FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/45UG/LSC/2020/0106**
Property	**:**	**Ditton Place, Brantridge Lane, Balcombe, West Sussex RH17 6JR**
Applicants	**:**	**Gerald Peter Burton & Michael Gary Rosenfeld**
Representative	**:**	**Cannings Connolly Solicitors**
Respondent	**:**	**Ditton Place Freehold Company Limited**
Representative	**:**	**Fladgate LLP**
Type of Application	**:**	**Determination of service charges: section 27A Landlord and Tenant Act 1985**
Tribunal Member	**:**	**Judge E Morrison**
Date of decision	**:**	**19 February 2021**

DECISION

The applications

1. By an application dated 15 October 2020 the Applicant lessees of four flats at Ditton Place applied under section 27A of the Landlord and Tenant Act 1985 ("the Act") for a determination of their liability to pay a service charge in respect of legal costs incurred by the Respondent freeholder.

2. Applications were also made under section 20C of the Act, and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, for orders that the Respondent's costs of these proceedings should not be recoverable through future service or administration charges.

3. Finally, a separate application was made for an order under section 20C of the Act in relation to the Respondent's costs incurred in previous proceedings, Case No. CHI/45UG/LVM/2019/0011.

Summary of decision

4. The only legal costs invoiced by Fladgate to DPF that the Tribunal finds are potentially recoverable under the lease as a service charge are those incurred in relation to alleged non-compliance by the Manager with the winding up directions that impacted DPF's ongoing ability to manage and administer DPF's estate.

5. The Tribunal has insufficient evidence to determine whether such costs were reasonably incurred or to determine the reasonable amount payable (see para. 75 below).

6. An order is made under section 20C of the Act in relation to the costs of these proceedings.

Procedural matters

7. On receipt of the applications, Directions were issued which included provision that the matter would be decided on the papers, without a oral hearing, unless any party objected. There being no objection, the Tribunal has determined the matter on the papers supplied, which include a bundle, separate skeleton arguments, and authorities. The bundle included copies of decisions and orders made in previous Tribunal proceedings concerning Ditton Place. The Tribunal has also had regard to the "Summary Decision and Directions" issued immediately after the hearing of 24 January 2020 in Case Ref. CHI/45UG/LVM/2019/0011, and the Application for permission to appeal against the decision of 23 March 2020 in the same proceedings. Copies of the service charge demands issued in respect of the disputed costs were also provided.

8. The Applicants had listed all the other lessees at Ditton Place as parties to the applications under section 20C. As there was no evidence that any

of those lessees had authorised this, provision was made for them to be served with all applications so they could request to be joined as a party. Only one lessee, Keith Sellers of Flat 2, stated that he wished to be joined as an applicant, and agreed that the original applicants could represent him. It appears that due to an oversight he was not formally joined as an applicant to the proceedings. However the Tribunal is treating him as a lessee for whose benefit section 20C orders have been requested.

Background

9. Ditton Place was formerly a school. Between about 2006 and 2010, the Main House and Coach House were converted into twelve flats demised on long leases, and six freehold houses on the estate were sold. The freehold of the Main House and Coach House, and of the remainder of the estate, was transferred by the developer to Ditton Place Management Company Limited ("DPM"), a company in which the lessees of each flat and the owners of each freehold house were the members.

10. On 24 January 2017, pursuant to an application made by the lessees of three flats under section 22 of the Landlord and Tenant Act 1987, the Tribunal made an order appointing a Manager for a period of three years in respect of the entire estate. The applicant lessees at that time, who included Mr Urwick and Ms Bajo of Flat 1, were represented by Fladgate solicitors, and Mr Heather of counsel.

11. About a year later, Ditton Place Freehold Company Limited ("DPF") was formed by a number of the lessees, who were unhappy with the Manager, and those lessees also temporarily gained control of DPM. DPF was formed for the purpose of exercising the statutory right to collective enfranchisement of the flats, under the Leasehold Reform, Housing and Urban Development Act 1993. The lessees of 7 out of 12 flats, excluding only the Applicants and Mr Sellers, participated in the enfranchisement, which was completed on 23 March 2018, the premium paid being £2.00.

