FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/26UG/LSC/2021/0075**
HMCTS code (audio, video, paper)	**:**	**P: PAPERREMOTE**
Property	**:**	**1-12 Heritage Close, High Street St. Albans, Hertfordshire AL3 4EB**
Applicant	**:**	**Hawk Investment Properties Limited**
Representative	**:**	**Darlington Hardcastles Solicitors**
Respondents	**:**	**Diana Eames and the other residential leaseholders listed in the Decision**
Representative	**:**	**SA Law**
Type of application	**:**	**Application for permission to appeal**
Tribunal members	**:**	**Judge David Wyatt** **Mrs M Hardman FRICS IRRV (Hons)**
Date of decision	**:**	**12 September 2022**

DECISION

Covid-19 pandemic: description of determination

This has been a remote decision on the papers. The form of remote decision was P:PAPERREMOTE. A hearing was not held because it was not necessary; all issues could be determined on paper. The documents we were referred to are described in paragraph 4 below. We have noted the contents.

Decisions of the tribunal

1. The tribunal has considered the request for permission to appeal based on the grounds of appeal provided and decided that:

   (a) the tribunal will not review its Decision; and

   (b) permission to appeal is refused.

2. In accordance with section 11 of the Tribunals, Courts and Enforcement Act 2007 and rule 21 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, each party who applied for permission to appeal may make further application for permission to appeal to the Upper Tribunal (Lands Chamber). Such application must be made in writing and received by the Upper Tribunal (Lands Chamber) no later than 14 days after the date on which the First-tier Tribunal sent notice of this refusal to the party applying for permission to appeal.

3. Where possible, you should send any such further application for permission to appeal **by email** to Lands@justice.gov.uk, as this will enable the Upper Tribunal (Lands Chamber) to deal with it more efficiently. Alternatively, the Upper Tribunal (Lands Chamber) may be contacted at: 5th Floor, Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 1NL (telephone: 020 7612 9710).

Reasons

4. The substantive decision was made on 19 July 2022 (the "**Decision**"). On 15 August 2022, the Applicant applied for permission to appeal, enclosing 16 pages of written representations. We have taken those documents, and those described in the Decision, into account.

5. We consider that none of the grounds of appeal have any realistic prospect of success. We do not propose to comment in detail on each representation. However, for the benefit of the parties and of the Upper Tribunal (Lands Chamber) (if any further application for permission to appeal is made), we comment below on some of the particular points raised by the Applicant in their written representations.

6. Please read this with the Decision, which explains the background and the expressions used. References below in [square brackets] are to those paragraphs in the Decision.

Ground 1 (inoperable) and Ground 2 (manifestly inequitable)

7. The Applicant appears to suggest that in [46(i)] the tribunal found that the provisional apportionment in paragraph 1(a) of Schedule 4 to the residential leases contemplated a change or abrogation of the rating system which left "operable" apportionment according to rateable values, so must have misunderstood para. 1(a), but that is not what the tribunal decided.

8. Paragraph [46(i)] addresses one of the arguments made at the hearing, which was that the words "*in force*" in para. 1(a) had some significance, having been used in the key parts of the relevant lease wording in Bedford Court.

9. Our understanding of how para. 1(a) operates was the same as the Applicant appears to be arguing. Para 1(a) provides merely for interim apportionment and only in certain limited circumstances (in essence, where a rateable value is not currently "*in force*" for the Demised Unit or other Lettable Unit but there is a market rent payable to the landlord for that unit, with provision for the surveyor to estimate the market rent in the case of any other Lettable Unit where no market rent is payable to the landlord). If such interim apportionment is made, para. 1(a) includes provision for adjustments if a rateable value is later determined.

10. The point the tribunal was making in [46(i)] was about the construction of paragraph 1 as a whole. In particular:

    (a) para. 1 does not (in contrast to the lease in Bedford Court) refer to rateable values "*in force*"; it simply refers to rateable values;

    (b) para. 1(b) plainly contemplates that the rating system or method might be "*changed or abrogated*" but apportionment according to rateable value might still be operable, because the condition does not end there. It is followed by: "*…so as to render the apportionment of and contribution to the Service Cost according to rateable value inoperable or manifestly inequitable*"; and

    (c) para. 1(a) only works for commercial or rented units (it does not enable provisional apportionment of the Service Cost payable under each lease of the residential flats while no rateable value is in force, because the rent payable under the long leases would be a nominal or concessionary rent). So it supports (or despite the "*in force*" is not inconsistent with) our interpretation that para. 1 anticipated that apportionment according to rateable value could be operable when the rating system has been changed or abrogated such that there is no current rateable value in force for the Demised Unit.

11. The tribunal took into account the arguments that the "*dynamic system*" had become inoperable and/or that the "system" had become manifestly inequitable because it was no longer dynamic. It was construing the words repeated in italics in paragraph 10(b) above [43] and considering the approach of apportioning according to the last year for which rateable values were published for all units in the Centre.

