



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

Case reference : **LON/00BA/LSC/2020/0141**

Property : **Various Properties at Poplar Court, Gap Road, Wimbledon, London, SW19**

Applicants : **Those leaseholders listed in Appendix 1 (“the First Group of Applicants”) and those leaseholders listed in Appendix 2 (“the Second Group of Applicants”)**

Representative of the First Group of Applicants : **Mr J Fieldsend of Counsel, instructed by Ms B Walkinshaw of Jury O’Shea LLP**

Representative of the Second Group of Applicants : **Miss C Dowding, Solicitor, of TMW Solicitors LLP**

Respondent : **Clarion Housing Association Limited**

Representative : **Miss S Evans, Solicitor, of Weightmans LLP**

Type of application : **Liability to pay service charges**

Tribunal : **Judge N Hawkes**

Date of Case Management Hearing and Determination : **22 June 2022**

Decisions of the Tribunal

- (1) The Tribunal determines that no service charge is payable by the Applicants in respect of the works which form the subject matter of this application.
- (2) The Tribunal gives the directions set out below in respect of an application for costs under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 made by the First Group of Applicants.

The hearing

1. A hearing took place by CVP video on 22 June 2022. The First Group of Applicants was represented at the hearing by Mr Fieldsend of Counsel, instructed by Ms B Walkinshaw of Jury O'Shea LLP. The Second Group of Applicants was represented at the hearing by Ms C Dowding, Solicitor, of TMW Solicitors LLP. The Respondent was represented at the hearing by Miss S Evans, Solicitor, of Weightmans LLP.

The determination that no service charge is payable

2. Paragraph 4(b) of Directions which were issued by Judge Korn on 22 March 2022 ("the March 2022 Directions") provides:

*"The Respondent shall by **29 March 2022** serve on the Applicants:*

...

b) the description of the works and specification for those works which United Living contracted to carry out under the Major Works Contract;"

3. Paragraph 6 of the March 2022 Directions provides (emphasis supplied):

*"If the Respondent fails to comply with paragraph 4a) and 4b) above, the Respondent shall be treated as not having contracted for the carrying out of the major works and in those circumstances it **shall be determined** that no service charge is payable by the Applicants in relation to those works."*

4. The First Group of Applicants, which is represented by Mr Fieldsend, states that the background to the March 2022 Directions is as follows:

"The relevant background to the March Directions can be summarised as follows (this summary was orally provided to the Tribunal at the hearing in March without objection from R (who were represented by their solicitor – Sian Evans) as to its accuracy):

a. The proceedings concern major works.

b. The s.27A application was made in March 2020.

- c. At that time there was no final costs.
- d. In Sept 2020 at a CMH, directions were given
- e. In Feb 2021, the s27A application was stayed until June '21 to enable R to produce final account / costings.
- f. At the end of the stay, As still did not have final account.
- g. On 02.06.21, the Tribunal directed that the final account be produced by 7 June 2021.
- h. There followed communication from R that the account would be available by the end of June 2021.
- i. Nothing was produced by end of June and there was no communication from R.
- j. On 16.08.21, at As' request, the Tribunal gave directions: (1) R to produce a statement explaining why the final account is late, and the explained lateness has not been explained to As and the Tribunal and (2) R to produce the account and give other disclosure by 24 Aug.
- k. On 24.08.21, R produces a statement in which there is a request for an extension for the account/disclosure until 03.09.21, but no explanation for not producing the final account by end of June 2021.
- l. On 26.08.21, the Tribunal grants an extension to 03.09.21.
- m. On 03.09.21: no account is produced; no disclosure is given; no communication is received from R
- n. On 15.10.21, R says that a meeting on-site is booked for 21.10.21 and it will then have clearer idea when the account will be available.
- o. Between 15.10.21 and 22.03.22, nothing further was heard from R.