12. Thereafter all the lessees, save for the Applicants, applied to the Tribunal to vary the management order so as to remove the enfranchised land from its scope. At the hearing of the application, on 27 November 2018, the lessees were represented by Ms Carvalho, the lessee of Flats 3 and 9, assisted by Mr Urwick of Flat 1. The application was dismissed.

13. On a further application made by the Manager for a variation of the management order, heard on 19 March 2019, Mr Urwick and Ms Bajo, the lessees of Flat 1, were represented by counsel instructed by Fladgate. Mr Heather, now a QC, submitted that, as a matter of law, the Manager had lost any right to manage the enfranchised land due to lack of registration of the Management order at the Land Registry prior to the enfranchisement. (Under the Order it was DPM's responsibility to deal

with registration, but it had failed to do so). The Tribunal rejected that argument and decided that the Manager could continue to manage the DPF land.

14. Mr Urwick and Ms Bajo pursued an appeal against that decision to the Upper Tribunal, again represented by Fladgate and Mr Heather. The appeal was successful, the Upper Tribunal deciding, on 12 November 2019, that DPF was not bound by the management order.

15. The Manager applied to the Court of Appeal for permission to appeal against the decision of the Upper Tribunal.

16. The management order was due to expire on 23 or 24 January 2020. The current applicants, Mr Burton and Mr Rosenfeld, made an application (Case Ref. CHI/45UG/LVM/2019/0011) to extend the term of the order. This application was heard on 24 January 2020. Mr Urwick and Ms Bajo were again represented by Fladgate and Mr Heather. On that date the Tribunal decided not to extend the term of the order, and instead required that the parties (who included all the lessees, DPM and the Manager, but not DPF) should provide submissions as to appropriate winding up directions. A further hearing was arranged for 2 March 2020.

17. On 22 February 2020 DPF was joined as a party, at its request. At no point previously had DPF requested to be joined as a party to any of the proceedings.

18. At the hearing on 2 March 2020, Mr Heather appeared for DPF and for Mr Urwick and Ms Bajo, all submissions being made for them jointly. The Manager, as on previous occasions, was represented by solicitors and counsel. Other parties who chose to participate acted in person. Following the hearing the Tribunal issued a decision dated 23 March 2020, dealing with the competing arguments, along with detailed winding up directions.

19. On 25 March 2020 the Court of Appeal granted permission to the Manager to appeal against the decision of the Upper Tribunal.

20. On 21 April 2020 DPF, Mr Urwick and Ms Bajo applied to the Tribunal for permission to appeal against various aspects of its decision and directions dated 23 March 2020. The grounds of appeal were settled by Mr Heather. Permission was refused on 3 May 2020.

21. On 8 July 2020, by consent, the Manager's appeal to the Court of Appeal was dismissed.

22. DPF issued demands dated 22 April 2020 and 18 August 2020 for on account service charges based on a budget, which in its amended form, provided for legal costs of £58,748.00. The actual legal costs incurred are now said to be £52,064.24. Because the actual costs are ascertained,

the Tribunal is determining this application under section 19(1) of the Act, rather than under section 19(2).

The Applicants' leases

23. The Applicants own Flats 4, 7, 10, and 12. The lease of Flat 4 has been supplied and the Tribunal is told that the leases are in materially the same terms.

24. The lease is a modern tripartite lease between the developer/landlord, DPM, and the lessee. The clauses most relevant to this application are as follows:

    (i) The freehold was to be transferred to DPM once all flats were demised (cl. 1.4.1)
    (ii) The lessee is liable to pay the Service Charge in accordance with Schedule 6 (cl.2.2)
    (iii) Schedule 4-14 is a covenant by the lessee to pay the full amount of the landlord's costs, "including … counsel, solicitors, surveyors and bailiffs…", incurred in relation to various matters, including applications for consents or licenses, notices under section 146 Law of Property Act 1925, the recovery of rent or other sums due under the lease, and schedules of dilapidations.
    (iv) "The Services" are defined as the services, facilities and amenities specified in Schedule 6 paragraphs 6-3 and 6-4 as added to, withheld or varied from time to time in accordance with the provisions of this lease (cl. 1.1.20)
    (v) Sch. 6-3 defines the Services, which include:

