FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case references	**:**	CAM/00KF/LIS/2020/0007, CAM/00KF/LDC/2020/0020 & CAM/00KF/LSC/2020/0042
Property	**:**	Beaumont Court & Richmond House, Victoria Avenue, Southend on Sea SS2 6EB
Applicants	**:**	Davey Thomason and Kenneth Andrew Carmichael (together with the lessees named in the schedule hereto
Applicant's Representative	**:**	Not represented
Respondent	**:**	Randal Watts London Limited
Respondent's Representative	**:**	Mathew McDermott of Counsel
Type of application	**:**	Application for permission to appeal against the Tribunal's decision dated 29th December 2020
Tribunal members	**:**	Mr Max Thorowgood and Ms Marina Krisko FRICS
Venue	**:**	N/A on paper
Date of Decision	**:**	28 April 2021

DECISION

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1. The applications

1.1. By their joint application dated 15th February 2021 Mr Thomason (in his capacity as lead applicant for the purposes of Case Reference CAM/00KF/LIS/2020/0007) and Mr Carmichael as the Applicant for the purposes of Case reference CAM/00KF/LSC/2020/0042 seek permission to appeal against the Tribunal's decision in respect of their applications dated 29th December 2020.

2. The test for granting permission to appeal

2.1. Given the broad scope of the application for permission to appeal and the way in which it mixes efforts to agree figures with alleged failures to decide issues with errors of fact and/or law, we think it may be of assistance to set out the parameters within which the Tribunal must consider an application for permission to appeal.

2.2. The statutory framework is set by the First-tier Tribunal (Property Chamber) Rules 2013 which provide as follows:

> **"52 Application for permission to appeal**
>
> (1) A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal.
>
> (2) An application under paragraph (1) must be sent or delivered to the Tribunal so that it is received within 28 days after the latest of the dates that the Tribunal sends to the person making the application—
>
> (a) written reasons for the decision;
>
> (b) notification of amended reasons for, or correction of, the decision following a review; or
>
> (c) notification that an application for the decision to be set aside has been unsuccessful.
>
> (3) The date in paragraph (2)(c) applies only if the application for the decision to be set aside was made within the time stipulated in rule 51 or any extension of that time granted by the Tribunal.
>
> (4) If the person seeking permission to appeal sends or delivers the application to the Tribunal later than the time required by

paragraph (2) or by any extension of time under rule 6(3)(a) (power to extend time)—

(a) the application must include a request for an extension of time and the reason why the application was not received in time; and

(b) unless the Tribunal extends time for the application under rule 6(3)(a) (power to extend time) the Tribunal must not admit the application.

(5) An application under paragraph (1) must—

(a) identify the decision of the Tribunal to which it relates;

(b) state the grounds of appeal; and

(c) state the result the party making the application is seeking."

"53 Tribunal's consideration of application for permission to appeal

(1) On receiving an application for permission to appeal the Tribunal must first consider, taking into account the overriding objective in rule 3, whether to review the decision in accordance with rule 55 (review of a decision).

(2) If the Tribunal decides not to review the decision or reviews the decision and decides to take no action in relation to the decision, or part of it, the Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it.

(3) The Tribunal must send a record of its decision to the parties as soon as practicable.

(4) If the Tribunal refuses permission to appeal it must send with the record of its decision—

(a) a statement of its reasons for such refusal; and

(b) notification of the right to make an application to the Upper Tribunal for permission to appeal and the time within which, and the method by which, such application must be made.

(5) The Tribunal may give permission to appeal on limited grounds but must comply with paragraph (4) in relation to any grounds on which it has refused permission."

> **"55 Review of a decision**
>
> (1) ***The Tribunal may only undertake a review of a decision—***
>
> ***(a) pursuant to rule 53 (review on an application for permission to appeal); and***
>
> ***(b) if it is satisfied that a ground of appeal is likely to be successful.***
>
> (2) The Tribunal must notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome.
>
> (3) If the Tribunal takes any action in relation to a decision following a review without first giving every party an opportunity to make representations, the notice under paragraph (2) must state that any party that did not have an opportunity to make representations may apply for such action to be set aside and for the decision to be reviewed again."

