FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BC/LSC/2023/0171**
Property	**:**	**Chelsea Mews 45-47 New Wanstead London E11 2SA**
Applicants	**:**	**Ms R Gregory and Mr L Clarke (the first Applicants) and the 12 other leaseholders named in the first appendix to this decision.**
Representative	**:**	**Ms R Gregory**
Respondent	**:**	**Property Property Limited**
Representative	**:**	**Mr Granby of counsel**
Type of Application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	**:**	**Judge Prof R Percival** **Ms M Krisko FRICS** **Mr C Piarroux JP**
Date and venue of Hearing	**:**	**9 October 2023** **10 Alfred Place**
Date of Decision	**:**	**28 March 2024**

DECISION

The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant in respect of the service charge year to September 2022.

2. Y and Y Management Ltd ("Y and Y") were originally identified as the Respondent. As Mr Granby, for the Respondent, explained, although the lease was tripartite in form, the management company that had been a party to the lease was no longer operational, and the Respondent freeholder now exercised (as provided for in the lease) the functions of the management company. Y and Y Management is the Respondent's managing agents. We substituted the Respondent identified above under Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013, rule 10.

3. Relevant statutory provisions are set out in Appendix 2 to this decision. The legislation referred to may also be consulted at:
https://www.legislation.gov.uk/ukpga/1985/70/contents
https://www.legislation.gov.uk/ukpga/2002/15/contents

The properties

4. Chelsea Mews, 45 to 47 New Wanstead is a low rise development comprising three blocks, apparently built in the first decade of this century. We were provided with a useful aerial photograph of the development. It shows that two blocks front the street, New Wanstead. Between them is a gated roadway leading to the third block. Immediately in front of the two road-facing blocks, on each side, behind a car parking space is a small turfed and planted area. Between the two road-fronting blocks, before the set-back block, there is a small eight-car car park on one side of the road way, and a planted and turfed garden area with trees on the other. Behind the set-back block, there is also a small garden area with turf and planting.

The lease

5. We were provided with the lease of flat 17, the first Applicants' property. We understood that the other leases were in like form.

6. The lease is in tripartite form between the landlord, the manager and the tenant. Clause 4 imposes the obligations in the eighth schedule on the tenant, clause 5 does the same for the landlord's obligations in the ninth schedule, and clause 6 the same for the manager in the tenth schedule.

7. The definitions in clause 1 define "Maintenance Expenses" as "the moneys actually expended by or on behalf of the Manager or the

Landlord … in carrying out the obligations specified in the sixth schedule". The "Maintenance Property" means the parts described in the second schedule, "the maintenance of which is the responsibility of the Manager".

8. The second and third schedules define the Maintained Property and the demised premises respectively.

9. The Manager covenants to "carry out the works and do the acts and things set out in the Sixth Schedule" in paragraph 1 of the tenth schedule.

10. The sixth schedule details the maintenance expenses. Part A relates to estate costs. The first paragraph of part reads:

> "Keeping the Communal Areas generally in a neat and tidy condition and tending and renewing any lawns flower beds shrubs and trees forming part thereof as necessary and maintaining repairing and where necessary reinstating any boundary wall hedge or fence (if any) on or relating thereto including any benches seats garden ornaments sheds structures or the like"

11. Part B details the block costs, which do not arise in this case.

12. The Maintained Property is defined as the accessways, parking spaces and Communal Areas (defined as "all gardens and grounds forming part of the maintained property" – clause 1), refuse storage areas and gardeners management store and the common parts, structure etc of the buildings.

13. Paragraph 5 of the seventh schedule makes provision for advance payment of estimated service charges, and for subsequent additional demands to cover underpayment (and the crediting to the tenant's account or to the reserve fund of overpayment).

The issues and the hearing

14. Ms Gregory, one of the first Applicants, represented the Applicants. Mr Granby of counsel represented the Respondent.

15. In their application form, the Applicants challenged gardening costs in 2022, and the cost of "general" insurance in the same year. At the commencement of proceedings, the Applicants explained that they no longer sought to challenge the cost of insurance.