    6-3.15 – administering and managing the Building, performing the Services, performing the Landlord's other obligations in this Lease and preparing statements or certificates or and auditing the Expenses of the Services and Insurance

    6-3.18 – taking any steps the Landlord, acting reasonably, from time to time considers appropriate for complying with, making representation against, or otherwise contesting or dealing with any statutory or other obligation affecting or alleged to affect the Estate, including any notice, regulation or order of any government department, local, public, regulatory or other authority or court, compliance with which is not the direct liability of the Lessee or any lessee of any part of the Estate

    6-3.19 – discharging the reasonable and proper cost of any service or matter the Landlord, acting reasonably, thinks proper for the better and more efficient management and use of the Estate and the comfort and convenience of its occupants.

The law and jurisdiction

25. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable.

26. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard. When service charges are payable in advance, no more than a reasonable amount is payable.

27. Under section 20C of the Act a tenant may apply for an order that all or any of the costs incurred by a landlord in connection with proceedings before a 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.

28. Under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 a tenant may apply to the Tribunal for an order which reduces or extinguishes the tenant's liability to pay an "administration charge in respect of litigation costs".

The issues

29. Following the exchange of statements of case/witness statements, the substantive issues remain those set out in the applications, namely:

- Whether legal fees incurred by DPF in Case Ref. CHI/45UG/LVM/2019/0011 and otherwise are recoverable from the Applicants under the terms of the lease

- If so, whether the costs were reasonably incurred, both in relation to whether they should have been incurred at all and whether the amount was reasonable

- Whether orders limiting costs recoverable in respect of these proceedings should be made, and/or a section 20C order made in relation to Case Ref. CHI/45UG/LVM/2019/0011.

Whether legal fees incurred by DPF in Case Ref. CHI/45UG/LVM/2019/0011 and otherwise are recoverable from the Applicants under the terms of the lease

30. The first point to consider is what type of work has been charged for. Ms Carvalho states that "Immediately following the hearing [of 24 January 2020] the Respondent actively instructed Fladgate LLP regarding the further conduct of matters before the FTT regarding the winding up of the Management order and related matters as instructed from time to time … Legal costs have been properly and reasonably incurred by the Respondent in connection with the directions for the winding up of the Management order and the related issues on the appeals as to whether the Management order extended to the Enfranchised Land. It is these costs to which these applications relate".

31. Ms Carvalho has provided copies of Fladgate's invoices, with partially redacted time-sheets. It is apparent from these that approximately £30,000.00 of the legal costs relate to the period up to and including the hearing on 2 March 2020. The remainder of the costs were incurred between 13 March 2020 and 27 October 2020.

32. It is also apparent from the time-sheets and counsel's fee note of 22 April 2020 that counsel's fees of £4500.00 and a not insubstantial amount of solicitors fees in respect of the latter period relate to the Manager's proposed appeal to the Court of Appeal. DPF was not a party to these proceedings.

<u>The Applicants' submissions</u>

32. The Applicants' case is that there is no provision in the lease which permits recovery of these legal costs through the service charge. The applicable test on the interpretation of leases is said to be set out in *Sinclair Gardens Investments (Kensington) Ltd v Avon Estates (London) Ltd* [2016] UKUT 317 (LC) at para. 23:

> *There is no hard and fast rule that legal costs cannot be recovered where the clause employs general words and makes no specific mention of lawyers or the costs of legal proceedings, as evidenced by two decisions of the Upper Tribunal (Conway v Jam Factory Freehold Ltd [2013] UKUT 0592, [2014] 1 EGLR 111; Assethold Ltd v Watts [2014] UKUT 0537). However, the requirement of clarity means that in such circumstances there must be 'other language apt to demonstrate a clear intention that such expenditure should be recoverable': see Union Pensions Trustees Ltd v Slavin [2015] UKUT 0103 (LC) per the Deputy President.*

33. Although Ms Carvalho has said in her witness statement that she relies on the entirety of the services listed at Schedule 6-3 and 6-4 of the lease, she specifically refers only to three clauses, and the remainder have no possible application.