The March Directions record the delay in production of the account (B'ground (2)) – referencing the correspondence – which sets out the above chronology of events – and both R's persistent failure to communication with As / Tribunal and inability to explain why (B'ground (4)).

6. Under the March Directions, the Tribunal gave case management directions to get the proceedings back on track. “

- 5. This account was not disputed by the Respondent at the hearing.
- 6. The Applicants submit that there has been non-compliance with paragraph 4(b) of the March 2022 Directions because attachments to an email sent in purported compliance cannot be opened.
- 7. The Applicants state that the Respondent sent the relevant email on 29 March 2022 at 15.55 hours. Ms Walkinshaw of Jury O'Shea LLP responded within 10 minutes, at 16.04 hours that day, stating that the attachments could not be opened. She received no reply. She then chased on 30 March 2022 at 10.14 hours but, again, she received no reply.
- 8. Mr Clarke (who was then representing the Second Group of Applicants) independently emailed the Respondent's solicitors on 30 March 2022 at 19.29 hours to state that the attachments could not be opened. He

received no reply. He emailed again on 31 March 2022 at 08.10 hours but, again, he received no reply.

9. Correspondence seeking the Tribunal's confirmation that paragraphs 4(a) and 4(b) of the March 2022 Directions had not been complied with by the Respondent and that the sanction specified at paragraph 6 had therefore taken effect was sent to the Tribunal on 13 April 2022 by the First Group of Applicants.
10. This correspondence was supported by letter dated 19 April 2022 from by TMW Solicitors LLP on behalf of the Second Group of Applicants. The Respondent's solicitors were copied into both letters.
11. By letter dated 22 April 2022, the Tribunal listed a Further Case Management Conference on 22 June 2022 in order to determine whether the sanction set out in the March 2022 Directions takes effect.
12. There was no response from the Respondent via its solicitors to any of the correspondence referred to above until approximately 7.55 am on the morning of 22 June 2022.
13. At the hearing, Mr Feildsend confirmed that neither he, nor his instructing solicitors had been able to open the attachments to the Respondent's solicitors' email of 29 March 2022. The Respondent's email of 29 March 2022 was forwarded to the Tribunal and the Tribunal was also unable to open the attachments. Miss Evans accepted that the documents were sent in an unopenable format and explained that she did not understand why the error had occurred.
14. There cannot be good service of documents which cannot be seen and the Respondent is therefore in breach of paragraph 4(b) of the March 2022 Directions. It is noted that the Respondent took no steps to remedy this breach on being notified six times by email/letter that the documents which had purportedly been served could not be accessed.
15. The wording of paragraph 6 of the March 2022 Directions is mandatory and the Respondent has made no application for an extension of time or for relief from sanctions. Accordingly, on Paragraph 4(b) of the March 2022 Directions having been breached, I determine that no service charge is payable by the Applicants in respect of the works which form the subject matter of this application

The rule 13 application

16. Mr Fieldsend made an oral application on behalf of the First Group of Applicants for costs in respect of all or part of these proceedings pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules")
17. By **20 July 2022** the First Group of Applicants shall send to the Respondent a Statement of Case setting out:

- (a) The reasons why it is said that the Respondent has acted unreasonably in bringing, defending or conducting the proceedings and why this behaviour is sufficient to invoke rule 13 of the 2013 Rules, dealing with the issues identified in the Upper Tribunal decision in *Willow Court Management Company (1985) Ltd v Mrs Ratna Alexander* [2016] UKUT (LC), with particular reference to the three stages that the Tribunal will need to go through, before making an order under rule 13;
- (b) Any further legal submissions;
- (c) Full details of the costs being sought, including:
 - A schedule of the work undertaken;
 - The time spent;
 - The grade of fee earner and his/her hourly rate;
 - A copy of the terms of engagement;
 - Supporting invoices for solicitor's fees and disbursements;
 - Counsel's fee notes with Counsel's year of call, details of the work undertaken and time spent by Counsel, with his/her hourly rate; and
 - Any expert witness's invoices, the grade of fee earner, details of the work undertaken and the time spent, with his/her hourly rate.

