IN THE FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) AND

IN THE COUNTY COURT SITTING AT 10 ALFRED PLACE, LONDON WC1E 7LR

Case references	**:**	**(A) LON/00BK/LLE/2021/0005** **(B) LON/00BK/LSC/2020/0152** **(C) LON/00BK/LLE/2021/0004** **(D) LON/00BK/LDC/2023/0173**
County Court Claim Number	**:**	**(B) GO1YJ292**
Properties	**:**	**(A) The residential leasehold properties in Fitzroy Place, London W1** **(B) & (C) Apt 705, 5 Pearson Square, Fitzroy Place, W1T 3BQ**
Applicants	**:**	**Fitzroy Place Residential Limited (1), Fitzroy Place Management Co Ltd (2) 2-10 Mortimer Street GP Limited and Mortimer Street Nominee 1 Limited (3)**
Representative	**:**	**Bryan Cave Leighton Paisner LLP**
Respondents	**:**	**(A) Mr Angus Lovitt & 234 other long residential leaseholders in Fitzroy Place** **(B) & (C) Nueva IQT SL (a company incorporated in Spain)**
Interested person	**:**	**Fitzroy Place Residents' Association**
Type of application	**:**	**Section 20C of the Landlord and Tenant Act 1985 and assessment of costs awarded as a condition of granting dispensation under section 20ZA of the 1985 Act**
Tribunal	**:**	**Judge Sheftel** **Mr Stephen Mason FRICS** **Mr John Francis**
Date of Decision	**:**	**5 February 2025**

DECISION

Summary of Decision

(1) The tribunal makes a partial order under section 20C of the Landlord and Tenant Act 1985:

(a) In respect of Trial 1, the tribunal determines that 50% of the Applicants' costs are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable; and

(b) In respect of Trial 2 the tribunal declines to make an order under section 20C.

(2) The tribunal assesses the Respondents' costs (as a condition of granting dispensation under section 20ZA of the Landlord and Tenant Act 1985 as follows (the sums below being exclusive of VAT):

a. Octavia: £23,841

b. Mortimer court Respondents: £14,992

c. Residents' Association: £5,939.50

Introduction

1. The background to these long-running proceedings is set out in the tribunal's substantive decisions of 9 March 2023 and 3 September 2024.

2. Following the tribunal's Decision dated 3 September 2024, two outstanding matters remained:

    (1) Assessment of the Respondents' costs ordered as a condition of granting dispensation to the Applicants under section 20ZA of the Landlord and Tenant Act 1985 (the "1985 Act"); and

(2) The determination of the application under section 20C of the 1985 Act, in respect of both Trial 1 (culminating in the tribunal's decision of 9 March 2023) Trial 2 (culminating in the decision of 3 September 2024).

3. These matters have been determined on the basis of the parties' written submissions as further set out below.

Assessment of Respondents' costs in relation to dispensation

4. In our decision on 3 September 2024, it was determined that the dispensation under section 20ZA of the 1985 Act be granted to the Applicants on terms that:

   a) the Applicants are not permitted to recover their costs of the application for dispensation; and

   b) the Applicants pay the Respondents' reasonable costs in connection with investigating and challenging the dispensation application.

5. Following the issuing of the tribunal's decision, we received costs submissions from Octavia, the Residents' Association and the Mortimer Court Respondents (as defined in the Decision of 3 September 2024). Directions were subsequently given on 1 November 2024 for the filing of any further submissions in relation to the assessment of costs, including provisions for the Applicants' response and for a reply, as there had been no previous specific directions in this regard. By letter from the tribunal to the parties dated 8 November 2024, the directions were varied so that the dates for the Applicants' response and Respondents' replies, should be on the same dates as for equivalent submissions in relation to section 20C.

6. As noted above, the tribunal has received submissions in relation to costs from Octavia, the Residents' Association and the Mortimer Court Respondents. The Applicants filed submissions in response dated 5 November 2024 and 6 December 2024. The Residents' Association and

Mortimer Court Respondents also each provided a reply dated 13 December 2024.

7. The tribunal also directed that the parties should indicate by 13 December 2024 whether they requested a hearing or for the matter to be determined on the papers. The Applicants and Octavia did not request a hearing but indicated that if the tribunal felt that a hearing was required, it would be done by way of a short video hearing (although Octavia considered the Applicants' time estimate of 1 hour to be unrealistically short, suggesting that if a hearing were to take place, 2 hours would be more appropriate). Mr Willis and Mr Puvanesan submitted that they were content for the matter to be determined on the papers. No representations were received from Nueva in response to this question.

8. In the circumstances, the tribunal considers it appropriate for the costs to be assessed on the basis of the parties' written representations. This was communicated to the parties by letter dated 20 December 2024.