34. Clause 6-3.15: the only possibly relevant words refer to the costs of "administering and managing the Building". Every case will turn on the wording of the lease, but in *Fairbairn v Etal Court Maintenance* [2015] UKUT 639 (LC) the lease permitted the landlord to recover the costs of doing "all other acts or things for the proper management administration and maintenance of the blocks of flats as the Lessor in its sole discretion shall think fit". Expenditure on unsuccessful litigation defending a lessee's claim for breach of the landlord's repairing covenant was found to be outside the scope of the charging clause. In respect of Ditton Place, the litigation was a battle between the manager and the lessees who had caused him to be appointed, and did not relate to the management or administration of the building, the contentious issues relating to recovery of service charge arrears and the manager's costs and expenses.

35. Clause 6-3.18: The winding up of the management order was the result of an order made by the Tribunal. The wording of the clause relates to matters such as compulsory purchase orders, orders under the Building Acts and the like, not internal disputes between leaseholders and their landlord or a manager.

36. Clause 6-3.19: Although the Respondent was a proper and necessary party to the winding up order, it did not need to make representations and its involvement with the litigation cannot be said to be "for the better or more efficient management and use of the Estate", let alone "for the comfort and convenience of its occupants".

<u>The Respondent's submissions</u>

37. DPF submits that the legal costs were incurred in respect of or incidental to managing the Building, performing the Services and "performing the Landlord's other obligations under the lease". DPF relies on *Iperion Investments Corporation v Broadwalk House Residents Limited* [1995] EGLR 47 " to the effect that a landlord can recover its legal costs connected to managing the property notwithstanding that there is no specific reference to legal costs or the costs of legal advisers being a specifically recoverable head of expenditure under the service charge".

38. The legal costs incurred with Fladgate were costs "which go to establishing the overall accounting position to enable the accounting status of individual tenants to be correctly established and identify and account for the funds representing that position".

39. Ms Carvalho mentions three specific clauses of the lease in her witness statement: Schedule 6-3.1, 6-3.18 and 6-3.19. However the Respondent's skeleton argument does not make any further submissions as to their interpretation, scope or application.

Discussion and determination

40. Since the decisions in *Arnold v Britton* [2015] UKSC 36 and *Assethold v Watts* [2014] UKUT 0537 it has been established that service charge clauses are not subject to any special rule of interpretation. Prior to those decisions, it had been suggested in some cases that specific words would be required before a clause would be considered to allow the recovery of legal costs. At paragraph 15 of *Arnold v Britton* Lord Neuberger set out the principles applicable to the interpretation of written contractual provisions:

When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean'... And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

41. It follows that each case involving interpretation of a lease must be decided on its own facts, and decided cases are of limited assistance, as explained in *Sinclair Gardens*, above, at [21]. In respect of legal costs the approach set out in that case at [23] – see paragraph 32 above – remains good law. There must be some language in the lease showing a clear intention that the costs should be recoverable. As the Deputy President said in *Assethold v Watts*, language may be clear even though it is not specific.

42. The three clauses in the lease mentioned by Ms Carvalho in her witness statement need to be considered in their context. Schedule 6-3 and 6-4 list the Services for which costs may be recovered through the service charge. Schedule 6-3 lists 19 types of work which fall within the definition of Services. The first 14 all directly relate to the costs of physical maintenance, and employing people to do this work and to collect the rents. 6-3.16 deals with paying for taxes, utilities etc relating to the parts retained by the landlord and 6-3.17 covers the cost of interest on loans taken out to pay for the Services. Schedule 6-4 covers maintenance and provision of utilities to the Main House and Coach House. None of these other clauses can assist the Respondent.

43. The lease makes only one mention of legal costs. At Schedule 4-14 the lessee covenants to pay the Landlord the full amount of costs and disbursements, including those of counsel and solicitors, incurred by the Landlord in relation or incidental to various matters. This is an administration charge, not a service charge, but it serves to demonstrate

that those drafting the lease did have legal costs in contemplation, but chose to make only one specific reference to them.

44. There is nothing in the lease to suggest the parties had in mind a situation where the Landlord might wish to charge lessees for legal costs incurred in connection with a disputed management order made against a predecessor in title.

45. Against that background, each of the clauses specifically relied on by the Respondent will be considered. It is noted that the Respondent's skeleton argument deals with the issue of payability under the lease only very briefly, without any analysis at all of the actual wording of the provisions in question.

