FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	:	**BIR/00FY/LDC/2020/0018** **BIR/00FY/LSC/2020/0007** **BIR/00FY/LSC/2020/0008**
Property	:	**The Hicking Building, Queens Road, Nottingham NG2 3BX**
Applicants	:	**The leaseholders listed in the Appendix**
Representative	:	**Mr A New**
Respondents	:	**The Hicking Building RTM Company Ltd (1)** **Abacus Land 4 Ltd (2)**
Representative	:	**Mr C Bryden (Counsel) instructed by Brady's Solicitors (for the First Respondent)**
Type of applications	:	**Application for an order under section 20C of the Landlord and Tenant Act 1985** **Application under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 for an order reducing or extinguishing a tenant's liability to pay an administration charge in respect of litigation costs**
Tribunal members	:	**Judge C Goodall** **Mr R P Cammidge FRICS** **Mr A McMurdo MCIEH**
Date and place of hearing	:	**Paper determination**
Date of decision	:	**12 November 2021**

DECISION

Determination

The Tribunal determines that:

A. Under section 20C of the Landlord and Tenant Act 1985, 25% of the costs of the proceedings under references BIR/00FY/LDC/2020/0018 and BIR/00FY/LDC/0007 are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

B. Under section 20C of the Landlord and Tenant Act 1985, that none of the costs of the proceedings under reference BIR/00FY/LSC/2020/0008 are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

C. Under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, the Applicants' liability to pay any litigation costs in respect of all of the proceedings under consideration in this decision are extinguished.

Background

1. This is a decision on applications under section 20C of the Landlord and Tenant Act 1985 and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 consequent upon two decisions made by this Tribunal dated respectively 15 April 2021 ("the April Decision" (references BIR/00FY/LDC/2020/0018 and BIR/00FY/LDC/0007)) and 14 September 2021 ("the September Decision" (reference BIR/00FY/LSC/2020/0008)).

2. The two decisions ("the Decisions") concerned liability to pay service charges at the Hicking Building, in Nottingham. This is a converted building now primarily used for residential purposes, comprising 329 residential apartments, all of which are let on long leases.

3. In December 2020, both the Applicants and the First Respondent commenced proceedings in this tribunal virtually simultaneously. Both applications concerned the liability to pay service charges for external fire protection works to the building. The First Respondent's applications requested dispensation from consultation for those works and confirmation that expenditure on the works would be reasonably incurred. The Applicant's application challenged the payability of the costs of the external works as part of a service charge.

4. The Applicant's application also challenged expenditure on internal fire protection works to the corridors in the building.

5. For case management purposes, the applications concerning external works were combined and determined in April 2021. The internal fire protection works application was determined in September 2021.

6. The April Decision considered two elements of expenditure on external fire protection works, being expenditure on re-cladding of the external structure housing the stairwells and replacement of the insulation within the cladding system ("re-cladding") that had been installed as part of the conversion, and replacement of some timber balconies which had been identified as a fire risk. The Tribunal concluded:

    a. The costs of the re-cladding work would be recoverable via the service charge;

    b. In so far as may be necessary, dispensation from consultation was granted, though on the quotations for the re-cladding work alone, the cost was unlikely to exceed the consultation threshold;

    c. It would not be reasonable to incur costs for replacing timber balconies as they were not recoverable under the lease(s) and would not have been reasonably incurred.

7. The September Decision considered liability for works to improve internal fire barriers in order to compartmentalise the building more effectively. These works were mainly required to the internal corridors in the building. At the hearing, the issues were reduced to the reasonableness and payability of invoices for 2020. The Tribunal concluded:

    a. The costs incurred on the internal corridor works in 2020 were unreasonably incurred. The sum paid of £62,720.38 net was considered to be unreasonable and it was reduced to a reasonable sum of £51,146.90 net;

    b. The First Respondent had not managed the process of contracting for the corridor works adequately, including failure to resolve an obvious conflict of interest on the part of the First Respondent's agent, failure to obtain comparable quotes, and failure to contract on normal terms;

    c. On the evidence, there was no reason to reduce any liability to pay a service charge on the grounds that a third party was liable.

8. The Applicants have applied for an order under section 20C of the Landlord and Tenant Act 1985 and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 limiting their liability to pay the First Respondent's costs of the proceedings that led to the Decisions.

9. The Tribunal directed that the parties provide written submissions on these applications. The Applicant's submissions are undated but were received by the Tribunal on 12 October 2021. The First Respondent's submission is dated 11 October 2021.

10. Our determination on the applications is set out at the beginning of this determination. Our reasons are given below.

Law

11. We firstly identify the law that applies.

12. Section 20C provides:

> 20C.— Limitation of service charges: costs of proceedings.
>
> (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.
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> (2) The application shall be made—
> …
> (aa) in the case of proceedings before the First-tier Tribunal, to the tribunal;
> …
>
> (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.

13. The purpose of section 20C is to give the Tribunal the power to prevent a landlord actually recovering its costs via the service charge when it was not able to recover them by a direct order from the Tribunal. The discretion given to the Tribunal is to make such order as it considers just and equitable.

14. Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 provides:

> Limitation of administration charges: costs of proceedings
> 5A (1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—

(a) "litigation costs" means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and

(b) "the relevant court or tribunal" means the court or tribunal mentioned in the table in relation to those proceedings.

15. The table referred to in sub-paragraph 3(b) confirms that if the proceedings to which the costs relate were proceedings in the first-tier tribunal, then the first-tier tribunal is the relevant court or tribunal.