9. The tribunal's determination is as follows:

Octavia

10. Octavia submitted a costs schedule with supporting submissions on 8 October 2024. Octavia were represented by Capsticks Solicitors and counsel, Mr John Beresford. The total sum claimed was £42,324.22 (£35,270.18 plus VAT). The total solicitors' costs were £6,841 plus VAT and counsel's fees (for advice and attendance at the hearing and earlier case management hearing and pre-trial review) totalling £28,429.18. The solicitors' costs ranged from a Grade A fee earner at £130 per hour to a Grade D fee earner at £75 per hour.

11. As set out in the explanatory notes, some of the costs are said to be 100% attributable to the dispensation application, whereas others have been apportioned at a rate of 50% in recognition of the fact that part of these costs related to the s.27A application more generally. It was submitted that 50% was a conservative apportionment given that the evidence and submissions were 'tilted more towards dispensation than reasonableness.'

12. In response, the Applicants accepted the apportionment and also the hourly rates. The one point of difference was that it was submitted that if

the costs charged by counsel are only 50% of the total cost of counsel, those costs are high for the level of involvement Octavia had in the proceedings. If they are in fact the total cost, the appropriate 50% reduction should be applied.

13. We allow Octavia's solicitors' costs in full and accept their submissions in support. We do, however, reduce counsel's fees. This is not in any way to criticise counsel and of course does not impact on whatever has been agreed to be paid between client and legal representative. However, we are concerned to determine what sum should be paid by the Applicants and in this regard we consider the sum claimed high having regard to the more limited role played by Octavia as compared to some other Respondents and when comparing counsel's fees claimed on behalf of the Mortimer Court Respondents totalling £12,500 as referred to below. In the circumstances, we allow a total of £15,000 plus VAT in respect of the hearing, advice and previous CMH and PTR.

14. **We therefore determine the costs payable to Octavia to be £21,841 plus VAT**. We consider this sum to be proportionate in the circumstances.

Mortimer Court Respondents

15. The Mortimer Court Respondents initially filed two costs statements: one in relation to dispensation and one in relation to reasonableness. As the Applicants note, there is no basis for awarding costs in relation to reasonableness. No order for such costs has been made, nor has a Rule 13 application.

16. It should be noted that the Mortimer Court Respondents' reply dated 13 December 2024 asserts that the threshold for Rule 13 costs has been met, although at paragraph 12.1 of that submission, it is stated that

> "*For the avoidance of doubt the MCR are not making a Rule 13 application at this juncture but reserve their right to do so depending on the nature of the Applicants section 20 application*".

In the circumstances, the tribunal makes no further comment and addresses only the costs claimed relating to dispensation.

17. The sum claimed by the Mortimer Court Respondents in respect of dispensation costs totalled £49,192.50. The costs schedule was prepared by Knapp Richardson Costs Lawyers, who also provided an explanatory note. The costs comprise principally Mr Puvansean's time (claimed at £500 per hour), together with leading counsel's fees for the hearing, costs of Mr Maunder Taylor in relation to an 'expert note for cross examination' and the time spent by the costs lawyers.

18. According to the submission, the dispensation issues took 70% of the preparation and tribunal time compared to 30% for the issues relating to reasonableness.

19. The Applicants oppose the costs on various grounds. The principal objection related to the entitlement to claim for Mr Puvanesan's time. It was said that the costs schedule has been prepared on the basis that 'Mortimer Court Chambers' was the representative. However, Mortimer Court Chambers is not a firm. It is a chambers from which Mr Puvanesan, who is a barrister, operates as a sole practitioner. It is said that he is the only member of the chambers and that Mortimer Court Chambers is registered with neither the BSB nor the SRA. Further, it was submitted that insofar as the costs relate to Mr Puvanesan's time, it is trite that barristers are not permitted to appear as a barrister in their own case; they act as litigants in person as any person who is involved in proceedings may. It was also pointed out that Mr Puvanesan signed off his 2nd May 2023 cost submissions 'Kay Puvanesan (Respondent acting in person)', which demonstrates his awareness of this fact.

20. In the alternative, it is said that if the FTT is to allow any of Mr Puvanesan's personal time costs, these should be limited to £19 per hour, this being the litigant in person rate set by the CPR. The Applicants also referred to the fact that under the CPR litigant in person costs should be limited to two thirds of the amount which would have been allowed if the litigant in person had been legally represented (CPR r.46.5). Applying the rate of £19 per hour without any other adjustment would reduce the costs claimed to £1,812.32. However, as to the principle, given that the tribunal's decision was that the Applicants should pay the reasonable costs of the Respondents of "investigating and challenging the

dispensation application", it was submitted that this should not include payment to the Respondents for their own time costs. The Applicants also take issue with various of the individual line items of the costs schedule as well as the apportionment of time.

