



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

Case Reference : **CAM/12UB/LSC/2021/0061**

HMCTS : **Paper**

Property : **117-131 (Odds) The Cherry Building and 133-171 (Odds), Addenbrookes Road, Cambridge CB2 9BA**

Applicants (Tenants) : **The Long Leaseholders identified in the Schedule to the Application**

Representative : **Dr Frank Gommer**

Respondent (Landlord): **RMB 102 Ltd**
Representative : **JB Leitch, Solicitors**

Type of Application : **Application for Review or Permission to Appeal**

Tribunal : **Judge J R Morris**
Mr G Smith MRICS FAAV REV

Date of Original Decision: **4th March 2022**
Date of Application : **14th April 2022**
Response : **13th May 2022**
Date of Review Decision: **17th June 2022**

DECISION ON REVIEW

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Decision

1. The Tribunal has decided to review its Decision dated 4th March 2022 under rule 55 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 because it is satisfied that the Respondent would be successful on a ground of appeal in respect of a part of the Decision for which it has sought review or permission to appeal.
2. The Tribunal makes an Order under section 20C of the Landlord and Tenant Act 1985 that 20% of the Respondent's costs in connection with these

proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Applicants.

Reasons

Background

3. On 4th March 2022 following an Application for a determination under section 27A of the Landlord and Tenant Act 1985 (the 1985 Act) the Tribunal made an Order under section 20C of the Landlord and Tenant Act 1985 that the Respondent's costs in connection with those proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Applicants.
4. On 8th October 2021 the Respondent sought a review or permission to appeal under rules 53 and 55 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 in respect of the Tribunal's Decision to make an order under section 20C of the Landlord and Tenant Act 1985.

The Grounds for Review or Permission to Appeal

5. The Respondent requested a review because the Respondent considered it would be successful on appeal for the following reasons:

Reason 1

6. The Respondent referred to [113] of the Tribunal's Decision which stated:

“With regard to the conduct, the Respondent's legal representative had asked for an extension of time on 14th December 2021. This was granted on 16th December 2021 with an order that they were “to use their best endeavours” to provide documentation in order for the Applicants to examine the papers before the Christmas break. By an email on 20th December 2021 the legal representatives informed the Tribunal that they chose to interpret this so as not to provide the Landlord's statement of response until the extended time. The Tribunal replied on 20th December 2021 that the Tribunal expected the Applicants to be provided with “at least the gist”. This was not done, which was not compliant with Rule 3 of the Tribunal Procedure (Property Tribunal) (Residential Property) Rules 2013. In addition, the Respondent's legal representatives attempted to unilaterally extend the Applications to cover Further Works, as referred to in the Dispensation Application, which resulted in about a half of the material in the Respondent's Bundle for both Applications relating to these Further Works. Neither of these factors was helpful to the progress of the case.”
7. The Respondent submitted that the Tribunal was not correct.
 - a) Documentation was provided to the Applicants on 21st December 2021 as was acknowledged by Dr Gommer on 31st December 2021.
 - b) The “gist” of the Landlord's response was provided to Dr Gommer in an email timed 12:06 on 23rd December 2021.

- c) No time was spent on the documents relating to the “Further Works” by the Tribunal during the hearing or the Applicants in addressing those matters.

Reason 2

- 8. The Respondent referred to [114] of the Tribunal’s Decision which stated:

“Early in the hearing the Tribunal commented to the Applicants’ Representative that on reading the papers it appeared that the dispute over payment for the replacement flue was a dispute between the Applicants and the Developer which, if they could not reach agreement was a matter for the County Court. The Tribunal was disappointed that this point was not made in correspondence by the Respondent to the Applicants with a view to settling the matter so far as the Respondent was concerned, well before the hearing. The Respondent had the benefit of expert legal advice, professional managing agents and all the documentation and access to the Developer well in advance of the hearing. The communal heating system is an essential part of the common parts and ongoing issues that occur within 5 years of completion warranted greater investigation by the managing agents and more than a bland acceptance of the Developer’s statement that it was out of warranty. The Property is still within the NHBC Buildmark Warranty. The Tribunal found from the correspondence and other documentation available that the relationship and respective liabilities of the parties was not made clear by the Respondent or its advisers who are in a dominant position. If it had been these proceedings would probably not have taken place.”