18. By **17 August 2022** the Respondent shall send to the First Group of Applicants a statement in response setting out:

- (a) The reasons for opposing the application, with any legal submissions;
- (b) Any challenge to the amount of the costs being claimed, with full reasons for such challenge and any alternative costs;
- (c) Details of any relevant documentation relied on with copies attached.

19. By **7 September 2022** the First Group of Applicants may send to the Respondent a statement in reply to the points raised by the Respondent.

20. The First Group of Applicants shall be responsible for preparing the bundle of documents (in a file, with index and page numbers) and shall by **16 September 2022** email to Respondent and to the Tribunal at London.Rap@justice.gov.uk, a digital indexed and paginated Adobe PDF bundle of all relevant documents for use in the determination of the application. If this is not possible, they should email the documents in Microsoft Word format, in numbered order (i.e. using a prefix of 01,

02, 03, etc). The subject line of the email must read: "BUNDLE FOR DETERMINATION IN [insert case details]"

21. The bundle shall contain copies of:
 - The Tribunal's determination in the substantive case to which this application relates;
 - These Directions and any subsequent directions;
 - The First Group of Applicant's statements with all supporting documents;
 - The Respondent's statement with all supporting documents.
22. The Tribunal determining this application will not have access to a physical file, nor electronic access to documents sent to the Tribunal. It is therefore essential that the parties include any relevant correspondence to the Tribunal within the digital bundle.
23. The Tribunal will determine the matter on the basis of the written representations received in accordance with these Directions, if possible in the **14 days** commencing on **19 September 2022**.
24. Any party may request an oral hearing by **7 September 2022**. If a hearing is requested, the Tribunal will notify the parties the details of the hearing.
25. This application shall be determined by Judge Korn or by Judge Hawkes, if possible.

Additional matters

26. Miss Evans confirmed that any application for relief from sanctions will be made within 28 days of the date of this decision. Mr Fieldsend submitted that a party in default must make any application for relief from sanctions promptly. The Tribunal makes no comment as to the merits of an application which has not yet been made but notes that the Respondent may wish to take legal advice concerning all aspects of this matter, including concerning the relevance of delay.
27. Ms Dowding informed the Tribunal that the Second Group of Applicants will make a separate application for costs in accordance with rule 13 of the 2013 Rules.
28. If any such applications are made, they shall be determined by Judge Korn or by Judge Hawkes, if possible.

Name: Judge N Hawkes

Date: 22 June 2022

NOTES

- (a) Whenever you send a letter or email to the tribunal you must also send a copy to the other parties and note this on the letter or email.**
- (b) If an Applicant fails to comply with these directions the tribunal may strike out all or part of their case pursuant to rule 9(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (“the 2013 Rules”).**
- (c) If the Respondent fails to comply with these directions the tribunal may bar it from taking any further part in all or part of these proceedings and may determine all issues against it pursuant to rules 9(7) and (8) of the 2013 Rules.**

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).

APPENDIX 1

1. David Waite
2. Abbas Davoudi & Shahla Kasaei
3. Akbar Ali Khan Sherwani
4. Nasser Afshar Azad
5. Korrina May Dunton
6. Peter Julian Bowley
7. James Arjun Theivendran
8. Patrick Mahon Minchin & Talitha Jane Minchin
9. Antony Artun Senny
10. Vishal Vashisht
11. Priscilla Yaa Owusu-Pomaa.

APPENDIX 2

1. Paul James Kendrick
2. Soheil Dadkhah
3. Alex Logan Halli
4. Scott James Atherton
5. Linval Simpson
6. Liliya Vasileva Lubczynska
7. Bianca Virginia Larch and Anthony Larch

8. Nicholas James Clarke and Louise Anne Clarke.

9. Annie Ayomide Ade-Ajayi.