16. We heard evidence from Mr Green, who had provided a witness statement. Mr Green is the current property manager for Y and Y at the development. He reported that he was not the property manager at the

development at the time that the contested gardening work was carried out. That had been a Mr Bloom. It followed that most of the relevant decisions had been made by Mr Bloom. Mr Green inherited the situation from Mr Bloom, but it appeared during cross-examination that the extent to which Mr Green had reliable records left by Mr Bloom was limited, despite the fact that both men worked for Y and Y.

17. In his witness statement, Mr Green had said that gardening at the development was undertaken by a company called 1st Class Gardening Ltd ("1st Class"), on what he described as a rolling contract. In cross examination, it became apparent that there was no written contract, which Mr Green said was standard practice in "most properties". In his oral evidence, Mr Green gave a description of only very informal supervision of the gardeners. General garden maintenance would consist of anything from cutting grass to leaf blowing to tidying up bushes. Again, this was not specified in a document, but when a new gardener was engaged, the property manager would tell them what to do.

18. Further, Mr Green could not find any specific record of 1st Class being instructed in relation to the work which was the subject of the challenge, although he said that he would expect Mr Bloom to have provided some such instructions. He described his failure to find any such document as "strange".

19. Mr Green was referred in cross examination to an email he had sent in March 2023 to the first Applicant that stated that the work did not require a statutory consultation process under section 20 of the 1985 Act because "these works took place over approximately 18 to 24 months, the contractor was not paid in one lumps sum, but in various stage payments, across several invoices, and involving different parts of the works themselves". He agreed that subsequently he had understood that that was not correct, and that the works had been carried out over a few weeks in the summer of 2022. It was put to him that he had continued to make this claim in an email sent on 3 April 2023, although, it was said, the invoices from 1st Class showed that the work had been carried out in the summer of 2022. He said that he could not remember when he realised that that was the case. He did not remember if he had corrected the false impression that the work had been carried out over the extended time period he first asserted.

20. Ms Gregory put to him that four of the invoices exhibited all contained the same invoice number, followed by a slash and a number from one to four. He said he could not remember if he, or someone else, had asked for four separate invoices set out in this way. Although he had asserted that a number of leaseholders had pushed for the work (it was put that there was only one), he said there were a few, but he could not remember their names. In answer to questions from our professional member, Mr Green said it was correct that he could not produce any record of discussions as to the work necessary, or any surveys or reports relevant

to it. He agreed that there was no specification or breakdown of the work produced. He said that major gardening works, in contrast to, for instance, major works on a building, would not normally involve a surveyor.

21. We found Mr Green to be an unsatisfactory witness, but by the end of his evidence, it was clear enough that the work had been carried out in a short period and that it was as described on the invoices exhibited.

22. As to what the costs were, the Applicants' position as stated in their skeleton argument was that the total amounted to £17,728, which, as we understand it, is the cost of all invoices for gardening by 1st Class during the year. Because their case was that the failure to undertake a section 20 consultation process meant that the Respondent was limited to recovering £250 from each of the 18 flats, and that therefore what was in dispute was the total minus £4,500. Their skeleton argument gives the figure of £13,380 as thereby being in issue, although it appears to us that it is £13,228. The former figure, is, in fact, the sum of what we go on to conclude are the five key invoices (minus an element of routine maintenance in one) – see below.

23. In her oral submissions, however, Ms Gregory said that the Applicants did not contest routine maintenance. Rather, she said, they contested the five invoices constituting what she argued was a single set of major works.

24. It is helpful at this point to give the details of the five key invoices. They are all from 1st Class. The sums are all inclusive of VAT.

Date	**No**	**Description**	**Sum**
30.6.22	2164/1	Tree pruning (08.06.2022)	£1,140
30.6.22	2164/2	Inner garden new layout (15.06.2022)	£2,520
30.6.22	2164/3	Front garden new layout (22.06.2022)	£1,140
30.6.22	2164/4	New Turf, new plants (29.06.2022)	£5,100
31.7.22	2219	Maintenance July Back garden (trimming trees, new boards)	£362.4 £3,480

25. It will be seen that, if the "maintenance July" sum in invoice 2219 is excluded, the total of the five invoices is £3,380.

26. We add at this point that the documents, including Mr Green's witness statement and correspondence between him, Mr Bloom and various of the Applicants indicated that the reasons why the property managers argued that a section 20 process was not necessary were, first, that the work had taken place over a long period (18 months to two years), and, secondly, because payment was demanded over a number of invoices. The correspondence does not show the property managers asserting that the work was not exceptional or out of the ordinary, nor that it did not

amount to a single set of exceptional gardening work (and so, if the reasons given were wrong, it would not be subject the section 20 process).