- 9. The Respondent submitted that:

- a) Counsel for the Respondent made the point at the Case Management Conference that “the dispute over payment for the replacement flue was a dispute between the Applicants and the Developer which, if they could not reach agreement was a matter for the County Court.” Nevertheless, the Procedural Judge allowed the Applicants to raise the issue as part of their application and the Tribunal Judge did not raise it as an issue at the Hearing.
- b) The Tribunal did not invite the parties to make representations regarding the Managing Agent not following up the Developer’s statement that the flues were out of warranty as a reason for making the order under section 20C. The Respondent did not have access to the Developer despite attempts to request information which was acknowledged by the Procedural Judge who made a Third-Party Disclosure Order requiring the Developer to produce documentation.
- c) The Applicants combative approach made it likely that a section 27A Application would be made regardless of any action by the Respondent.
- d) The Respondent made a without prejudice offer to the Applicants prior to the hearing which in the event was exactly what the Tribunal ordered. The offer was raised at the hearing but the Tribunal does not appear to have given due consideration to it.

10. The Tribunal was not provided with a copy of this offer in the Bundle and there was no reference to it in the index. At the Tribunal's request the Respondent provided a copy to the Tribunal following this Application for Review. On receiving the letter, it was apparent to the Tribunal that it was withheld from the Bundle because it was a without prejudice offer. However, the letter makes it clear that if the offer is rejected the Respondent reserved the right to refer to the terms of the correspondence when the Tribunal comes to consider whether or not to make an order under section 20C of the 1985 Act. The relevant part of the offer states:

“The Service Charges

The application to determine the reasonableness of the service charges is limited to the Works in the sum of £13,954.08. In summary, it seems to be the case that the leaseholders' position is that they should not be paying anything at all. However, our assessment is that an amount will be payable. If dispensation is granted, our client is confident that they will recover in excess of the statutory limit of £250.00 for the Works.

Settlement Terms

Given the impending hearing on 22 January 2022, our client is mindful of the increasing costs being incurred by all parties in determining the applications. Accordingly, our client proposes the following terms in settlement of the applications:

1. The leaseholders' consent to dispensation being granted to the Works and the Further Works;
2. The leaseholders' contribution to the Works only will be limited to £10,500.00 equating to a contribution per leaseholder of £375.00; and
3. Our client will agree to an Order pursuant to Section 20C of the Landlord & Tenant Act 1985 that their costs incurred in dealing with the applications will not be passed to the leaseholders via the service charge.

If, as appears, the leaseholders perceive that the cost of the Works should be borne by the developers then, unlike our client, they can seek reimbursement of the contribution from them.

If the above is acceptable, we propose to embody the terms of settlement into a Consent Order to be approved by the Tribunal.

Should our client's offer be rejected, whilst they will be making representations against the issuing of a Section 20C Order in any event, our client reserves the right to refer to the terms of this correspondence when determining such an Order. Should the Tribunal refuse the granting of a Section 20C Order, our client's costs will be sought via the service charge and which in turn, will only seek to increase the leaseholders' liabilities under the service charge, something which our client is seeking to avoid by way of this offer.

Given the need for our client to attend to their statement of case in reply and to complete their bundles by 20 December 2021, the terms of this offer shall remain open for acceptance until 4:00pm on Wednesday 8 December 2021 after which the same will be withdrawn.”

Reason 3

11. The Respondent referred to [115] of the Tribunal’s Decision which stated:

“The Tribunal is of the opinion that the parties should effectively pay their own costs of the proceedings. Therefore, the Tribunal finds it is just and equitable to make an Order under section 20C of the Landlord and Tenant Act 1985 that the Respondent’s costs in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Applicants.”

12. The Respondent submitted that it was successful and therefore it was not just and equitable to deprive it of its costs taking into account that it had not acted improperly or unreasonably and was forced to defend an unsuccessful application.

Applicant’s Response

13. The Applicants made the following response to the Respondent’s Application.

Response to Reason 1

14. The Respondent claims that all information was sent to the Applicants in a timely manner. The Applicants submitted that this claim is incorrect and referred the Tribunal to the Tribunal’s letter of 20th December 2021 in which it was said “It is not obvious that JB Leitch have used their best or indeed any endeavours to comply with the letter”. The Applicants said that they had made it clear that information was required before the start of the Christmas break to ensure that the documents can be studied in time as the Applicants have other responsibilities during work weeks. The Applicants submitted that the Respondent did not communicate even the gist of their statements of case before the Christmas break, which the Applicants made clear in their correspondence to the Tribunal of 31st December 2021.

Response to Reason 2

15. The Applicants submitted that the Application was not against the Developer only but, as detailed in the Applicants’ letter of 29th April 2022, that it was also against the Respondent on the basis of historic negligence.
16. The Applicants submitted that the Respondent’s representatives made it impossible for the Applicants to obtain information from either the Managing Agents or the Developer. The Developer insisted that it would only communicate with the managing agents and the property managers regarding the communal areas. They refused to pass on any information received by

claiming that these fall under the GDPR privacy rules. Documents can be found in the bundle.

