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

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| **Case reference** | : | **LON/00AU/LSC/2022/0390**<br>**LON/00AU/LDC/2023/0160** |
| **Property** | : | **40 Morea Mews London N5 2EE** |
| **Applicant to LON/00AU/LSC/2022/0390**<br>**Respondent to LON/00AU/LDC/2023/0160** | : | **Mr Ying Choi Ng** |
| **Representative** | : | **In person** |
| **Respondent to LON/00AU/LSC/2022/0390**<br>**Applicant to LON/00AU/LDC/2023/0160** | : | **Aberdeen Lane Limited** |
| **Representative** | : | **Mr Joshua Cullen, Counsel instructed by LMP Law Limited** |
| **Types of application** | : | **For the determination of the liability to pay administration charges under Para 5A Schedule 11, Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") and**<br>**Dispensation from the consultation requirements under section 20ZA of the Landlord and Tenant Act 1985** |
| **Tribunal members** | : | **Mr Charles Norman FRICS**<br>**Valuer Chairman**<br>**Mr Clifford Piarroux JP** |

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| **Venue** | **:** | **10 Alfred Place, London WC1E 7LR** |
| **Date of Hearing** | **:** | **2 October 2023** |
| **Date of decision** | **:** | **20 January 2024** |

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**DECISION**

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## Decisions of the Tribunal

### Case reference LON/00AU/LSC/2022/0390

(1) The Tribunal determines that the sum of £499.80 for administration charges is not payable.

(2) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the Tribunal proceedings may be passed to the lessee through any service charge.

(3) The Tribunal makes an order under Paragraph 5A of Schedule 11 of the 2002 Act extinguishing the tenant's liability to pay an administration charge in respect of litigation costs in connect with this application.

(4) The Tribunal determines that the Respondent shall pay the Applicants application and hearing fees to the Tribunal within 28 days of this Decision, in respect of the reimbursement of the Tribunal fees paid by the Applicant.

### Case reference LON/00AU/LDC/2023/0160

(5) The Tribunal GRANTS the section 20ZA application subject to the condition that the applicant pays the respondent's costs for attending the hearing, summarily assessed at £250, within 28 days of the date of this decision.

(6) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the Tribunal proceedings may be passed to the lessee through any service charge.

## The applications

1. The Applicant seeks a determination pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of administration charges payable by the Applicant in respect of the service charge years 2022. There is an application for an order under section 20C of the 1985 Act. These are under case reference LON/00AU/LSC/2022/0390.

2. By a separate application, in June 2023, the landlord as applicant seeks an order seeking dispensation from statutory consultation requirements in relation to replacement boiler works. There is also a lessee's application for an order under section 20C of the 1985 Act. These were under case reference LON/00AU/LDC/2023/0160.

3. The Tribunal ordered that the cases be determined together.

## The Hearing and Procedural Matters

4. The Applicant appeared in person at the hearing and the Respondent was represented by Mr Joshua Cullen of counsel, instructed by LMP Law Limited.

5. Following the hearing of 2 October 2023, the Tribunal, as agreed with counsel, directed that further information to clarify aspects of the section 20ZA claim be provided.

6. Subsequently, the Tribunal received an application from the lessee for further directions as the applicant submitted that he had not received further directions of 3 August 2023, or the final form of bundle until 28 September 2023.

7. The Tribunal gave further directions permitting the parties to make written representations in relation to the respondents' response to directions of 15 May 2023 at pages 100-105 of the respondents amended bundle.

8. Following the hearing, the Tribunal also raised with the parties paragraphs 47-100 of paragraphs 47 – 100 of *London Borough of Southwark and Runa Akhtar and Stell LLC* [2017] UKUT 0150 (LC) and invited written representations. The Applicants made a written submission.

## The background

9. The property which is the subject of this application is a purpose-built block of 72 flats. These appear to have been recently constructed in the last ten years or so. The subject lease dates from 2014. The respondent is a management company for whom Habitare acts as managing agent. The applicant lessee has sublet 40 Morea Mews and has appointed Chase Evans to act as his managing agent. Both applications arise in connection with the sudden need to carry out major communal boiler repairs, heating and hot water being supplied communally as part of the building services and as reflected in the lease.

10. Neither party requested an inspection, and the Tribunal did not consider that one was necessary.

11. Prior to the hearing, directions were given on 9 January 2023. Further directions were given on 15 May 2023 and 14 June 2023. On 3 August 2023 further directions were issued directing that the cases be heard together, at a face-to-face hearing.