Was work done in the garden "qualifying works"?

27. For the Respondent, Mr Grandby submitted that the work covered by the invoices was not a set of "qualifying works". He made two allied submissions.

28. The first, to quote Mr Granby's skeleton argument, is that "the gardening undertaken, although relatively substantial as gardening goes – was just that, gardening – it may have been work, but it was not *works*."

29. "Qualifying works" for the purposes of section 20 is defined in section 20ZA(2) as "works on a building or any other premises". Mr Granby did not argue that it was impossible for "qualifying works" to be done in a garden, as "other premises", but relied on *Paddington Walk Management Ltd v Peabody Trust* [2010] L & TR 6 for the distinction between "work" and "works".

30. In that case, HHJ Marshall KC (exercising a co-ordinate jurisdiction to ours in the County Court) was dealing with a submission that window cleaning on a large development amounted to "qualifying works". It was a comparatively minor issue in the case. The judge said this in conclusion:

> "It is again a short point and a matter of impression. I prefer [counsel for the landlord's] argument. Window cleaning may be "work" and even "work on a building" but it is not, in my judgment, "works on a building". Works on a building comprise matters that one would naturally regard as being "building works" and it does not seem to me that window cleaning naturally falls within that concept."

31. Mr Granby quoted this passage in his skeleton argument.

32. Mr Granby also argued that each of the five principal invoices (see above at paragraph #) related to "different aspects", as expressed in the description of the work contained therein. He argued that tree pruning and the laying of turf were distinct from re-modelling ("new layout" for front and inner gardens), and the work on each individual garden could be distinguished one from another. The result, he said, was that only one invoice triggered the section 20 threshold of, in this development, £4,500. That was the invoice for new turf and new plants, for £5,100.

33. Our understanding is that the second argument is in one sense implied by the first (if the first is correct, then the individual invoices are "just gardening" invoices, separable one from another). But it should also be considered as an independent and alternative argument. If the first

argument is wrong, and what was done in the garden is capable of being "works" for the purposes of the definition of qualifying works, then the five invoices are for separate bundles of work, and should not be seen as constituting a single set of major works. In that event, there was a failure to consult, but only in respect of the new turf and new plants invoice.

34. We reject the Respondents arguments. We address them in reverse order, as a clearer way of setting out our thinking.

35. The work identified and charged in the five invoices is a single set of exceptional work. We have had regard to the discussion of what comprises a single set of works in *Woodfall Landlord and Tenant*, paragraph 7.199.3 in coming to this conclusion.

36. First, the work is clearly not routine maintenance (and we did not understand Mr Granby to argue that it was). Routine maintenance was invoiced on a monthly basis, and the last of the five invoices includes a sum for routine maintenance in July, at £362.40, which we have taken off the sum constituting the exceptional work (as, it appears, have the Applicants).

37. Secondly, the work took place in a short and contiguous time period. The four 2164 invoices record work that took place on four consecutive Wednesdays in June 2022. The fifth does not specify the date of the work, but the invoice itself is dated on the last day of July.

38. Thirdly, the gardens were in close physical proximity.

39. Fourthly, all the work was undertaken by the same contractor.

40. fifthly, it was always understood as a single set of work by the Respondent's property managers (see above). Not only is this evident from the contemporaneous correspondence, but also from the tenor of Mr Green's oral evidence. That a number (or a few) leaseholders were pushing for the work to be done (as he said in evidence) implies that it was considered (by him and by them) to be a single set of work. His comments about the lack of a record of specification for the work (as "strange"), and his answer contrasting the role of a surveyor in gardening works as opposed to major works to a building, also show that that is what he understood to be the nature of the works. As to the separate numbers of the 2164 invoices, he said he could not remember who it was who asked for them to be so presented, an answer which presupposes that submission of separate invoices was initiated by the Respondent, not 1st Class. If Mr Granby is right that each invoice just represented a separable bit of more expensive gardening, it would be surprising that all parties involved at the time appeared to consider it a single set of works.