The test for granting permission to appeal is not expressly stated by the rules but the Tribunal's guidance as to the test to be applied is as follows:

> "The Upper Tribunal (Lands Chamber) has indicated that a person who wishes to apply for permission to appeal must specify whether their reasons for making the application fall within one or more of the following categories:
>
> (a) The decision shows that the First-tier Tribunal wrongly interpreted or wrongly applied the relevant law;
>
> (b) The decision shows that the First-tier Tribunal wrongly applied or misinterpreted or disregarded a relevant principle of valuation or other professional practice;
>
> (c) The First-tier Tribunal took account of irrelevant considerations, or failed to take account of relevant considerations or evidence, or there was a substantial procedural defect; and/or
>
> (d) The point or points at issue is or are of potentially wide implication."

In considering whether that test is made out, the Tribunal will consider whether there is a real (as opposed to a merely fanciful) prospect that the

applicant for permission might succeed on any of his/her stated grounds of appeal.

2.3. We also think that it would be helpful for us to make some general points about how litigation in general ought to be conducted. The principal that there should be finality in litigation is a very important one. For that reason, the rules require parties to set out their respective cases before either is obliged to give disclosure and/or prepare witness statements in order that both the parties and the Tribunal can know what the case is about and what matters are in issue. Whilst it is possible to amend Statements of Case, with permission, it is important that the process of litigation does not entail one or both parties attempting to shoot at a target which is constantly in motion. The trial process is not a form of boundless roving enquiry; the process of enquiry has to be kept (so far as practical) within the bounds defined by the Statements of Case if it is to be reasonably fair to both parties. As we have already remarked, these matters were originally listed for hearing over two days and a bundle exceeding 1000 pages was prepared for the purpose of that hearing. The matter was then listed for a further two days hearing for the purpose of which a further 1400 + documents were produced. Our decision was intended, so far as possible, to be a final decision on all the matters relating to the service charge accounts for the y/e 31st March 2019 and 31st March 2020. Given the volume of the material and the large number of issues, it was necessary for us to limit our consideration of some of those issues in order to deal with the matter proportionately. The summary nature of our reasoning in respect of some of our decisions reflects that pressure of time. Such limitations are an essential part of the fairness of the process which can otherwise run out of control.

2.4. All of the above is even more true for an appeal the parameters of which are defined by the decision of the Tribunal and the grounds of appeal. The trial of a claim is not a dress rehearsal, it is the final performance; an appeal is the encore. The scope for new matters to be introduced by way of appeal is, therefore, very limited unless it is to proceed by way of re-hearing.

3. The grounds of appeal

3.1. With those points in mind our decisions in respect of the various grounds of appeal identified in the Applicants' document entitled "15022021 Letter to FTT v. 1" are as follows.

3.2. *Unsubstantiated charges* – This is a prime example of problem to which our remarks above are directed. We made clear to the Applicants in the course of the second two days of hearing that they would have a limited opportunity to raise challenges in respect of what they considered to be unsubstantiated items but that all the remaining matter had to be dealt with within the time available. Subject to what we say below, our decision does deal with all the matters raised by the Applicants before us. Insofar as the Respondent may have committed any offences in respect of failures to provide documents for which it was asked, that is a criminal matter which is only justiciable before the Magistrates' Court.

3.3. *Specific challenges (boiler pump)* – It is not correct to say that there was no evidence as to the nature of the failure of this pump, Mr Watkinson gave evidence on this point which was to the effect that this was an ordinary equipment failure not caused by any defective equipment or workmanship. Had the pump been defective, it would no doubt have been possible to have it replaced without cost but that is not what happened. It is therefore reasonable to assume that the landlord and/or Mr Watkinson were satisfied that there was no case to answer in that regard. We accepted Mr Watkinson's evidence and also agreed that it was reasonable for his company to charge for the diagnostic services which he provided on its behalf.

3.4. There is nothing inherently wrong or suspicious in Mr Watkinson's company providing services to the landlord. Mr Watkinson's in-depth knowledge of the development is likely to have resulted in a saving of costs rather than the reverse.

3.5. *Voids charge* – We have made our decision on this issue and commented upon the poor quality of the Respondent's evidence about it. Nevertheless, a decision was required to resolve the matter and we made

it on the balance of probabilities. There is no real prospect of a successful appeal against that decision.

3.6. *Commercial units' contribution* – This is not a matter which was identified as one requiring our decision. It cannot be introduced now by way of appeal.