12. The lessee holds a long lease of flat 40, which includes service charge provisions. Relevant parts of the lease are referred to below.

## The issues in Relation to Administration Charges

13. The relevant issues for determination as follows:

    (i) The payability and reasonableness of administration charges of £499.80, levied for late payment of a service charge;

    (ii) Whether an order under section 20C should be made;

    (iii) Whether an order requiring reimbursement of fees should be made.

## Administration charges items & amounts claimed

14. The items challenged were £150 for a late payment fee imposed by Habitare and separate legal costs of £349.80.

## The Applicant Lessee's Case

15. The administration charges followed a demand for service charge payment as a share towards the cost of boiler replacement. This was issued on 17 May 2022 giving 14 days to pay. There was no consultation. On 31 May 2022, a second request was made and imposed a £150 late payment charge. On 8 June 2022 via a solicitors' letter the respondent demanded a total amount of £1,438.80, comprising a service charge of £1,037.80, an administration charge of £150, interest of £5, legal fees of £200 and £46 for other charges. On 22 July 2022 a solicitors' letter was sent to Chase Evans which imposed a further amount of £98.80 as additional costs of LMP, making the total amount of charges and fees £499.80.

16. The lessee's leasing agent asked for details of the repair works once the demand for funds had been received but no further information was provided. The charge for late payment was made only 14 days after the demand was issued. The landlord referred the non-payment to a collection agent three weeks after the demand was made. The lessee paid his share of the repair costs of £1037.80 within one month of the demand. In order to prevent charges escalating the lessee made payment of the £499.80, ten weeks after the demand was issued. He was not in breach of Para 3 of Schedule 11 of the lease because the landlord had not provided additional information to his leasing agent. The applicant sought a refund of the £499.80 paid.

17. In his supplementary Reply of 27 March 2023, the Applicant stated:

> "the Respondent has provided no evidence when it was actually posted, or whether any leaseholder actually knew about it at the time, or whether the Respondent sent the note to any leaseholder by any other means, e.g., email, post, etc., on 13 May 2022. I or my letting agent, Chase Evans, certainly did not know about it as of 13 May 2022. As submitted in Paragraph 8 of the Applicant Final Statement, (a) Chase Evans did not get the note when it downloaded the First Request on 18 May 2022 from the portal; and (b) the note does not contain the requisite information anyway."

18. The Applicant did not call witnesses.

**The Landlords Case**

19. The respondent cited paragraph 1.1 of schedule 5 of the lease by which the lessee covenants "to pay the tenant's proportion and the rent on the days and in the manner herein provided without any deduction…" By Paragraph 16 of schedule 5, the applicant covenants "to pay all expenses including solicitors' costs and surveyors fees incurred by the company or the management company in the recovery of any arrears of maintenance charge…"

20. The tenant's proportion of the service charge is due on demand and in advance in accordance with paragraph 2 and 3 of schedule 11. Paragraph 2 defines the tenant's proportion as the fair reasonable proportion of the expenses reasonably properly incurred by the company and/or management company pursuant to the provisions of schedule seven and schedule 10 and schedule eight and schedule 10.

21. Paragraph 3 of schedule 11 states "the tenant shall within 14 days of receipt of demand pay the tenant's proportion to the management company…"

22. The respondent also submitted that the applicant was liable to pay the respondents legal costs and administrative charges by virtue of Para 5 of Schedule 5 of the lease.

23. The landlord was seeking the following administration charges

Administration charge £150 payable to Habitare [Landlord's managing agents]
Interest £5 (this appears to have been waived)
Legal fees £200

VAT £40
Disbursements £6
Additional legal costs of £98.80 (inc VAT)

24. LMP Law provided a service charge and ground rent recovery fee list which included a letter before action at £200 plus VAT.

25. The landlords provided a remittance advice from Chase Evans Residential Ltd dated 16 June 2022 for £1037.80 in response to a demand dated 17 May 2022. The landlord exhibited an email dated 14 June 2022 from Chase Evans (Ricardo Carranza) and Aqueela Mohammed of KMP law in which Chase Evans stated that they had never received the recent demand for payment regarding the boiler replacement works. The last demand received was the service charge. 01/01/2022 to 30/06/2022. The late payment fee and instruction fee to solicitors were added to the account on 31/05/2022, 14 days after it was issued without any demand or reminders to their office. Chase Evans requested proof that the demand reminders were sent to their office in the previous 14 days and to where they were addressed.