12. The tribunal was not using post-formation matters to construe the lease. It was observing that the fact the 1990 rateable value proportions had been charged and paid for some 30 years following abolition of domestic rating seemed consistent with the tribunal's finding that apportionment according to rateable value had not become inoperable.

13. This was not the type of case (as in Bedford Court) where additional residential units, or the like, had been created since the end of domestic rating. The Decision is not inconsistent with Bedford Court, where the key wording in the lease and the circumstances were distinctly different, as noted at [49].

Ground 3 - evidence

14. It is argued that the tribunal took into account an irrelevant consideration by observing at [46] that there was no evidence to show when abolition of domestic rating was said to have rendered apportionment according to rateable value inoperable or manifestly inequitable.

15. But this was a secondary observation:

    (a) there was no evidence to show that such apportionment had been rendered manifestly inequitable in the first year, or immediately on abolition of domestic rating;

    (b) at the time of our Decision 30 years later, taking into account the conduct and cumulative adverse changes for residential leaseholders over those years compared to the 1990/2015 change in relative values/estimated values and the other matters relied upon by the Applicant, we were not satisfied that the current apportionments were manifestly inequitable (and later decided they were within the range of what would be just and equitable in the current circumstances); and

    (c) we were observing simply that we had seen no evidence to suggest (for example) that since 1990 relative commercial and residential values had changed significantly before most of the adverse changes for leaseholders, or to counter the Respondent's evidence about those adverse changes and conduct over the 30 years, so the Applicant had not shown that there had ever come a point before the time of our Decision when the change in relative values and other matters relied upon by the Applicant sufficiently outweighed the adverse changes and the relevant conduct of the parties [46(ii].

Ground 4 – admission/submission

16. It is argued that there was a procedural irregularity at [44] in relation to an "*admission*" by the Respondents that apportionment according to rateable value had become inoperable or manifestly inequitable.

17. We considered this was a submission, not an admission, particularly because: (a) the case management directions provided for submissions

in statements of case, not formal pleadings; (b) the Respondents produced their initial statement of case under protest, following it with a more detailed statement of case settled by counsel after the Applicant produced their first formal statement of case [2 & 3]; and (c) the Respondents made alternative submissions in their final statement of case that apportionment based on the 1990 rateable values was not inoperable or manifestly inequitable.

Grounds 5 and 6 - just and equitable

18. As with the substance of most of the grounds, these are in reality a disagreement with the tribunal's assessment, having inspected the Centre, that on the evidence produced and for the current service charge year the existing apportionments were within the range of what would be "just and equitable" and the apportionments proposed by the Applicant's expert fell outside that range.

Ground 7 - other reason

19. This does not seem an appropriate case for a decision which might have wider application. Even apart from the lack of evidence from the Applicant about the background, it turns on: (a) the precise wording of the leases involved; (b) the particular nature of this mixed-use development, the cumulative changes made over time without actually creating additional units and conduct over the relevant period [54]; and (c) the other specific difficulties with the approach proposed by the Applicant's expert, the Applicant's refusal of access for measurement and the much higher proposed charges for major works for this year [55].

Ground 8 – s.20C order

20. It is said the summary in [58] (that, although the Respondents could have been more co-operative, the Applicant appeared not to have engaged constructively with leaseholders before the application was made, did not do enough to co-operate with the residential leaseholders and had been unsuccessful in these proceedings) gave inadequate particulars. We considered the Decision was already quite long enough, but the following comments may assist.

21. Paragraph [58] summarised points noted earlier in the Decision (such as the Applicant's refusal to allow the Respondents to, albeit belatedly, measure the car parking area [55(iv)]) and our overall assessment of the conduct of the parties.

22. It appeared the Applicant may have asked for access to measure flats and initially been refused, since that was mentioned in Mr Forrester's first report. However, no pre-action letter or other proposals were produced in the bundle. It appeared from the timing that the Applicant had probably not done enough to consult leaseholders about Mr Forrester's

report (which proposed much higher costs for leaseholders at a time when major works were planned) before applying to the tribunal. For personal reasons, Mr Forrester had needed a long time to produce his first report. He had inspected the Centre on 24 July 2019, his first report was dated 16 December 2021 and the application was made to the tribunal on 21 December 2021.

23. Perhaps as a result, the Respondents may have been less co-operative than they could have been at the start of the proceedings (producing a rather limited initial statement of case). However, following the case management hearing and revised directions they were helpful, including taking instructions from all joint leaseholders to avoid the need for documents to be served on others individually, as discussed at the case management hearing and confirmed at the substantive hearing, and allowing access to their flats for measurement as requested. Ultimately, they did not challenge the amount of any of the substantial costs estimated by the Applicant, only the higher proportions proposed by the Applicant.

24. The Applicant was unsuccessful for the reasons we gave in our Decision. The Respondents should be relieved of any contractual obligation to contribute through the service charge to the costs of the Applicant's unsuccessful proceedings. While as requested we made and make no finding about this, there may be no such contractual obligation under the terms of the residential leases.

Name: Judge David Wyatt **Date:** 12 September 2022