21. The Applicants' analysis is strongly contested by Mr Puvansean on behalf of the Mortimer Court Respondents. In the reply of 13 December 2024, Mr Puvanesan asserts that he was entitled to and did act in a professional category. Attached to that reply is an email dated 11th November 2024 from a Barrister Records Assistant at The Bar Council confirming that Mortimer Court Chambers is the Chambers that he is practising from. A copy of his Practising Certificate for the year April 2024 to 30 April 2025 is also attached. This includes the right to conduct litigation, a reserved legal activity under the Legal Services Act 2007. In addition, Mr Puvanesan attaches Notices of Acting by Mortimer Court Chambers, both dated 23 April 2024 which were filed with the FTT (one in respect of Mr & Ms Mabretti and Mr Blom and the other in respect of Mr Puvanesan himself). Prior to this, Mortimer Court Chambers had provided a previous Notice of Acting for Mr Puvanesan dated 28 February 2022, although on 21 November 2022, Mr Puvanesan gave notice that he was no longer represented by Mortimer Court Chambers and that he would be acting in person. The implication of this argument appears to be that even if Mr Puvanesan could not act as a barrister in his own case, he was representing Mr & Mrs Mambretti and Mr Blom, albeit nothing has been provided to confirm that these other lessees are liable for all or a proportion of the costs claimed.

22. While the submission is forcefully argued, the position is not as straightforward as Mr Puvanesan contends. The Notice of Acting is filed on behalf of 'Mortimer Court Chambers'. However, it is not Mortimer Court Chambers that is licensed to conduct litigation. Rather, it is Mr Puvanesan himself, according to the Practicing Certificate provided. Therefore, there is an issue with regard to the Notices of Acting. To the extent that 'Mortimer Court Chambers' represented Mr & Mrs Mambretti and Mr Blom (and Mr Puvanesan himself), they were entitled to do so as the FTTs rules do not limit who can be a party's representative by

reference to rights to conduct litigation (Rule 14 of the 2013 Rules). However, on the basis of the materials provided, Mortimer Court Chambers is not of itself a barrister or licensed to conduct litigation – only Mr Puvanesan himself in his own name. However, he was not Mr & Mrs Mambretti and Mr Blom's named representative.

23. We therefore agree with the Applicants in relation to the points above and for the reasons they assert, accept that the Mortimer Court Respondents' costs should be assessed on the basis of a litigant in person. Although the Civil Procedure Rules do not apply to the tribunal, in the absence on any directly applicable rules, we consider that the CPR provisions provide a useful guide and are content to adopt the rate of £19 per hour. Even if we were wrong, we would consider the hourly rates claimed have been significantly excessive. Proceeding on this basis, we agree that the Mortimer Court Respondents can recover some of the notional costs claimed – as we accept that as a matter of fact, Mr Puvanesan has done a considerable amount of work in relation to this case.

24. As noted above, the costs schedule provided adopts a 70:30 split in terms of the dispensation issues and reasonableness issues. Notwithstanding Mr Puvanesan's submissions in support of this, we consider that a 50;50 split is more appropriate having regard to the way in which the issues were presented before the tribunal at Trial 2. Even this is arguably generous to the Respondents: much of the argument relating to prejudice for the purposes of section 20ZA was in fact argument concerned with reasonableness as set out in more detail in our substantive Decision. Nevertheless, we are prepared to allow a 50;50 apportionment for the purposes of assessing the Respondents' costs (as we did for Octavia), save that from the schedule of work done on documents we allow 100% for the witness statement in relation to dispensation as Mr Puvanesan claims.

25. With regard to Mr Puvanesan's time and applying a broad-brush approach, the costs schedule provides for 123.5 hours (claimed at 70%). Leaving aside the 11 hours on the witness statement referred to above, this would leave 112.5. Applying a 50% apportionment would give 57 hours, giving 68 hours when adding back in the time relating to the witness statement. We allow this sum notwithstanding the Applicants'

challenge to individual line items and accept the claims as to time spent. This gives a total of £1,292.

26. As regards the other items, we allow counsel's fee, in the sum of £12,500 plus VAT (applying the 50% apportionment as set out above). We do not allow the expert cost of preparing a note to assist with cross examination. We are not satisfied that this was required when leading counsel has been retained and in light of the considerable involvement of Mr Puvanesan. We do, however, allow the costs of the costs lawyers in preparing the schedule.

27. Adding up the above components gives a total of £14,992 plus VAT where applicable.

28. It should be noted that a further costs schedule on behalf of the Mortimer Court Respondents was provided to accompany the Reply dated 13 December 2024. This was for the sum of £16,375 and was said to relate to the period dated 5 November 2024-13 December 2024 – ostensibly dealing with the costs issues. We do not allow these costs. It is doubtful whether they fall within the terms of our original order relating to the dispensation application (i.e. that the Applicants' pay the Respondents' reasonable costs in connection with investigating and challenging the dispensation application). In any event, in light of our conclusions regarding the treatment of the Mortimer Court Respondents' costs in relation to Mr Puvanesan's time as set out above, we do not consider that these further costs are recoverable.

29. **Therefore, we determine the costs to be paid to the Mortimer Court Respondents in the sum of £14,992 (plus VAT where applicable)**.

Residents' Association

30. Mr Willis produced several written submissions in relation to the issue of costs.

31. As a starting point, the Residents' Association claim the costs of their expert, Mr Maunder Taylor, in the sum of £3,564.50 (being half of his total costs of £7,129 on the basis that 50% should be attributed to dispensation).