26. By an email dated 7 July 2022 KMP law (Ms Mohammed) responded by email attaching service charge demands a reminder served on the leaseholder addressed to Chase Evans.

27. The email stated:

> "as requested please find attached the service charge demand and reminder served on the leaseholder by yourselves on the date stated therein. Both have been correctly served by post to the address of Mr YC NG care of Chase Evans Residential, The Strata, 10 to 12 Walworth Rd, London SE1 6EA. We also confirm that you were sent an email notification to the email address of accounts payable@chaseevans.co.uk to notify you that there has been a change on the account and therefore new service charges are fallen due and a reminder had been sent to you. [...] on the proviso that payment is made by the below deadline our client is willing to waive interest therefore the total amount outstanding is in the sum of £396 this is broken down as follows arrears £1187.80 plus costs £246, less part payment of £1037.80. Payment of £396 should be made by no later than 4 PM on 15 July 2022 in order to prevent any further action. Should we not receive full payment by this date then please note we will be proceeding for the full amount outstanding as per our client request."

28. The respondent included a telephone note from Ms Mohammed dated 22.07.2022 AM described as taking a call from Gian [Giannotti] of Chase Evans. The note records Miss Mohammed stating that her client would waive interest provided payment was made by the deadline provided in her email. Miss Mohammed stated that £150 was charged

by the agent [Habitare] and the £349.80 were her costs. Mr Giannotti said that he was trying to get it paid today and he has the lesser amount authorised and asked if Miss Mohammed could wave anything. She said no because my clients incurred those fees.

29. Also, on 22 July 2022 at 15:01 is an email from Mr Gian Giannotti to Ms Mohammed which states:

> "I tried to call you but you were not available… We are having difficulties explaining the cost to our clients and understanding the interest fees that been waived as a gesture of goodwill as the amount is £499.80 but right below it shows "costs £349.80". In order to get this matter settled and paid today could you please authorise the payment of £349.80… so we can process the payment to confirm with the remittance? That is the amount our client agreed to pay and expect to get it reduced for an amicable solution"

30. At the hearing counsel submitted that the parties had agreed that the legal costs of £349.80 had been agreed as a result of Mr Giannotti's email and that consequently the Tribunal lacked jurisdiction to decide that aspect of the case in accordance with paragraph 5 (4) of schedule 11 to the 2002 Act. This excludes the Tribunal's jurisdiction "in respect of a matter which "(a) has been agreed or admitted by the tenant". In support of this contention, counsel referred to *Avon Freeholds Limited and Alexander Garnier* [2016] UKUT0477 (LC).

31. The respondent did not call witnesses.

## The Lease

32. The lease dated 27 June 2014 grants a term of 999 years from 1 June 2013.

33. Clause 7.7 states:

> Section 196 of the Law of Property Act 1925 (as amended by the Recorded Delivery Service Act 1962) shall apply to any notice demand or instrument authorised to be served hereunder and any notice served by the Company and/or the Management Company shall be sufficiently served if served by any agent of the Company and/or the Management Company

## Findings

### Was the demand properly served?

34. As the Tribunal pointed out, by clause 7.6 of the lease, section 196 of the Law of Property Act 1925 shall apply to the service inter alia of demands under the lease. This provides as follows:

> 196.—Regulations respecting notices.
>
> (1)Any notice required or authorised to be served or given by this Act shall be in writing.
>
> (2)Any notice required or authorised by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.
>
> (3)Any notice required or authorised by this Act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorised to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.
>
> (4) Any notice required or authorised by this Act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned [ by the postal operator (within the meaning of [Part 3 of the Postal Services Act 2011][2]) concerned][1] undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.
>
> (5) The provisions of this section shall extend to notices required to be served by any instrument affecting property executed or coming into operation after the commencement of this Act unless a contrary intention appears.

> (6) This section does not apply to notices served in proceedings in the court.

35. In *London Borough of Southwark and Runa Akhtar and Stell LLC* [2017] UKUT 0150 (LC), the Upper Tribunal (Deputy Upper Tribunal Judge Cooke, (as she then was)) held that because section 196 permitted the service of certain documents by post, section 7 of the Interpretation Act 1978 also applied to the posting. The significance of this is that unlike section 196, which requires use of registered or recorded delivery post, section 7 of the interpretation act 1978 states:

> where an act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be affected by properly addressing, prepaying and posting a letter containing the document and, unless the contrary is proved, to have been affected at the time at which the letter would be delivered in the ordinary course of post.