3.7. *Management fee* – Our decision involved a series of value judgments in respect of the matters to be considered. We weighed all the matters raised by the Applicants and reached the conclusion which we set out. There are no real prospects of a successful appeal against that aspect of our decision.

3.8. *Contribution to electricity charges* – We agree that this was an issue which we were required to decide and which we failed to decide. That was a manifest error on our part in respect of which the Applicants' proposed ground of appeal has excellent prospects of success. We shall accordingly review our decision and make it afresh.

3.9. Unfortunately, whilst we accept that the photographs produced by the Applicants do suggest strongly that contractors working on the remaining parts of the development were taking electricity from sources in respect of which the Applicants were being charged there is no substantial evidence upon which we could reach any sort of reasoned conclusion as to the amount of their electricity usage. The landlord's evidence was that its associated contractor, RW Construction Limited, made a contribution of £8,283.88 towards the electricity costs. There is simply no evidence to suggest that this was not a fair and reasonable apportionment of responsibility for this liability.

3.10. *Cleaning costs* – Again, this is a matter about which we have made our decision based on the evidence presented to us. The simple point is that this is precisely the sort of decision which it is a landlord's right and responsibility to make. Provided that the decision is a reasonable one, which in our judgment taking it as part of the improved concierge package it was, the fact that it is more expensive or that some lessees do

not agree with it is irrelevant. There is accordingly no real prospect that the Applicants will succeed on this ground of appeal.

4. Requested guidance

4.1. *VAT* – Although this is expressed to be a matter on which our guidance is sought, it does in fact tangentially raise a possible ground of appeal by the Respondent. This is a matter dealt with by Mr Axelsen in his letter, namely that VAT paid by the landlord in respect of services which it is contracted to supply pursuant to the terms of the leases are exempt supplies in respect of which the VAT is not recoverable by the landlord. Therefore, it is a cost which the landlord is entitled to pass on to the lessees. It is therefore irrelevant whether the landlord is VAT registered. In either case it is entitled to pass on any VAT which it has paid to the lessees. To the extent that our decision suggested otherwise, it was incorrect and gave rise to a ground of appeal in respect of which the landlord would be likely to succeed. To that extent we take this opportunity to review our decision and correct it in the manner set out above.

4.2. *Settlement* – It is not for us to comment upon the mechanisms by which any settlement is to be achieved.

4.3. *Accountant* – It is not within the Tribunal's power to direct that the landlord use any particular accountant.

4.4. *Insurance* – If the Applicants do not seek to challenge this aspect of our decision, we cannot concern ourselves further with it.

5. Review and permission to appeal

5.1. Since we have reviewed our decision, at least to the extents explained above, we are required to consider whether the parties should be entitled to make further opportunity to make submissions in respect of the outcome of that review. In our view that is not necessary because both

parties have already made full submissions in regard to the matters which we have decided above and indeed in respect of the principle of a review.

5.2. We are also required to state what rights of appeal the parties have against our reviewed decision. In view of the fact that the only change to our previous decision as a result of our review relates to a matter in respect of which the Applicants have already sought permission to appeal and that our decision does not give them the relief which they seek, it does not seem to us that it is in accordance with the overriding objective to permit them to make a further application for permission to appeal in respect of that decision to us. That does not mean they are not entitled to apply to the Upper Tribunal for permission as they may of course do in relation to all the other matters in respect of which we have sought permission.

6. Costs

6.1. We have received submissions from the Respondent in respect of the question whether it is in principle entitled to recover the costs of these proceedings from the lessees under their leases.

6.2. The Respondent has also expressly reserved its right to make further submissions in respect of the Applicants' application for an order pursuant to s. 20C Landlord & Tenant Act 1985.

6.3. Accordingly, we make the following directions for the resolution of the issues relating to costs:

6.3.1. The Applicants shall, by 4 pm on 12 May 2021, file and serve any submissions which they wish to make in relation to:

6.3.1.1. The Respondent's entitlement to recover its costs of these proceedings pursuant to the lease; and

6.3.1.2. Their entitlement to an order pursuant to s. 20C Landlord & Tenant Act 1985.

6.3.2. The Respondent has permission, by 4 pm on 26 May 2021, to file and serve such submissions as it may be advised in response to any submissions filed and served by the Applicants pursuant to paragraph 6.3.1 above. If it does so, it must also file and serve a Statement of its Costs of these proceedings in Form N260 by the same time.