32. In addition, it is asserted that he (and other committee members) have spent considerable time on this case. Rather than trying to itemise those costs, he proposed a practical solution: namely offsetting his and his fellow Committee member's reasonable time costs against the RA's proportion of any costs on the more minor items where the FTT did not make an award in the RAs favour, principally staff costs. However, while this suggestion might have the attractiveness of simplicity, is it not an order that the tribunal can make or is prepared to. Such a set off would not be appropriate given the terms of our costs order – the two issues are distinct. Moreover, as set out below, we do not accept the Residents' Association's submissions as to the quantum of costs sought.

33. In the Residents' Association's subsequent submission of 15 November 2024, Mr Willis sought to provide a breakdown of the time spent by himself and other (unnamed) committee members of the Residents' Association. This comprises a total sum of £94,575. It is calculated on the basis of 675 hours of work, with other committee members and Residents' Association members at £19 per hour for 300 hours. Mr Willis's time of 375 hours is calculated at a rate of £1,800 per day, which it is said is his lowest professional charge out rate. It should be noted that the total time of 675 hours vastly exceeds those of Octavia and the Mortimer Court Respondents.

34. Finally, it should be noted that the Residents' Association also seek the costs of their counsel from the Upper Tribunal proceedings. However, as these are not within the jurisdiction of the FTT, this is not something that we can order.

35. In response, the Applicants submitted that the Residents' Association, have not quantified any reasonable costs incurred in connection with the dispensation applications beyond their expert costs.

36. In terms of the cost of the expert (Mr Maunder Taylor), the Applicants accepted that as a matter of principle, it was not unreasonable to have instructed an expert in these proceedings – and particularly reasonable to jointly instruct an expert with Octavia to save costs (albeit it appears that Octavia have not claimed any costs in relation to expert fees). Nevertheless, it was submitted that the costs of Mr Maunder Taylor

should not be recoverable on the grounds: (i) Mr Maunder Taylor was of little assistance to the tribunal and (ii) that his report was not independent on the basis that it had been drafted in conjunction with Mr Willis.

37. We do not accept the Applicants' submission to the extent that no sum should be recovered. Although Mr Maunder Taylor accepted that he adopted Mr Willis's figures, this does not mean that his report was not an independent expert report. Further, even if the evidence was ultimately of limited assistance to the tribunal, as the Applicants accept, it was reasonable to instruct an expert. In the circumstances, we allow £3,564.50 in respect of expert fees as claimed.

38. As regards other costs, while the Applicants' submissions are noted we have no doubt that Mr Willis has spent a considerable amount of time on this case. We also do not doubt that he is a professional person. However, despite his professional (non-legal) experience, for the purposes of these proceedings, Mr Willis is a litigant in person – and it has not been demonstrated that any specific financial loss has been established. In the circumstances, we consider that the default rate of £19 per hour, analogous to the CPR ought to be applied for the same reasons as in relation to the Mortimer Court Respondents. With regard to the time spent by Mr Willis, for the purposes of a costs assessment, we have to consider a reasonable amount of time, noting that he is a litigant in person. Further, it may well be that other committee members have done so as well although there is no first-hand evidence and so do not allow such time.

39. We must also bear in mind that we are concerned solely with the costs relating to the dispensation application, not reasonableness. In the circumstances, we will allow a total of £2,375 for Mr Willis's time, which equates to 125 hours at £19 per hour. While we note that this is almost double the number of hours claimed by the Mortimer Court Respondents, we accept that Mr Willis has spent a considerable amount of time on this case as noted above, although we are also conscious that a significant amount of the work undertaken went to questions of reasonableness (for example Mr Willis's of costs incurred compared to the original SAY Plan

as set out in the tribunal's decision). Accordingly, we determine that the sum allowed is reasonable in the circumstances.

40. Taking both elements together provides a total of £5,939.50.

41. **Therefore, we determine the costs to be paid to the Residents' Association in the sum of £5,939.50 (plus VAT where applicable)**.

Section 20C

42. Some submissions had been provided by various parties in relation to section 20C following the conclusion of Trial 1. However, given that Trial 1 resulted in an (ultimately unsuccessful) appeal to the Upper Tribunal, it had been held that determination of the application under section 20C be stayed pending the outcome of that appeal and following the conclusion of Trial 2.

43. At the end of the tribunal's decision of 3 September 2024 (Trial 2), the following directions were given:

    (1) The Respondents must provide any written representations in support of the applications under section 20C by 8 October 2024 to the Applicants and the tribunal;

    (2) The Applicants may respond by 29 October 2024;

    (3) The Respondents may serve a brief reply by 12 November 2024;

    (4) By the same date (12 November 2024), the parties should notify the tribunal whether they wish for the applications under section 20C to be determined on the papers or whether they wish for there to be a hearing.