41. Finally, it appears to us that the works obviously were, and were commissioned as, a set of works to smarten-up what had become tired and ill-maintained outside spaces. In his witness statement, Mr Green said that, in the summer of 2022, "gardeners provided additional services within the garden area for various gardening works to revitalise the external areas, which included tree pruning, relaying of new turf, planting of new flower beds and removal of old bushes and hedges".

42. Mr Green exhibited to his witness statement a document which showed "before" and "after" photographs, and gave explanations as to the costs. The text appears to be an email, although it looks as if it has been cut and pasted into a word processing format, and there is no header or signature. The internal evidence indicates that it was an email written by someone at 1st Class. The email gives the time frame for the work as from early June to mid July, which is consistent with the work representing all five invoices, all of which also appear as screen shots in the document.

43. We conclude that the work encapsulated by the five invoices (minus the July maintenance cost) was a single set of work outside and in addition to routine maintenance, carried out to implement a plan of revitalisation, to adopt Mr Green's term. It makes no more sense to isolate out, say, tree pruning or planting than it would to isolate re-wiring the hall or painting the front door in the context of a project to improve and re-decorate the communal areas of a block of flats.

44. We turn to whether the major work conducted in the gardens amounts to "works", the word used in the definition of qualifying works, or whether they were merely "work". Mr Granby relies on the parallel with window cleaning, and the finding in *Paddington Walk*.

45. In coming to the conclusion she did, HHJ Marshall briefly rehearsed the arguments of counsel, and preferred those of the landlord. Counsel's submissions were that window cleaning was not "works on a building" or "building works", but rather fell more naturally into the category of "services".

46. We do not think that the learned judge (nor, presumably, counsel) meant "services" in the senses of things done by the provision of labour, ie people providing "a service", as opposed to supplying goods. That would not make sense, since in general a large proportion of the cost of all "building works" as everyone understands that term is composed of labour costs. Rather, we think the reference is to a requirement in a lease for a freeholder to provide services to tenants. In context, we think the point was that window cleaning is more in the nature of a regular service than it is in the nature of works on a building.

47. HHJ Marhsall's key point was that it was a matter of impression, and it is an impression we share in relation to window cleaning. We would similarly see regular cleaning of the communal areas as a routine service,

rather than as "works". Both functions are regularly and routinely performed, and are of the nature of continuous, short term upkeep, rather than even repair, let alone re-fashioning or major re-decoration exercises. In the gardening context, grass cutting or leaf blowing, depending on the season, constitute similar routine, continuous upkeeping services.

48. There is a clear contrast between this and the one-off, garden revitalisation project undertaken in June and July 2022 at this development. It was much more like an extensive, one off re-decoration and re-furbishing exercise on a building that had been allowed to decay to a low decorative state. Such an exercise on a building routinely attracts a section 20 consultation process if the threshold is met. We conclude that the same applies here.

49. It follows that we conclude that a section 20 consultation exercise should have been conducted in relation to the garden works. The question thus becomes what are the consequences of this conclusion.

Dispensation

50. Mr Granby's alternative submission was that, if we did find that there should have been a section 20 consultation exercise, we should order retrospective dispensation under section 20ZA of the Act.

51. In *Daejan Investments Ltd v Benson* [2013] UKSC 14; [2013] 1 WLR 854, the Supreme Court laid down the proper approach to dispensation in a case where the landlord had failed to undertake a section 20 consultation process. The object of section 20 consultation was a practical one, "to ensure that tenants were not required to pay more than they should for those services that were necessary and provided to an acceptable standard or to pay at all for unnecessary or defective services" (*Aster Communities v Chapman and others* [2020] UKUT 177 (LC), [12]). Consultation was not a good in itself. On an application for dispensation, the question for the FTT would therefore normally only be the question of whether the tenants had been prejudiced by the failure to consult, in the practical, usually financial, sense implied by the objects of the consultation process, as determined by the Supreme Court.

52. While the legal burden to satisfy the Tribunal that it should dispense with the consultation requirements remained on the landlord, there was a practical burden on the tenants to identify "some relevant prejudice that they would or might have suffered". Once there was a "credible case of prejudice" it was for the landlord to rebut it (*Daejan*, [67], [68]).

53. Further, the Tribunal has the power to grant dispensation on terms, and should do so, where the terms were such as to remedy the prejudice that the Tribunal found made out, rather than decline to dispense.