17. The Applicants submitted that as detailed in their letter from 29th April 2022 they had held the Developer responsible twice for the defective flue works but on both occasions the Respondent Landlord failed to ensure that the arrangements achieved were implemented at no costs for the tenants.
18. The Applicants submitted that they had used an evidence-based approach in making their application whereas the Respondent provided as little information as possible to tenants at any one time.

Response to Reason 3

19. The Applicants' stated that the Respondent submits that just because "they won" they should be awarded costs. The Applicants submitted that the Tribunal discussed this in detail in both decisions and the Respondent has not made any additional points and the argument should be rejected.
20. The Applicants added that they strongly believe that any proceedings could have been avoided if the Respondent and its Managing Agents had tried to work with residents on the different issues on the estate, but unfortunately this has been rejected by the Respondent on numerous occasions.

Discussion

21. The Tribunal considered the parties' submissions.

Reason 1

22. With regard to the Respondent's submissions in respect of Reason 1 for Review the Tribunal found as follows:
23. The Respondent submitted that the Respondent was not invited to make representations about the correspondence of 14th December 2021 when an extension was requested by the Respondent which was granted on 16th December 2021 with an order that they were "to use their best endeavours" to provide documentation in order for the Applicants to examine the papers before the Christmas break. By an email on 20th December 2021 the legal representatives informed the Tribunal that they chose to interpret this so as not to provide the Landlord's statement of response until the extended time. The Tribunal replied on 20th December 2021 that the Respondent should provide at least the "gist" of its case to the Applicants.
24. This exchange was referred to by both the Applicants [100] and the Tribunal in relation to the section 20C application and Counsel for the Respondent's reply is recorded at [104]:

“With regard to the conduct of the proceedings Counsel said that the Respondent had asked for an extension of time which had been granted and that it had complied with the amended Directions.”

Submission a)

25. The documentation provided to the Applicants on 21st December 2021 and acknowledged by Dr Gommer on 31st December 2021 related to the Further Works which were not a part of these proceedings. Therefore, these added nothing to the case.

Submission b)

26. The Tribunal notes that the compliance referred to in [104] was via the email dated 23rd December 2021 which stated:

“The gist is that the landlord will say that they have acted reasonably at all times, not only in respect of what works have been undertaken, but also concerning the costs that have been incurred regarding the Works of which are recoverable from the tenants under the leases. The landlord will deny the tenants’ reasoning to avoid the liability to pay or reduce the costs of the Works due to historic neglect and/or that third party contributions ought to have been pursued by them.”

27. It is for the Tribunal to determine to what extent the content of the email is sufficient compliance with the Direction and if not whether it should contribute to making an Order under section 20C. In the event it found that the statement was perfunctory. Some indication of the reasons why the Respondent is not liable for example reference to the Developer’s liability, and the Managing Agents involvement in respect of maintenance of the boiler and flue systems and the maintenance contractor’s reports.

Submission c)

28. Counsel for the Respondent at [114] acknowledged that the Respondent’s unilaterally seeking to have the Further Works dealt with at the same time as the Works had increased the Respondent’s bundle by half. The Tribunal did not agree that a determination in respect of the Further Works should be made. Therefore, the Tribunal considered that the costs incurred in preparing half the Bundle should not be included in the costs for the proceedings and this was a consideration when making the order under section 20C.

Reason 2

29. With regard to the Respondent’s submissions in respect of Reason 1 for Review the Tribunal found as follows:

Submissions a) and b)

30. The Tribunal acknowledges the issue that “the dispute over payment for the replacement flue was a dispute between the Applicants and the Developer” which, if they could not reach agreement was a matter for the County Court” was referred to at the Case Management Conference and early on in the hearing.
31. Nevertheless, the Applicants believed that the Respondent or its Managing Agent should have recognised the defects which they felt resulted from the Developer’s failures at the time of construction. They argued that the Respondent should have then taken action against the Developer. They submitted that the failure to do so was historic negligence. It was also part of the Applicant’s case that the Managing Agent did not follow up the Developer’s statement that the flues were out of warranty. The Respondent submitted that the Respondent was not invited to make representations regarding the Managing Agent not following up the Developer’s statement that the flues were out of warranty as a reason for making the order under section 20C.
32. It was submitted by the Applicants that the failure by the Respondent and its Managing Agent was a reason for making an order under section 20C as recorded at [99] of the Decision. The point having been made by the Applicants and it was for the Respondent to refute it when asked what submissions the legally represented Respondent had following the Applicant’s submissions regarding the making of an order under section 20C.
33. The Tribunal decided the dispute over payment for the replacement flue was a dispute between the Applicants and the Developer. It also found that there was no historic neglect that made the cost of replacing the flue in June 2021 unnecessary or more expensive. Notwithstanding this the Tribunal considered that the bland acceptance of the Developer’s position by the Managing Agent had contributed to the proceedings being brought. It took into account that

“the communal heating system is an essential part of the common parts and ongoing issues that occur within 5 years of completion warranted greater investigation by the managing agents and more than a bland acceptance of the Developer’s statement that it was out of warranty. The Tribunal found from the correspondence and other documentation available that the relationship and respective liabilities of the parties was not made clear by the Respondent or its advisers who are in a dominant position.” [113]
34. The making of the Third-Party Disclosure Order was not an acknowledgement by the Procedural Judge that the Respondent was not able to obtain documentation from the Developer. Irrespective of whether the Respondent had a copy or indeed wanted a copy of any documentation, the Order was to require the Developer to produce the documents to both the parties.

