not calling these witnesses,

whose evidence related to the reasonableness of the actual service charge costs, the Applicants saved the Tribunal time.

30. As regards the indications given by the Tribunal concerning the individual service charge items identified by the Respondents, the Applicants' position appears to be that their proposed grounds of challenge related to the actual rather than the estimated service charge costs, which the Tribunal determined were not before it.

31. In summary, the Applicants maintain that they were successful and that the orders sought should be made.

## The Tribunal's determinations

32. Section 20C of the Landlord and Tenant Act 1985 provides 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 Residential Property 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.

33. Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 provides that:

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

34. The question for the Tribunal under both section 20C and paragraph 5A is what is "just and equitable". These provisions provide the Tribunal with a wide discretion to exercise having regard to all the circumstances of the case.

35. In *Tenants of Langford Court v Doren Ltd (LRX/37/2000)*, His Honour Judge Rich QC stated in respect of section 20C (emphasis supplied):

*"In my judgement* ***the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances*** *... Where, as in the case of the LVT there is no power to award costs, there is no automatic expectation of an order under s.20C in favour of a successful tenant..."*

36. In *Schilling v Canary Riverside (LRX/26/2005)* His Honour Judge Rich QC reconsidered and reaffirmed the principles in *Doren*. He also stated, in the context of a service charge dispute, that weight should be given "to the degree of success, that is the proportionality between the complaints and the determination".

37. As noted by the Respondents, the relevant principles are discussed at §§17-05 to 17-07 of Tanfield Chambers' Service Charges and Management, 4th edition.

38. The Tribunal accepts that the Respondents were successful in respect of certain procedural issues. However, the Tribunal notes that it was the Respondents who invited the Tribunal to make findings of fact concerning Mr Reed's honesty which the Tribunal did not accept were necessary (see paragraphs 67 to 68 of the Decision dated 14 August 2020).

39. Further, Mr Reed accepted that documents were disclosed to the Applicants late or not at all (see paragraphs 67(ii), 91 and 96 of the Decision) and the Tribunal considers that this would have made the preparation of the Applicants' case more difficult than it would otherwise have been.

40. The Tribunal has placed significant weight on the fact that, in respect of the application under section 27A of the Landlord and Tenant Act 1985, the Applicants have been wholly successful because the Tribunal has determined that nothing is presently payable. Further, the Tribunal found that the statutory consultation requirements had not been complied with. The majority of the Tribunal's time was spent considering matters relating to these two issues.

41. At the invitation of the parties, the Tribunal has given an indication of the findings that it would have made had the condition precedent in the lease been complied with. However, that these indications do not form part of the Tribunal's substantive decision and do not detract from the Applicant's success. Further, as noted by the Applicants, the Tribunal indicated that it would have made reductions in respect of service charge items which are not referred to in the Respondents' submissions.

42. As regards the application for dispensation, as pointed out by the Applicants, it was a term of granting dispensation that "the Respondents' costs of the dispensation application shall not be recoverable from the lessees through the service charge".

43. The Tribunal does not accept the Applicants' submission that this term means that, in all circumstances, the Respondents are prevented from potentially recovering the costs of the dispensation application. Having

considered the terms on which dispensation was granted and the findings set out in the Tribunal's original decision, the Tribunal is satisfied that it would not be fair to enable the Respondents' to recover these costs through the service charge in the unlikely event that they do not rely upon the grant of dispensation.

44. In all the circumstances, the Tribunal is satisfied that in respect of both of the applications which were before the Tribunal it is just and equitable to make orders under section 20C and paragraph 5A and to exercise its discretion under paragraph 13(2) to order the Respondents to reimburse the Tribunal fees paid by the Applicants.

**Name:** Judge Naomi Hawkes **Date:** 11 November 2020

## Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).