54. As to the approach of the Tribunal to a case for prejudice, the Supreme Court said this (at [67]):

> "… given that the landlord will have failed to comply with the requirements, the landlord can scarcely complain if the LVT views the tenants' arguments sympathetically, for instance by resolving in their favour any doubts as to whether the works would have cost less (or, for instance, that some of the works would not have been carried out or would have been carried out in a different way), if the tenants had been given a proper opportunity to make their points. As Lord Sumption JSC said during the argument, if the tenants show that, because of the landlord's non-compliance with the requirements, they were unable to make a reasonable point which, if adopted, would have been likely to have reduced the costs of the works or to have resulted in some other advantage, the LVT would be likely to proceed on the assumption that the point would have been accepted by the landlord. Further, the more egregious the landlord's failure, the more readily an LVT would be likely to accept that the tenants had suffered prejudice."

55. The Applicants' case in respect of dispensation was that, had they been given the opportunity to express their views, they would have argued that the revitalisation programme should not have taken place at all. Their argument depended on what they argued was the unreasonable nature of the decision to proceed in the light of the grant of planning permission (in May 2022) for the Respondent to add another floor on top of the existing development.

56. Planning permission was granted before the revitalisation works took place. The Applicants said that the Respondent had indicated that the middle gardens would be used to store building materials and to locate the site office and lavatories etc.. Further, the scaffolding that would be erected would damage or destroy new flower beds. More generally, the external areas would become "a building site", with the inevitable disruption and damage that that implied. The Applicants understood the commencement of the building works to be imminent, or at any rate, planned for the immediate future. Thus, money spent on the revitalisation works in advance of the building works would be wasted, as a result of the inevitable damage and disruption to the gardens that the building work would cause.

57. The Respondent did not contest the facts underlying this submission – that the Applicants had been told that the building work would start soon, and that the garden would be used as described.

58. We conclude that this submission is sufficient to discharge the burden on the Applicants to identify a relevant prejudice that they would or might have suffered. They would have made this point if there had been a consultation exercise, and if they had done so, they argue, the only

reasonable course that the Respondent could have taken would be to postpone the revitalisation work until after the building work was completed.

59. Mr Granby's answer to this is that the witness statements of the Applicants show a mistaken view of the nature of a section 20 consultation. The wording used – terms such as "I would not have agreed" – suggested that the Applicants believed that they had a veto over the works taking place as a result of consultation. That is not the case. Even if they had given their views, Mr Granby said, the Respondent would still have gone ahead with the revitalisation works, so there was no prejudice demonstrated.

60. While correct in his criticism of what appeared (to us as well as Mr Granby) to be the Applicants' misconception, we do not consider that Mr Granby's answer is sufficient to rebut the Applicant's case.

61. The quality of the decision to press on with the revitalisation in the face of the planning permission and its associated use of the gardens is clearly relevant. We do not think such a decision could possibly have been reasonable. It would have been apparent to anyone with any experience of building projects that a project of this size and complexity, in respect of which it had been decided to use parts of the gardens and/or it would inevitably impact other parts of the gardens, would obviously physically compromise whatever revitalisation works were undertaken.

62. It is true that the planning permission was granted comparatively shortly before the revitalisation work took place. However, the property managers knew, or should have known, that the application for planning permission had been made, and should have factored that into their planning for the revitalisation work.

63. If Y and Y were had not taken account of the planning permission, then it is all the more clear that the Applicants were compromised by the loss of the opportunity to be consulted. It was the uncontested evidence of the Applicants that they would have raised the issue. It is immaterial whether the Applicants mistakenly thought they had a veto over the work or not – they would have brought it up, and if the Respondent had not taken the point and desisted from engaging on the garden works at that point, then it would have been acting unreasonably.

64. We do not think it a legitimate counter-argument to say that, however unreasonable the decision to undertake the work would have been, the Respondent would have taken it anyway, so there was no prejudice.