44. The Directions were subsequently amended (also to coincide with directions relating to costs of the dispensation application) as noted above.

45. The tribunal has received the following written submissions in relation to section 20C:

(1) The Applicants: dated 24 April 2023, 5 November 2024 and 6 December 2024.

(2) Octavia: dated 6 April 2023, 12 May 2023 and 8 October 2024.

(3) The Residents' Association: dated 10 April 2023, 1 May 2023, 8 October 2024 (revised on 15 October 2024), 15 November 2024 and 13 December 2024.

(4) The Mortimer Court Respondents: dated 10 April 2023, 2 May 2023 (by Mr Puvanesan) and 13 December 2024.

(5) Nueva: 10 April 2023 and 2 May 2023. It should be noted that Nueva's submissions were also made on behalf of Fabio Blom, Malvina and Mario Mambretti and Michele Gulino. Further, Nueva's submission of 10 April 2023 stated that a section 20C was also sought on behalf of lessees leaseholders Sulaiman Al-Rashidi and Falah Al-Rashidi who, although had not taken part in the proceedings, had "given their authority to be specified in the s.20C application in accordance with the principles established in *Plantation Wharf Management Limited -v- Fairman & Others* [2019] UKUT 236 (LC)" – although the tribunal does not appear to have received such confirmations.

It should be noted that by application dated 8 October 2024, Nueva sought to extend the deadline for making section 20C submissions to 15 October 2024 (with consequential extensions for the response and reply). This was agreed by the Applicants by email of the same date. The tribunal confirmed the extension by letter also of 8 November 2024. Subsequently, an application under s..20C was received on behalf of Nueva on 15 October 2024. It was said to also be made on behalf of the lessees of:

- Apartment 602, 3 Pearson Square;
- Apartment 304, 4 Pearson Square;
- Apartments 402, 705, 606, 301, 604, 702, 5 Pearson Square;
- Apartment 603, 6 Pearson Square; and
- Apartments 703, 103, 402 7 Pearson Square.

The application stated that grounds of application would be provided by 18 October 2024, although no further submissions were received by the tribunal.

46. As per the assessment of costs in relation to dispensation, the tribunal also directed that the parties should indicate by 13 December 2024 whether they requested a hearing or for the matter to be determined on the papers. The submissions received were as set out at paragraph 7 above. In the circumstances and as set out above, the tribunal considers it appropriate for section 20C to be determined on the basis of the parties' written representations.

47. Before turning to the substantive question of whether an order under s.20C should be made, two points should be addressed.

48. First, and so as to avoid any confusion, this tribunal's power to make an order under section 20C extends only to the proceedings before this tribunal (i.e. the FTT). It does not extend to costs in relation to proceedings before the Upper Tribunal.

49. Secondly, the Applicants (in their initial submissions) raised an issue as to who an order under section 20C could be in respect of. The issue has been considered by the Upper Tribunal in both *Plantation Wharf Management Ltd v Fairman* [2019] UKUT 236 (LC) and *Re Scmlla (Freehold) Ltd* [2014] UKUT 0058 (LC). It is established that the scope of the order which may be made under section 20C of the 1985 Act is constrained by the terms of the application, and that the tribunal does not have jurisdiction to make an order in favour of any person who has neither made an application of their own under section 20C or been specified in an application made by someone else. In the *Plantation Wharf Management Ltd* case, it was made clear that an application may not be made on another lessee's behalf unless that person has notified the tribunal that they wish to be represented by the applicant. For a person to be validly "specified" under section 20C, that person must have given their consent or authority to the applicant in whose application the person is specified.

50. The Applicants therefore submit that limited only to those parties actively participating in these proceedings or who have given their authority to an active Respondents to represent them. On the basis of this analysis, in relation to the submissions on behalf of the Residents' Association, the Applicants must be correct that any sections 20C application is on behalf of those 33 leaseholders 33 stated they wish to be represented by Mr Willis/the Residents' Association. The tribunal also appears to have received confirmation from Karen Tong and Jordan Ng (both dated 11 April 2023) that they wished to be represented by the Residents' Association. As regards those leaseholders referred to in Nueva's application, aside from those who have previously participated, in these proceedings, pending receipt of confirmation from these other leaseholders that they wish to participate in the section 20C application, they cannot at this time fall within the tribunal's order.

The law

51. Section 20C of the 1985 Act provides as follows:

> "(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" ... the First-tier Tribunal... 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.
>
> ...
>
> (3) The court or tribunal to which the application is made may make such order as it considers just and equitable in the circumstances."

52. In essence, the tribunal must determine whether it is just and equitable in the circumstances to make such an order. This can include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise, and consideration of the practical and financial consequences for all of those who will be affected.