6-3.15 – administering and managing the Building, performing the Services, performing the Landlord's other obligations in this Lease and preparing statements or certificates or and auditing the Expenses of the Services and Insurance.

46. The only possibly applicable words are "administering and managing". The words "performing the Services, performing the Landlord's other obligations" appear to be surplusage. Looking at this clause in its context within Schedule 6-3, the Tribunal concludes that its natural and ordinary meaning is that it covers the administrative and management costs of providing the physical services, paying necessary bills, collecting the rent, and complying with the service charge machinery in the lease. In other words it is intended to cover the cost of performing the sort of work that would normally be undertaken by managing agents, perhaps assisted by accountants.

47. There is nothing in the wording of the clause or its context that evinces an intention it should cover (i) the legal costs of a landlord becoming involved in a dispute about the terms of winding up of a management order to which it was never a party, or (ii) funding the costs of a lessee who has undertaken and funded litigation in opposition to the Manager. Furthermore, as will be explained in more detail below, the dispute about the terms of the winding up order did not affect DPF's future management or administration in any material degree.

48. The Applicant has referred to *Conway v Jam Factory* where the landlord's costs of successfully resisting an application for the appointment of a manager were found to be recoverable as service charges, but the relevant provisions in that lease were very much more specific, referring to engaging "advisers of whatever nature …in the interests of good estate management", and of course in that case the Landlord was the respondent to the application for a management order. In the case of Ditton Place, the management order – to which it was not a party - had come to an end by the time DPF sought legal representation. DPF had already assumed management of the enfranchised land, and its only interest was to ensure a proper hand-over from the Manager.

49. Furthermore, Mr Heather's submissions at the winding up hearing were unsuccessful, and as explained at paragraphs 64-66 below, the hearing was necessary only because of the actions of those lessees who had formed DPF. In *Fairbairn* the Upper Tribunal, in disallowing the recovery of legal costs, stated that "the underlying difficulty …is that the steps required to be taken by [the landlord] were as a result of a breach by the respondent of its own obligations under the lease" [44]. The situation here is not exactly analogous but the principle has some application to DPF, an entity wholly controlled by its lessee members. The Tribunal had previously found that the purpose of the enfranchisement was to find a way to evade the management order, a finding undisturbed by the Upper Tribunal.

50. However, the Tribunal accepts that to the extent that legal advice and representation might been required subsequent to the hearing on 2 March 2020, with respect to alleged non-compliance with the winding up directions that impacted on DPF's ongoing ability to manage and administer its buildings, those costs could be recovered under Sch. 6-3.15.

51. Subject to this, the Tribunal does not find that legal costs can be recovered under Sch.6-3.15.

6-3.18 – taking any steps the Landlord, acting reasonably, from time to time considers appropriate for complying with, making representation against, or otherwise contesting or dealing with any statutory or other obligation affecting or alleged to affect the Estate, including any notice, regulation or order of any government department, local, public, regulatory or other authority or court, compliance with which is not the direct liability of the Lessee or any lessee of any part of the Estate

52. The natural and ordinary meaning of Sch. 6-3.18, in its context, is to permit the landlord to recover costs it incurs in complying with, or challenging, any legal requirements with respect to the Estate which do not fall to be dealt with by individual lessees.

53. As already explained, the Management order had ended, without any involvement of DPF in the proceedings, before DPF engaged solicitors. There was nothing in the Management order, or indeed, in the winding up directions made following the hearing on 23 March 2020, that required compliance from DPF. Nor did the winding up directions affect the Estate as such. Sch. 6-3.18 can have no possible application.

6-3.19 – discharging the reasonable and proper cost of any service or matter the Landlord, acting reasonably, thinks proper for the better and more efficient management and use of the Estate and the comfort and convenience of its occupants

54. This is a sweeping-up clause. It comes at the very end of Sch.6-3, which as seen, is almost exclusively concerned with the practical running of

the estate and building. The Tribunal repeats the points made at para. 47 above. Adopting a generous interpretation, the Tribunal finds only that it could cover the cost of legal advice and representation obtained as a result of the Manager's alleged non-compliance with the handover to DPF, if that was affecting management or the amenities of the residents.