65. The Applicants may not have been entitled to a veto, but they were entitled to have their representations considered. In *Waaler v Hounslow* [2017] EWCA Civ 45, [2017] 1 W.L.R. 2817, at [38], Lewison LJ

considered the duty of a landlord to "have regard to" a tenant's observations on proposed work (Service Charges (Consultation Requirements)(England) Regulations 2003, in our case at schedule 4, part 2, regulation 3):

> "What this means is that the landlord must conscientiously consider the lessees' observations and give them due weight, depending on the nature and cogency of the observations. In the light of this statutory obligation to consult, it is impossible to say that the tenants' views are ever immaterial. They will have to be considered in every case. This does not of course mean that the lessees have any kind of veto over what the landlord does; nor that they are entitled to insist upon the cheapest possible means of fulfilling the landlord's objective. But a duty to consult and to 'have regard' to the lessees' observations entails more than simply telling them what is going to happen."

66. We do not think a landlord can be said to "conscientiously consider" responses to the initial consultation on the scope of the works, and give them "due weight" if it obdurately goes on to make an evidently unreasonable decision in the face of the representations.

67. Accordingly, our conclusion is that the Applicants were prejudiced by the failure to consult. Had the consultation taken place, then the revitalisation work would not have been proceeded with at that time.

68. In some circumstances, we should consider whether the work would anyway have been done at some other time, such as to obviate the prejudice suffered by the Applicants. That is not the situation here. The work, or at any rate, substantially similar work, will have to be undertaken after the building work is completed, and that will have to be paid for by the Applicants. In this situation, the prejudice lies in the likelihood that this further work will be required in the future, as a consequence of the Respondent's unreasonable decision to go ahead in the summer of 2022.

69. Had the Respondent properly consulted, and had the Respondent come to a reasonable decision once the point about the building works had been put, the works would not have been carried out. In this situation, the prejudice suffered by the Applicants can be quantified as the whole total of the costs of the revitalisation works. In the slightly artificial light of a dispensation application, the result is that we should allow the Respondent's application for dispensation, subject to the condition that the Applicants service charge accounts be credited with the sum of £13,380.

70. *Decision*: The Tribunal allows the Respondent's application for dispensation from the consultation requirements under section 20 of the 1985 Act and the regulations made thereunder, on condition that the

Applicants each be credited with the appropriate proportion of £13,380 charged to the service charge in 2022 for the work described in this decision.

Sections 27A and 19 of the 1985 Act

71. A more direct way to come to the same conclusion is for us to record our conclusion that the decision to go ahead with the revitalisation works was unreasonable in the terms of section 19, in the exercise of our jurisdiction under section 27A.

72. During his submissions, we put to Mr Granby that this was an alternative we may wish to consider. He objected that the Applicants case had not be argued in that way, and that it would be procedurally unfair for us to decide the question on that basis. We suggested that any procedural unfairness could be overcome by us allowing written submissions, to which his response was that the Respondent would not wish to make any further submissions.

73. On reflection, we are not persuaded that a decision under section 27A is not available to us. It is quite true, as Mr Granby says, that the argument had been put orally before us by the Applicants only in terms of the section 20 point. However, we were dealing with a lessees' application under section 27A, not, at the outset, on a landlord's application under section 20ZA. And, in their application form, while the Applicants had first made the argument on section 20 grounds, they also wrote in the box describing the question for the Tribunal, "in the alternative, whether the charge for gardening was reasonably incurred …". Further, in his answer to our question about written submissions, Mr Granby made it clear that he did not consider that the Respondent needed to add anything to what he had said before.

74. In truth, the key to our assessment of prejudice above was our assessment of the unreasonable nature of the Respondent's decision to go ahead with the works before the building works were completed. That assessment is, of course, exactly the same as an assessment of unreasonableness under section 27A. A decision in exercise of the section 27A jurisdiction is no more than a direct reflection of the decision we have already come to in relation to dispensation.

75. We have therefore concluded that we can and should make a determination in exercise of our jurisdiction under section 27A that the decision was unreasonable and that the service charge of the same sum was not reasonably incurred. We come to this conclusion as an equal and independent basis for our determination.

76. *Decision*: the sum of £13,380 charged for the work described in this decision and charged in the service charge for 2022 was not reasonably incurred.

Issue 5: Application for orders under Section 20C of the 1985 Act/Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A

77. The Applicants applied for orders under section 20C of the 1985 Act that the costs of these proceedings may not be considered relevant costs for the purposes of determining a service charge; and an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 extinguishing any liability to pay an administration charge in respect of litigation cost in relation to the proceedings.

78. We consider these applications on the basis that the leases does provide for such costs to be passed on either in the service charge or as administration charges, without deciding whether that was the case or not. Whether the lease does, in fact, make such provision is, accordingly, an open question should the matter be litigated in the future.