53. The parties made reference to various Upper Tribunal decisions in relation to section 20C. This included the following:

54. In *Church Commissioners v Derdabi* [2010] UKUT 380 (LC) the Upper Tribunal highlighted that the conduct of all parties will also be relevant. *Derdabi* goes on to encourage a broad-brush percentage approach where the landlord is found to not be entitled to charge back for some of its costs

and says that the time occupied by the tribunal is only one of the relevant matters in applying that broad-brush approach:

> "18. In very broad terms, the usual starting point will be to identify and consider what matter or matters are in issue, whether the tenant has succeeded on all or some only of them, whether the tenant has been successful in whole or in part (i.e. was the amount claimed in respect of each issue reduced by the whole amount sought by the tenant or only part of it), whether the whole or only part of the landlord's costs should be recoverable via the service charge, if only part what the appropriate percentage should be and finally whether there are any other factors or circumstances which should be taken into account.
>
> 19. Where the tenant is successful in whole or in part in respect of all or some of the matters in issue, it will usually follow that an order should be made under s20C preventing the landlord from recovering his costs of dealing with the matters on which the tenant has succeeded because it will follow that the landlord's claim will have been found to have been unreasonable to that extent, and it would be unjust if the tenant had to pay those costs via the service charge. By parity of reasoning, the landlord should not be prevented from recovering via the service charge his costs of dealing with the unsuccessful parts of the tenant's claim as that would usually (but not always) be unjust and an unwarranted infringement of his contractual rights.
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> ...
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> 22. Where the landlord is to be prevented from recovering part only of his costs via the service charge, it should be expressed as a percentage of the costs recoverable. The tenant will still of course be able to challenge the reasonableness of the amount of the costs recoverable, but provided the amount is expressed as a percentage it should avoid the need for a detailed assessment or analysis of the costs associated with any particular issue.
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> 23. In determining the percentage, it is not intended that the tribunal conduct some sort of "mini taxation" exercise. Rather, a robust, broad-brush approach should be adopted based upon the material before the tribunal... ."

55. Similarly, in *SCMLLA (Freehold) Limited* [2014] UKUT 0058 (LC) the Upper Tribunal stressed that section 20C orders interfere with parties' contractual rights and obligations under a lease and noted that they have serious implications for landlord companies whose only asset is the freehold interest in a building let on long leases. As such, a section 20C order "*ought not be made lightly or as a matter of course, but only after considering the consequences of the order for all those affected by it and all other relevant circumstances*".

56. Mr Puvanesan also referred to *Conway v Jam Factory Freehold Ltd* [2013] UKUT 592 (LC), in support of the proposition that it was essential for the Tribunal to consider what would be the financial and practical consequences for all those who would be affected by the making of such an Order.

The circumstances of the present case

57. The Applicants contend that no section 20C order should be made.

58. First, the Applicants' submit that they were largely successful in the application. Further, it is said that they had no option other than to bring the application. An impasse had been reached with the Residents' Association, but, in addition, they were faced with different groups of leaseholders wanting different things. In this regard, in response to allegations of failure to attempt to reach a settlement, it is submitted that would have been all but impossible to get all residential leaseholders to reach the same agreement with the landlord – some would not have even engaged with the process – and such an exercise would have only served to waste time and money. Further, it would not have been possible to reach an agreement with an individual or individual representative group because the service charge mechanism is common to all leaseholders and the terms of the lease rely on apportionment by specific means.

59. The Applicants also point out that it was not always clear which Respondents were disputing which items, but in any event, to the extent that one or some of the Respondents took issue with an item, the Applicants had to engage with it. Irrespective of whether it was one or not all Respondents taking an issue, that did not serve to reduce the Applicants' costs.

60. The Residents' Association, Mortimer Court Respondents and (in relation to Trial 1) Nueva, provided detailed submissions as to why a section 20C order should be made. Broadly, this broke down into two broad heads: issues as to success and the conduct of the Applicants.

61. On the issue of conduct, while it is not possible to repeat the Respondents' arguments in full, some of the key allegations were as follows:

62. Nueva submitted that whilst the Respondents attempted to cooperate with the Tribunal to further the overriding objective, trying to clarify as much as possible the extent of the dispute on the apportionment methodology, the Applicants consistently ignored the Respondents' requests for clarification until the second day of Trial 1 when they were invited by the Tribunal to clarify their proposed methodology of

apportionment. Nueva asserted at paragraph 21 of the submission that the Applicants' approach was '*beyond unreasonable*' and '*consistent with aggressive litigation practices meant to create confusion and indefense at trial*'.

63. The Residents' Association made similar allegations and contended that no notice of the possibility of tribunal proceedings had been given and no attempts were made to resolve the matter thereafter. In the same vein, Mr Puvanesan also argued that it would be unjust and inequitable for the Applicants to recover the costs of an application brought by them, which was capable of consent notwithstanding the Applicants' insistence that matters had hit an 'impasse'.

64. The Residents' Association's submissions included the assertion that in the run up to Trial 2, the Applicants had engaged with only one Respondent to discuss the most important matter before the FTT, the Estate Charge apportionment clause, without advising or informing the other Respondent groups. Just one week before the start of Trial 2, the Applicants shared the work they had undertaken, with no warning or context, including an expert report.