55. The Respondent has cited only one authority in support of its position: *Iperion Investments Corp. v Broadwalk House Residents Ltd*, a 1995 decision of the Court of Appeal. In that case a service charge provision enabling the recovery of "the proper cost of management of [the building] "was found to cover legal costs incurred in properly brought forfeiture proceedings. Other cases, e.g. *St Mary's Mansions Ltd v Limegate Investments Co Ltd* [2002] EWCA Civ 1491, have reached reached the opposite conclusion with respect to sweeping up clauses. In any event, the situation of the landlord in *Iperion* can be clearly distinguished. There the landlord was the claimant seeking forfeiture against a lessee, a position wholly different to that of DPF in respect of the proceedings relating to winding up of the management order.

56. In conclusion, the only legal costs invoiced by Fladgate to DPF that the Tribunal finds are potentially recoverable under the lease as a service charge are those incurred in relation to alleged non-compliance by the Manager with the winding up directions that impacted DPF's ongoing ability to manage and administer DPF's estate.

Whether the costs were reasonably incurred, both in relation to whether they should have been incurred at all and whether the amount was reasonable

57. In the event that the Tribunal has erred in its conclusion with respect to recoverability under the lease, this point will be considered in relation to all the legal costs.

<u>The Applicants' submissions</u>

58. The Applicants say that the costs were not reasonably incurred at all, and that they were excessive for representation at a one day hearing in which the Respondent had little interest. Fladgate and Mr Heather were in substance acting for Mr Urwick and Ms Bajo, as they had done on all previous occasions, and the arguments put forward were for their benefit, not for that of DPF. Ms Carvalho has not explained why DPF needed legal advice or representation.

59. Further, costs of nearly £50,000.00 cannot be justified for dealing with a matter in which it had little practical interest in the outcome. Some of Fladgate's time sheets suggest that DPF was not the only billable party.

The Respondent's submissions

60. The Respondent submits that it was in the interests of DPF that "all service charge issues are resolved so that it can reach a clean and correctly accounted position from which it can recover payments from the Lessees… To enable the Respondent to recover current sums it is necessary to establish the accounting status of the lessees under each of the leases so that correct balances either way can be identified". It also said that "All of the provisions of the winding up order are of direct relevant to the accounting status of the lessees…". It is said that the winding up order includes numerous provisions which directly affect the continuing administration of the service charges, and that it was therefore entirely reasonable and appropriate for DPF to incur legal costs to assist it in "the understanding and determination of issues arising on termination of the management order and the winding up". It was also reasonable to incur legal costs to seek to preserve the order the Upper Tribunal which the Manager was seeking to appeal.

61. As to the amount of the legal costs, it was reasonable to instruct Fladgate, which had a full knowledge of the matter, the hourly rates were reasonable, that it was reasonable to instruct Mr Heather as leading counsel due to his familiarity with the case, and the importance to DPF of the proposed appeal to the Court of Appeal.

Discussion and determination

62. It is again necessary to consider the different types of work carried out by Fladgate and consider for each type whether the cost was reasonably incurred. Doing the best it can on the evidence, the work falls into three categories:
(i) preparation for and representation at the hearing on 2 March 2020 regarding the winding up directions, and the subsequent request for permission to appeal
(ii) work in connection with the Manager's proposed appeal to the Court of Appeal
(iii) work in connection with implementation of the winding up directions.

Preparation for and representation at the hearing on 2 March 2020 regarding the winding up directions, and subsequent request for permission to appeal

63. At this stage Fladgate was explicitly acting for both DPF and Mr Urwick/Ms Bajo. No distinction was made in Mr Heather's submissions between their interests.

64. In the normal course of events, the winding up directions made on the ending of a management order are non-controversial. They do not require a hearing, let alone a highly contested one. It is important to understand why the situation was otherwise in the case of Ditton Place.

The Tribunal had found, in its decision of 5 April 2019, that the purpose of the enfranchisement through DPF, in which the lessees of seven flats participated, was to evade the management order. It also found that the enfranchisement had undermined the effectiveness of the management scheme and the ability of the manager to fulfil his obligations. Mr Urwick and Ms Bajo had brought and funded litigation to challenge the manager's right to manage the enfranchised part of the estate.