Submission c)
35. The Applicants were no more combative than many other parties and their representatives taking into account the proceedings are basically adversarial.

Submission d)

36. The Tribunal considered the contents of the offer letter which it was seeing for the first time in the course of considering this review. The Tribunal noted that notwithstanding that the letter was without prejudice it reserved the right to produce the letter in support of its case against an order being made under section 20C of the 1985 Act.
37. The Tribunal found that the letter required agreement to dispensation from the consultation requirements for the Works and Further Works. Taking into account the Tribunal's decision in respect of the Works the offer was reasonable. The Further Works were not part of the proceedings but there was no evidence to suggest that the Leaseholder sought to accept the offer save for dispensation relating to the Further Works.
38. The Tribunal found that taking into account the Tribunal's decision in respect the section 27A Application the offer made to reduce the demand to £10,500.00 and agree to an Order pursuant to Section 20C of the Landlord & Tenant Act 1985 was reasonable. The Respondents also inform that the Leaseholders can seek reimbursement of their contribution from the Developer if, as they believe, the Developer should bear some liability for the Works.

Reason 3

39. With regard to the Respondent's submissions in respect of Reason 3 for Review the Tribunal found as follows:
40. The Tribunal does not award costs other than under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The decision for the Tribunal is whether it is just and equitable to restrict in part or whole the Respondent's contractual right under the Lease to recover the costs it incurred in defending the section 27A Application through the Service Charge. Although the Tribunal is not awarding costs just because the Respondent was successful, nevertheless in determining whether or not to make an order under section 20C of the 1985 Act it must consider both the conduct of the parties and the outcome of the proceedings. When it made its determination, it was not aware of the without prejudice letter and the terms that were offered. If it had it would have given more weight to the co-relation between the outcome and the terms offered in the letter.

Conclusion

41. The Tribunal found that the Applicants had at the hearing, in their representations in respect of their section 20C Application, raised all the points referred to by the Tribunal in its Decision. The Respondent in turn had an opportunity to respond to those points at the hearing. Therefore, the Tribunal did not consider this a reason for reviewing its decision to make an order under section 20C of the 1985 Act (Identified by the Tribunal as Reason 2 b)).

42. The Tribunal decided not to review its decision in making an order under section 20C of the 1985 Act because:
- 1) The Tribunal found that a clearer expression of the Respondent's case prior to the Christmas break would have reduced the later correspondence between the parties (Identified by the Tribunal as Reason 1 a) and b)).
 - 2) The Tribunal found that the Respondent's costs incurred in respect of the written representations regarding section 27A Application for Further Works should be discounted because they were not included in the proceedings (Identified by the Tribunal as Reason 1 c)).
 - 3) The Tribunal found that the Applicants were not unduly combative (Identified by the Tribunal as Reason 2 c)).
43. Notwithstanding the above the Tribunal decided it would review its decision in making an order under section 20C of the 1985 Act for the following reasons:
- 1) The Tribunal found it had not given sufficient weight to the raising by Counsel for the Respondent at the Case Management Conference the point that "the dispute over payment for the replacement flue was a dispute between the Applicants and the Developer which, if they could not reach agreement was a matter for the County Court" (Identified by the Tribunal as Reason 2 a)).
 - 2) The Tribunal found it had not taken account of the Respondent's without prejudice letter offering terms on which to settle the matter as this had not been produced until the application to review due to its without prejudice nature (Identified by the Tribunal as Reason 2 d)).
 - 3) The Tribunal found that if it had known the terms of the letter it would have given more weight to the outcome of the proceedings taking into account the offer in the letter.
44. Therefore, the Tribunal reviews its Decision of 6th March 2020 as follows:

The Tribunal replaces its Order under section 20C of the Landlord and Tenant Act 1985 that the Respondent's costs in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Applicants.

With the following:

The Tribunal makes an Order under section 20C of the Landlord and Tenant Act 1985 that 20% of the Respondent's costs in connection with these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any Service Charge payable by the Applicants.

Judge JR Morris

APPENDIX - RIGHTS OF APPEAL

1. If a party wishes to appeal the 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.
2. 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.
3. 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.
4. 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.