65. Similar arguments were deployed by the Mortimer Court Respondents. However, in their most recent submissions, the arguments went further so as to suggest that the Applicants' conduct has been 'mala fidei'. It is submitted that "*the Applicants were in fact masterminding a cost effective way to get their defective leases redrafted and dispensation orders made for contracts they entered with 3rd parties for which they failed to consult with leaseholders for over a period of 8 years*."

66. We note the Respondents' arguments as to the Applicants' conduct and we agree that there have been some issues as regards the general running and administration of the Property as referred to in Trial 1 and Trial 2. There appears to have been a breakdown of communication and we also have sympathy for the Respondents in this regard. However, we do not go so far as to find that the Applicants' conduct has been unreasonable as alleged. In this regard, we also have some sympathy the Applicants' argument that it had no choice but to bring these proceedings on the basis that it faced an impasse and the fact that the Respondents were not all

aligned. Further, we do not find the Applicants' conduct to have been mala fidei as asserted by the Mortimer Court Respondents. If the intention were to find a cost-effective way to have defective leases re-drafted, that has not been borne out as the Applicants have not pursued a section 35 application – Trial 1 merely determined that service charges had not been determined in accordance with the terms of the private residential leases.

67. The Residents' Association also raised a question of moral hazard: if the Applicants are able to put the (considerable and arguably unnecessary) costs of their application to the FTT onto the Respondents, by allocating them to the service charge notwithstanding all of the points raised above, the Applicants will be free to bring all manner of claims against the Respondents without economic penalty. The Applicants should be discouraged from further such claims against the Respondents and should be encouraged to enter into full and frank discussion with the parties with a view to settling any dispute. There are two points to make in response to this submission. First, irrespective of whether or the extent to which section 20C orders are made in these proceedings, this would not determine whether it would be just and equitable to make such an order in any future proceedings. Secondly, as the Applicants assert, the purpose of a section 20C order is not to impose a penalty on a party. Rather it simply involves an assessment of whether it would be just and equitable that all or part of the landlord's costs should not be regarded as relevant costs in determining the amount of any service charge payable by the tenant.

68. A further point made by the Residents' Association is that unrepresented Respondents have spent considerable time and effort in relation to these proceedings and it would be unfair if they should have to fund the Applicants' costs as well. That is a factor that can be taken into account, along with the other circumstances of this case, to determine whether it is just and equitable to make a section 20C order – but it is not determinative of the issue.

69. Turning to Octavia's submissions, it was noted that the proceedings had not been triggered by any actions on the part of Octavia, that Octavia had

played a more limited role in the proceedings and, on the whole, Octavia's involvement had not generated extra costs for the Applicants – although this latter contention was disputed by the Applicants. Nueva made a similar submission that it did not adopt a scattergun approach and did not challenge all of the items in dispute.

70. In addition, Octavia pointed out that it is a social landlord. On the basis that it is a very different type of paying party to the other Respondents and the commercial tenants, it is submitted that it is not just nor equitable for Octavia (and by extension, its shared owners) to pay for the Applicants' costs.

71. These submissions raise an implicit question as to whether different section 20C orders could be made in favour of different categories of respondents. An order under section 20C of the 1985 Act considers whether costs should not be regarded as relevant costs to be taken into account in determining the amount of any service charge. The operation of a service charge can be contrasted with an administration charge which is in respect of a single lessee only. Section 20C therefore operates by looking primarily at the costs incurred by the landlord. However, it is also important to look at the wording of 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" ... the First-tier Tribunal... 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...". (emphasis added)

72. The argument might therefore be made that different section 20C orders could be made in respect of different tenants, notwithstanding that the landlord's costs incurred remain the same. However, even if correct, we do not consider that this would be appropriate in the present case. As Octavia acknowledge, they were included as a respondent from the outset because, understandably, the Applicants wished for any determination to apply to all leaseholders. Accordingly, while different groups of lessees might have taken different points, they were all respondents to the same action. In the circumstances, we do not consider that any lessee of groups of lessees should be treated differently for the purposes of section 20C or that their conduct, for example, was so out of the ordinary as to justify

anything other than a uniform approach to section 20C and whether it is just and equitable to make an order. Similarly, while we note that Octavia is a social landlord, we do not consider on the facts of the present case that this justifies anything other than a uniform approach to section 20C on the basis of the reasons already given. While Octavia does not pay for all of the same services as the other Respondents, this is reflected in in the service charges subsequently levied.