36. At the hearing the Tribunal raised the issue that there was no direct evidence of service of the initial demand of 17 May 2023. Although this is referenced in a solicitors' letter, and in a statement of case, the demand of 17 May 2023 was not served by solicitors. There was no certificate of posting or any witness or other evidence as to the posting of the notices. There is no first-hand evidence that the original demand was sent to the "last-known place of abode or business in the United Kingdom of the lessee, or affixed or left for him on the land or any house or building comprised in the lease". Therefore, the Tribunal finds that there is no evidence of the proper addressing, prepaying and posting of the letter containing the demand. It therefore finds that the demand was not sent on 17 May 2023.

37. If the Tribunal is wrong about that, it finds that the presumption of receipt is rebutted because the agents expressly denied receipt of the demand. Managing Agents are used to dealing with large volumes of documents and the Tribunal sees no reason to disbelieve their emails. The Tribunal does find that the address of Chase Evans would amount to a place of business of the Applicant, being his managing agent for the subject property. The Tribunal does not accept that electronic service of a demand is compliant with section 196.

38. The Tribunal finds that clause 7.7 of the lease makes use of a method of service under section 196 mandatory. Although the evidence is that Habitare use an electronic system known as "MyBlockMan" together with email alerts to communicate with lessees, in the Tribunal's judgment its use when serving formal demands under the lease does not comply with section 196. That is hardly surprising given that

electronic written communications of this type were inconceivable when the Law of Property Act 1925 was enacted. Compliance with section 196 is mandatory in this case, because that is what the parties agreed.

39. The Tribunal does not accept that service of the demand is within the purview of the CPR, as no litigation had then commenced. Nor does the CPR apply to Tribunal proceedings.

40. For these reasons the Tribunal finds that the demand was not served on the applicant on 17 May 2023. The Tribunal finds that an effective demand was first made on 9 June 2023 as a result of the LMP letter of 8 June 2023 addressed to the subject property, which attached copy demands (although these were not included in the bundle). Payment of the principal charge was made on 14 June 2023. Therefore, that payment was made within the 14-day period provided for under the lease.

41. Consequently, the Tribunal finds that there was no breach of the lease in relation to this matter and that therefore none of the administration charges are payable.

42. However, the Tribunal rejects the applicant's case that liability to pay depended upon further information being provided or a contract entered into by the applicant. The applicant is entitled to serve interim demands at any time and these fall due for payment after 14 days.

43. Although that disposes of the substantive matter, the Tribunal makes additional factual findings below.

**Was there an agreement on behalf of the lessee to pay £499.80 as per Chase Evans email 22 July 2022 15: 01?**

44. Having regard to the email exchanges set out above the Tribunal finds that the lessee was only prepared to pay in aggregate £396.80 against the landlords' demand of £499.80 as at that date. The tenant's offer to settle clearly excluded the £150 for Habitare which had been added to the service charge account. Therefore, the Tribunal finds that no agreement was reached between the parties. Accordingly, the Tribunal retains jurisdiction.

45. Although the full amount sought was paid by the applicant some 10 weeks after the initial demand, the Tribunal accepts his submission that that was solely to avoid an escalation in administration charges. The Tribunal finds that this did not amount to an agreement that the full sum was properly payable.

## Were the administration charges reasonable in amount?

46. The Tribunal finds that the £150 agents' charge is too high and that a reasonable sum would be £60. It finds that the cost of a solicitor's letter of £200 plus VAT is reasonable plus reasonable disbursements. It notes this includes "the sending of the letter to multiple addresses the first telephone call and a written response to any queries raised" in the schedule of charges. The Tribunal considers that the activities undertaken fall within this scope and therefore rejects the additional charge of £98.80 as being unreasonable.

## Applications under s.20C and Para 5A Sch 11

47. In the application form the Applicant applied for an order under section 20C of the 1985 Act, Para 5A Sch 11 of the 2002 Act and reimbursement of fees. Having considered submissions from the parties and taking into account the determinations above, the Tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Respondent may not pass any of its costs incurred in connection with these proceedings before the Tribunal through the service charge. The Tribunal also makes an order under Paragraph 5A of Schedule 11 of the 2002 Act extinguishing the tenant's liability to pay an administration charge in respect of litigation costs in connect with this application. It also finds that the respondent should reimburse the application and hearing fees, within 28 days.