79. An application under section 20C is to be determined on the basis of what is just and equitable in all the circumstances (*Tenants of Langford Court v Doren Ltd* (LRX/37/2000). The approach must be the same under paragraph 5A, which was enacted to ensure that a parallel jurisdiction existed in relation to administration charges to that conferred by section 20C.

80. Such orders are an interference with the landlord's contractual rights, and must never be made as a matter of course.

81. We should take into account the effect of the order on others affected, including the landlord: *Re SCMLLA (Freehold) Ltd* [2014] UKUT 58 (LC); *Conway v Jam Factory Freehold Ltd* [2013] UKUT 592 (LC); [2014] 1 EGLR 111. Unlike the situation in respect of, for instance, a leaseholder owned freehold company, there is no suggestion that making the orders would have a substantial effect on the Respondent, a reasonably large freehold company.

82. The success or failure of a party to the proceedings is not determinative. Comparative success is, however, a significant matter in weighing up what is just and equitable in the circumstances.

83. In this case, the Applicants have been wholly successful before us, and we conclude that it would be just and equitable to make both orders.

84. There was no application to reimburse the application and hearing fees.

85. *Decision*: The Tribunal orders

(1) under section 20C of the 1985 Act that the costs incurred by the Respondent in proceedings before the Tribunal are not to be taken into

account in determining the amount of any service charge payable by the Applicant; and

(2) under Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A that any liability of the Applicant to pay litigation costs as defined in that paragraph be extinguished.

Rights of appeal

86. 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 London regional office.

87. The application for permission to appeal must arrive at the office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

88. If the application is not made within the 28 day time limit, the 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 these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

89. The application for permission to appeal must identify the decision of the Tribunal to which it relates, 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.

Name: Tribunal Judge Professor Richard Percival **Date:** 28 March 2024

Appendix 1: The Applicants

Applicant number	Name	Property number
1	Rachael Gregory and Laurence Clarke	17
2	Emma Johnson	1
3	Zoe Haswell	3
4	Darren Hopkins	4
5	Sophia Mehnaz	6
6	Meepoh Hugett	7
7	Christalla Christodoulidou	8
8	Dina and Vinay Sonagara	9
9	Trishen Naidoo	12
10	Rina Gulrajani	13
11	Sandy Duker	14 and 18
12	Zainab Darwish	15
13	Katherine Dillon	16

Appendix 2: Relevant Legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent—

(a) which is payable, directly or indirectly, for services, repairs, maintenance , improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose—

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under subsection (1) or (3).

(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—

(a) complied with in relation to the works or agreement, or

(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal.

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or

(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—

(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in

determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.

Section 20ZA

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

(2) In section 20 and this section—

"qualifying works" means works on a building or any other premises, and

"qualifying long term agreement" means (subject to subsection (3)) an agreement entered into, by or on behalf of the landlord or a superior landlord, for a term of more than twelve months.

(3) The Secretary of State may by regulations provide that an agreement is not a qualifying long term agreement—

(a) if it is an agreement of a description prescribed by the regulations, or

(b) in any circumstances so prescribed.

(4) In section 20 and this section "the consultation requirements" means requirements prescribed by regulations made by the Secretary of State.

(5) Regulations under subsection (4) may in particular include provision requiring the landlord—

(a) to provide details of proposed works or agreements to tenants or the recognised tenants' association representing them,

(b) to obtain estimates for proposed works or agreements,

(c) to invite tenants or the recognised tenants' association to propose the names of persons from whom the landlord should try to obtain other estimates,

(d) to have regard to observations made by tenants or the recognised tenants' association in relation to proposed works or agreements and estimates, and

(e) to give reasons in prescribed circumstances for carrying out works or entering into agreements.

(6) Regulations under section 20 or this section—

(a) may make provision generally or only in relation to specific cases, and

(b) may make different provision for different purposes.

(7) Regulations under section 20 or this section shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court , residential property tribunal2 or leasehold valuation tribunal or the First-tier Tribunal3 , or the Upper Tribunal4 , or in connection with arbitration 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 tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to the county court ;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;

(c) in the case of proceedings before the Upper Tribunal4 , to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to the county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on [the appropriate tribunal]1 in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).