73. One other point raised by Octavia was in relation to the financial circumstances of the Applicants. In their submissions of 24 April 2023, the Applicants asserted as follows at para.5:

> *"In this case, while the parties have colloquially referred to the Landlord as 'Aviva', the Applicants are in fact companies formed specifically to operate and manage the wider estate. It is trite law that the corporate veil cannot be pierced to look for wider shareholder assets or liability – each entity exists as its own separate corporate personality – and, in considering the impact of any s 20C order, the Tribunal cannot take group or parent companies into account. The fact is that the Applicant entities rely on the funds obtained from the estate occupiers to meet their costs and continue to run the estate. It is neither just nor equitable to expect the Applicants to fund any shortfall in cost recovery."*

The premise of this statement is challenged by the Respondents. We agree with the submission that even if a landlord's only source of income is the service charge, that does not and cannot of itself offer it any blanket protection against section 20C orders being made. That would fetter the Tribunal's wide jurisdiction under section 20C. On the other hand and in light of Upper Tribunal decisions such as *Re SCMLLA* and *Conway v Jam Factory* as referred to above, it is something which should be taken into account in determining whether it is just and equitable to make a section 20C order.

74. On the question of success, we consider Trial 1 and Trial 2 separately. First, however, as a general point, the Applicants reject the Residents' Association's suggestion that section 20C determination could be calculated by reference to percentages of 'actual service charge' held to be reasonable by the Tribunal. It was said that this bears no relation to the amount of time and costs spent on a particular issue. While we agree that there is no requirement that the tribunal must apply such approach when determining a section 20C application, there seems no reason why it is

not a matter that can be taken into account as part of the broader exercise of applying the just and equitable test.

75. In relation to Trial 1, it is correct that the Applicants succeeded on a number of issues in relation to payability – it is asserted that they succeeded on all but one of the issues specified in the application. However, on the issue of the methodology of apportionment, the Applicants were unsuccessful. We note that the Applicants maintain that this was not part of their claim. However, it was clear that this had been argued in detail by the parties and indeed took up a significant proportion of the hearing time.

76. We also have regard to the point raised by the Applicants that although a substantial amount of time was taken up in the hearing dealing with the method of measurement to be applied to the residential flats and the methodology for apportioning the estate service charge, neither necessarily account for a reflective proportion of the costs incurred by the Applicants – and it is the Applicants' costs which are in issue in relation to a section 20C determination. As to the method of measurement for the residential flats, this was a legal argument based on the wording of the Lease and the interpretation of the same. There was little to nothing to be added by the witnesses or disclosure on this point, neither did it account for a large amount of expert evidence (and indeed was a point of substantial agreement between the experts anyway). It is submitted that it therefore accounts for a disproportionately small aspect of the costs incurred versus the time taken in the hearing. It should be said that this is disputed by the Mortimer Court Respondents: it is asserted that costs incurred both preparatory and trial work described in relation to this issue formed a significant part of the FTT proceedings and in all circumstances, outweigh the cost that was occasion in the determination of the payability issues.

77. We have not seen a breakdown of the Applicants' costs and so have no way to know what proportion of those costs related to preparation for the hearing as compared to the hearing itself. However, as noted above, a determination under section 20C does not require a 'mini-taxation' exercise and the tribunal is entitled to adopt a broad brush approach.

78. The Applicants go on to state that they wish to take a fair and pragmatic approach and recognising that issues regarding the interpretation of erroneous lease drafting are not the fault of the residents and that as a matter of practicality it was necessary for the Applicants to bring the application (on the measurement of the residential flats) in order to have clarity on the contractual meaning going forwards. Accordingly, for the purpose of these s 20C applications, the Applicants agree not to recover those costs from the service charge. This appears to be in answer to a point made by the Residents' Association that the Applicants had admitted that the lease was defective, the implication being that lessees should not have to pay the Applicants' costs of determining questions of interpretation in such circumstances.

79. While this concession by the Applicants is commendable, unfortunately, the tribunal is given no guidance as to how the Applicants have ascertained such costs – particularly how they have apportioned the costs of the hearing (i.e. solicitor and counsel's attendance). The implication from the Applicants' submissions as a whole, is that this would comprise a relatively small proportion of the Applicants' costs in respect of Trial 1.

80. Taking all of the above matters into account and noting in particular that the issue regarding apportionment (on which the Applicants were unsuccessful) took a considerable part of the hearing time during Trial 1, we consider that it is just an equitable that 50% of the Applicants' costs should 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.

81. In relation to Trial 2, it is important to bear in mind that we have already determined that the Applicants are not entitled to recover their costs of the dispensation application. In considering section 20C, we are therefore only concerned with the remaining issues, principally reasonableness. Here, the Applicants have been largely successful.

82. In the circumstances, and taking into account all of the other arguments, including in relation to conduct and our findings as set out above, we do not consider that it would be just and equitable to make a section 20C order.

Conclusion

83. For the reasons set out above we make the following orders:

    (1) In relation to Trial 1, 50% of the costs incurred by the landlord in connection with Trial 1 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) In relation to Trial 2, we decline to make an order under section 20C.

84. For the avoidance of doubt, the above determinations make no finding as to the contractual recoverability absent a section 20C order or reasonableness of the levels of any of the Applicants' costs.

Name: Judge Sheftel **Date:** 5 February 2025

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 should be made on Form RP PTA available at https://www.gov.uk/government/publications/form-rp-pta-application-for-permission-to-appeal-a-decision-to-the-upper-tribunal-lands-chamber

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).