65. The result of the dispute between the lessee members of DPF and the manager, which extended to a host of issues even pre-dating the enfranchisement, was that, at the date of expiration of the management order, there were the following major problems:

- Service charges demanded by the manager had not been paid, leading to a shortage of funds to pay third parties and the manager's own fees
- The manager had incurred a very substantial liability to the supplier of heating oil to the lessees, which the lessees had not reimbursed
- The manager had incurred substantial legal fees, almost all of which related to issues raised by the lessee
- The "historic" service charge arrears for the four years preceding the management order had still not been collected.

66. At the hearing on 2 March 2020 Mr Heather argued that the lessees should not be required to pay the manager's fees or legal costs, or to reimburse the manager for any other costs incurred for the enfranchised land after the date of enfranchisement. He did not suggest how those liabilities should be met, only that the lessees should not pay them. Another argument was that the lessees should pay only 1/18th each of the pre-enfranchisement management fees, as opposed to a larger proportion. These arguments were all rejected by the Tribunal.

67. It was never suggested by anyone that DPF would have any liability for any of these costs. The arguments he made were solely for the benefit of his clients Mr Urwick/Ms Bajo, and incidentally for other lessees allied to them.

68. Looking at the Decision of 23 March 2020, the only representations made by Mr Heather which mention DPF are:

- A suggestion that DPF should prepare the service charge accounts for the enfranchised land for the post-enfranchisement period. This was rejected because the service charges would have included costs which Mr Urwick/DPF did not consider should be paid by the lessees. It was therefore an argument of benefit only to his lessee clients, by giving them (through DPF) an opportunity not to charge for those costs.
- The argument that DPF and not the Manager should be authorised to collect the service charge arrears relating to the enfranchised land for the post-enfranchisement period. Had this argument succeeded, the manager would have been left out of

pocket, and the lessees controlling DPF could have decided either to waive the arrears (which related to costs that DPF had no legal liability to pay in any event) or to collect them as a windfall. Either way, the ultimate beneficiary would be not DPF itself, but the lessee members of DPF. This argument was also rejected.

Looking at the substance of the points made, it is clear they were really made for the benefit of Mr Heather's lessee clients, who had substantial service charge arrears, rather than for DPF.

69. Therefore, the Tribunal cannot be satisfied that it was reasonable for DPF to be represented the period leading up to and at the hearing of 2 March 2020. In reality all DPF needed to do was to await the winding up directions. Any minor points regarding DPF of which Ms Carvalho thought the Tribunal should have been made aware could have been dealt with by her in person, as she had done at previous hearings. The costs incurred by DPF were thus not reasonably incurred, and none are recoverable. The same reasoning applies to the costs incurred in making an application for permission to appeal against the Tribunal's decision and directions.

70. If DPF had simply sought advice from Fladgate on whether it needed representation at the hearing, this would have been reasonable, but there is no evidence that this is what happened. Given Fladgate's familiarity with the case, a reasonable cost for such advice would have been two hours work i.e. £680.00 + VAT.

71. The Tribunal notes also that it cannot even be satisfied that DPF actually entered into a legal obligation to Fladgate for its fees for this period, as opposed to simply voluntarily agreeing to pay them. Up to and including 24 January 2020, only Mr Urwick/Ms Bajo were responsible for those fees. There is no evidence that Mr Urwick/Ms Bajo ceased to be so liable after that date, or that DPF entered into a contractual relationship with Fladgate. Mr Carvalho was asked to supply a copy of Fladgate's engagement letter, but declined to do so, saying it was privileged from disclosure. However, there is no reason why DPF or indeed Mr Urwick could not have provided other evidence regarding their respective contractual obligations to Fladgate, yet they chose not to do so.

Work in connection with the Manager's proposed appeal to the Court of Appeal

72. DPF was not a party to this litigation. Had the appeal succeeded and the Court of Appeal reversed the decision of the Upper Tribunal, it would have meant that the Manager, rather than DPF, had had the right to manage the enfranchised land from the date of enfranchisement to the expiration of the management order. The issue involved a novel and interesting point of law. However, from a practical point of view, it would have made no difference to anyone. It would not have affected the winding up directions, because they gave the manager the right to

collect the service charges and other costs relating to the enfranchised land in any event. That is why the winding up directions provided that if the manager elected to pursue the appeal he would have to do so at his own expense and risk as to costs.