## Refund of Administration Charges Paid

48. The Tribunal has no jurisdiction to order repayment.

## Section 20ZA Application

## Background

49. By an application dated 9 June 2023 the applicant landlord applied for dispensation from consultation requirements in respect of the costs of temporary and main boiler works should be granted, and if so on what terms. [It is clear from the lease that heating and hot water are supplied by a communal system].

50. The grounds of application were that both boilers serving the building failed almost simultaneously. This was a catastrophic failure. The applicant had to arrange a temporary boiler powered by diesel.

51. Directions were issued on 14 June 2023 setting the matter down for determination on the papers, unless any party requested a hearing. The applicant landlord was directed to serve the application on leaseholders, and to display a copy in common parts. It was then directed to confirm to the Tribunal that this had been done. The respondents were invited to return a reply form if they objected. By an email of 23 August 2023, the applicant's solicitors confirmed that the application had been sent to leaseholders.

## The Applicant Landlord's Case

52. From the application, the precise nature of the dispensation sought was unclear to the Tribunal as the total value of the works claimed of £127,832.50 did not appear to correspond with quotations. The chair raised this with Counsel, who was without instructions. The Tribunal therefore directed, with the agreement of counsel, that this be addressed by written submissions. The purpose of this was to ensure that there was legal clarity in respect of what works dispensation would be granted, if the order was made. It was not for the purpose of considering the reasonableness and payability of service charges, as that is outside the scope of a section 20ZA application.

53. The Tribunal issued further directions accordingly. In a helpful written submission Ms Mangia and Mr Cullen, explained the position as follows. The application covered invoices for main works of £69,004.50 and temporary works of £57,304.26. The aggregate was therefore said to be £126,308.76. Relevant invoices from Wright Maintenance, Block Maintenance and Rapid Energy were exhibited. The applicants confirmed that the dispensation did not extend to diesel as that is out with section 20.

## The Lessee's Case

54. By a reply form dated 3 July 2023 Mr Ng made a submission which may be summarised as follows: the applicant demanded funds before the section 20ZA application had been made; the applicant did not set out a case for urgency; granting the order would encourage management companies not to conduct consultation. In addition, the respondent lessee requested a hearing.

## The Law

55. Section 20ZA is set out in the appendix to this decision. The Tribunal has discretion to grant dispensation when it considers it reasonable to do so. In addition, the Supreme Court Judgment in *Daejan Investments Limited v Benson and Others* [2013] UKSC 14 empowers the Tribunal to grant dispensation on terms or subject to conditions. In addition, Lord Neuberger stated at Para 59:

> I also consider that the LVT [the predecessor Tribunal to the FTT] would have power to impose a condition as to costs – e.g. that the landlord pays the tenants' reasonable costs incurred in connection with the landlord's application under section 20ZA(1).

56. The Tribunal finds that installation of the temporary and main boiler works was urgently required to ensure that heating and hot water could be provided to the lessees. The Tribunal finds that the applicant has acted reasonably in its approach, has obtained multiple quotes and carried out some consultation. The Tribunal does not find any general prejudice to lessees and does not accept the respondent lessee's submissions as they are incompatible with the *Daejan v Benson*.

57. Nevertheless, the Tribunal does find that the lessee was entitled to object and require a Tribunal hearing. This is particularly so as the Tribunal found that in some respects the application lacked clarity. The Tribunal therefore finds that the reasonable costs of the respondent attending the hearing should be paid by the applicant as a condition of the grant of dispensation. The Tribunal summarily assesses that sum as £250. Accordingly, the Tribunal grants dispensation subject to the condition that that sum is paid with 28 days of the date of this decision.

58. <u>This application does not concern the issue of whether any service charge costs have been reasonably incurred or are payable. The residential leaseholders continue to enjoy the protection of sections 19 and 27A of the Act.</u>

## Application under s.20C

59. The respondent lessee applied for an order under section 20C of the 1985 Act. Having considered submissions from the parties and taking into account the determinations above, the Tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Applicant landlord may not pass any of its costs incurred in connection with these section 20ZA proceedings before the Tribunal through the service charge to the respondent.

**Name:** Mr Charles Norman FRICS **Date:** 20 January 2024

## 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).