16. The Tribunal therefore has a discretion limited only by the requirement that it make a just and equitable decision.

Discussion

A. Are the First Respondent's costs a service charge cost?

17. If the First Respondent's costs are not recoverable under the leases, there would be no liability, and no need to make an order under section 20C or otherwise. The First Respondent relies upon paragraph 2 of Part 2 of the Seventh Schedule of the lease which allows it to "instruct solicitors … in connection with the maintenance and proper convenient management and running of the Estate…".

18. In his submission, Mr New confirms that "there is no dispute over the Applicant's contractual right to recover the legal costs under the terms of the lease."

19. Whatever the correct interpretation of this clause, there is no need for the Tribunal to consider this aspect further as the parties are agreed that in principle the costs could be recovered under the lease.

B. The Section 20C application

20. We have approached this determination by having in mind three key factors; the outcome of the proceedings, the surrounding context (including the conduct of the parties), and the practical and financial consequences of any orders we may or may not make. We have carefully considered the parties submissions identified in paragraph 9 above. Our overriding aim has been to make a just and equitable decision about

whether the Applicants should contribute towards the costs of the proceedings.

21. The only people identified in the Applicants' application are the 13 leaseholders (owning 39 flats) identified in the Appendix to this decision. There is no application on behalf of the other 290 flats. In the absence of a request to do so, we cannot make an order in favour of the other leaseholders. If we do make orders as requested in favour of the Applicants, the First Respondent's costs will then be shared between the other flat owners. Other leaseholders could of course apply for their own section 20C order, or could challenge expenditure on this litigation under section 27A of the Act when service charge accounts are produced, but our view is that unless any such applications are made and are successful, the making of any section 20C order does not deprive the First Respondent of the opportunity to recover costs from the remaining leaseholders. Any orders we make therefore do not put the First Respondent at risk of financial insolvency.

The April Decision

22. Our decision is that the Applicants should make some contribution towards the First Respondent's costs in connection with the April Decision, as we consider that it was reasonable for the First Respondent to seek a protective determination of the reasonableness of the costs for the re-cladding work, which the Tribunal agreed.

23. We do however take the view that it would be unjust for the Applicants to contribute their normal proportion of those costs. The First Respondent unsuccessfully sought a determination that the costs of the balcony work should also be charged. It also sought dispensation from consultation, which is highly unlikely, on the basis of the evidence presented to us, to in fact be required. So far as outcome is concerned, the Applicants achieved an outcome which we think they would have been unlikely to have achieved without tribunal involvement. We have also taken some account of the context of the April Decision in so far as transparency and disclosure of evidence is concerned, particularly the evidence about combustibility set out in paragraph 97 of the April Decision.

24. Our decision is that the Applicants should only be required to contribute 25% of their normal share towards the costs incurred in connection with the April Decision. This percentage figure is arrived at via a very broad brush assessment that the consideration of the liability for balcony repair consumed around 50% of the time and cost, and of the remaining 50%, our view is that the parties share equal responsibility for being unable to resolve matters without contested litigation.

The September Decision

25. In outcome terms, the Applicants only secured a reduction of around 18% on the sum charged in 2020 for internal corridor works. The Tribunal has noted carefully paragraph 13 of the First Respondent's submission and the outcome of the case of *Schilling v Canary Riverside Development PTE Ltd* (LRX/26/2005).

26. However, we do make a section 20C order in respect of the costs incurred in the September Decision case. We do not think it would be just and equitable for the Applicants to make any contribution towards the First Respondents costs of this case.

27. Our reason is that although the Applicants only secured a small percentage reduction, what the proceedings exposed was a significant failure on the part of the First Respondent's board and/or its managing agent to discharge their responsibilities in the best interests of the service charge payers. We refer to paragraphs 82 to 94 of the September Decision in which our criticisms are identified. We do not think these deficiencies would have come to light without the proceedings.

28. In the light of these failures, our view is that it would be unjust for the Applicants to have to pay any contribution towards the First Respondents costs in relation to the September Decision.

29. We have considered whether the Applicants' decision to withdraw its initial case concerning consultation and the scope of the works it challenged should impact this conclusion. In fact, our view is that this was a sensible step designed to save costs, rather than an action worthy of sanction. We cannot see that it was unreasonable to raise the additional issues in the first place, and if so, it would not be just to penalise the Applicants for sensibly limiting the extent of the Tribunal's enquiry.

C. The paragraph 5A application

30. Claiming costs of tribunal proceedings via an administration charge is an alternative route by which a landlord or RTM company might recover costs. Rather than asking all lessees to pay their respective contributions through a service charge, individual lessees can be asked to pay via a direct covenant in a lease that may make them individually liable.

31. The First Respondent has not identified any specific clauses in the lease under which it argues that such charges might be recoverable from each lessee individually. In the light of our conclusions above, it would be invidious and unjust for any individuals to be the subject of a claim by the First Respondent that they should be personally responsible for the costs of the proceedings in the two applications.

32. We determine that an order under paragraph 5A should be made.

Appeal

33. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)

Appendix – List of Applicants

Saxon Urban (Five) Ltd
Mr John Trehy
Ms Kiran John
Mr Marco Pino
Mr Sailesh Chauhan
Mr Justin Heath
Mr Javier Rodriguez Plaza
Ms Sue Griffin
Dr Mohammed Amjed Khan
Mr Tony Ball and Mrs Toni Ball
Mr David Thomas