73. It was therefore not reasonable to fund the costs of Mr Urwick/Ms Bajo in making representations with respect to the proposed appeal.

74. There is also no evidence that DPF entered into a legal obligation with Fladgate in respect of these costs.

Work in connection with the implementation of the winding up directions.

75. The winding up directions did not require DPF to do anything at all. However, it is possible that delay or failure by the Manager to comply with the directions on such matters as preparing the service charge accounts for the period of his management, and handing over documents, might impede DPF's ability to ascertain each lessee's service charge position going forward. If DPF reasonably needed to take legal advice or be represented on such matters, rather than dealing directly with the Manager, such costs would be reasonably incurred. However, it is simply not possible for the Tribunal to identify, from the documents provided, what or how much work was done in this regard, or whether it was done in circumstances that reasonably required legal assistance. If matters cannot be agreed in this regard following further disclosure by DPF, a further application to the Tribunal will need to be made.

Whether orders limiting costs recoverable in respect of these proceedings should be made, and/or a section 20C order made in relation to Case Ref. CHI/45UG/LVM/2019/0011.

Application under paragraph 5A of Sch.11 to the 2002 Act

76. Although applied for in the initial application, the Applicants have made no submissions regarding this, and thus no order is made.

Section 20C application in relation to these proceedings

77. The authorities make it clear that the only principle upon which the section 20C discretion should be exercised is to have regard to what is "just and equitable in the circumstances". The outcome of the proceedings is one of those circumstances. However, there is no automatic expectation of an order in favour of a successful lessee. The practical and financial consequences should also be considered (*Conway v Jam Factory* at [75]).

78. The outcome of these proceedings is very largely favourable to the Applicants. The service charges which the Tribunal has found are potentially recoverable are likely to be only a very small proportion, at best, of the total of the Fladgate invoices. On the principal issue of whether the Applicants should have to pay the costs incurred in

connection with the winding up hearing the Applicants have been wholly successful.

79. The consequence of making a section 20C order in favour of the Applicants and Mr Sellers is that the costs of these proceedings will fall to be met by the lessee members of DPF. That is neither unjust nor inequitable, given the background explained above.

80. Accordingly, the Tribunal makes an order that, to such extent as they may otherwise be recoverable under the lease, the Respondent's costs, in connection with these 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 Applicants or Mr Sellers.

Section 20C application in relation to Case Ref. CHI/45UG/LVM/2019/0011

81. The Tribunal has found that the Respondent is not entitled under the lease to recover its legal costs of these proceedings as a service charge, and also that such costs were not reasonably incurred. Given these findings, no additional section 20C Order is necessary.

Rule 13 costs and reimbursement of fees

82. In their submissions, the Applicants have applied for the above. Under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal has the power to make an order in respect of costs against a person who has acted unreasonably in bringing, defending or conducting the proceedings. It also has a general discretion whether to make an order for reimbursement of tribunal fees.

83. In relation to Rule 13, the Applicants' case is that the Respondent failed to comply, in a meaningful way, with the Tribunal's direction to identify the lease provisions relied on within Sch.6-3 and 6-4. Instead Ms Carvalho said she relied on "all of them".

84. In *Willow Court Management Ltd v Alexander* [2016] UKUT 0290 (LC) the Upper Tribunal gave detailed guidance as to how applications under Rule 13(1)(b) should be approached. At paragraph 28 of its decision the Upper Tribunal set out a three stage test to be applied to Rule 13 applications:

At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to

a second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.

85. The Respondent has not sought to respond to the application under Rule 13, but the Tribunal is not persuaded that the matter relied on by the Applicants is of sufficient moment or gravity to amount to unreasonable conduct. Ms Carvalho identified three specific clauses on which she relied and it was obvious as a matter of common sense that none of the other clauses were relevant. Further, even if it was unreasonable conduct, the discretion would not be exercised in favour of an order because the impact on the proceedings was minimal.

86. In respect of reimbursement of the Tribunal application fee of £100.00 the discretion will be exercised in favour of the Applicants for the reasons set out above in relation to the section 20C application. The Respondent is to reimburse the Applicants in the sum of £100.00 by 5 March 2021.

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.