11508

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/LSC/2015/0290**
Property	:	**Hillfield Mansions, 1-21 Haverstock Hill, London NW3 4QR**
First applicant	:	**Quayglade Limited ("the management company")**
Representative	:	**Comptons Solicitors LLP**
Second applicant	:	**MDDT Nominees SA and Wolfe Nominees SA ("the freehold reversioner")**
Representative	:	**Brecher Solicitors**
Third applicant	:	**Jeffrey Stone**
Respondents	:	**The 20 long residential leaseholders listed in the application form ("the tenants")**
Representative	:	**Guillaumes LLP, solicitors apart from the tenants of flats 1, 2, 7 and 19 who were not represented**
Type of application	:	**Liability to pay service charges**
Tribunal members	:	**Angus Andrew** **Mr C Gowman MCIEH, MCMI, BSc** **Mrs L Hart**
Date and Venue of hearing	:	**23 and 24 November 2015** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**18 December 2015**

DECISION

Decisions

1. The term "building" in the respondents' leases includes only the residential flats.

2. The tenants alone are liable to pay a service charge in respect of the major works cost currently estimated at £459,861.60 plus professional fees.

The application, parties and hearing

3. By an application dated 15 July 2015 the management company sought a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") of the tenants' liability to pay a service charge in respect of the cost of a major works project estimated at £459,861.60 plus professional fees. The tenants applied under section 20C of the 1985 Act for an order preventing the applicants from recovering their costs incurred in these proceedings through the service charge.

4. Directions were issued at a case management hearing on 11 August 2015 Copies of the application form and the tribunal directions were sent to the freehold reversioner and the lessees of all the commercial units and they were given the opportunity to be joined either as an applicant or a respondent. Ultimately the freehold reversioner, Chez Bob Limited, Euphorium Bakery and Jeffrey Stone were joined as applicants. However at their request Chez Bob Limited and Euphorium Bakery were subsequently removed from the proceedings leaving the management company, the freehold reversioner and Mr Stone as the only applicants. The lessees of the other commercial units did not apply to be joined.

5. At the case management hearing 18 of the 20 tenants were represented by Guillaumes LLP. Mr and Mrs Bose of flat 1 have been self-represented throughout and Mrs Bose appeared at the hearing. Copies of the application and directions were sent to Mr and Mrs Sefalian of flat 7 but they have not engaged with the tribunal.

6. At the hearing we were told that Guillaumes LLP no longer represented the tenants of flats 2 and 19. We were not told why they fell by the wayside but as they were represented when the directions were issued we are satisfied that they would have had notice of the hearing although they have not subsequently engaged with the tribunal.

7. We inspected the property on the morning of 23 November 2015. During the inspection we were accompanied by Ronald Laser, Daniel Rabin, Robert Brown and Mr J Satchwell. Ronald Laser is a director of the management company's managing agent, David Menzies Management Services Limited: Daniel Rabin is employed by the freehold reversioner: Robert Brown represents 16 of the 20 tenants and Mr Satchwell is the tenant of flat 21.

8. The hearing took place during the afternoon of 23 November 2015 and on the following day. The management company was represented by Stan Gallagher, the freehold reversioner by Mark Loveday and 16 of the 20 tenants by Robert Brown, all of whom are barristers. We heard evidence from Ronald Laser and Daniel Rabin.

9. Although Ms Bose of flat 1 appeared at both the case management hearing and the hearing she took no active part in the proceedings. She and her husband recently purchased their flat from the freehold reversioner and she believes that they have an indemnity in respect of the major works cost although she appreciated that this decision may impact on their future liability for service charges. Mr Stone did not attend the hearing but he had filed a brief statement to the effect that he wished *"to remain neutral"*.

Background

10. The site was developed in the mid 1930s. The centrepiece was a large Odeon cinema. Wings on each side of the cinema consisted of five shops on the ground floor with five flats on each of the first and second floors. A separate entrance in each wing from Haverstock Hill provided access via a hall and stairwell to rear concrete cantilevered walkways on the first and second floors. Metal stairwells provided a secondary means of access to the walkways from the rear of the building and were presumably intended primarily as a means of escape in case of fire. The 20 flats were accessed either from the main stairwells or from the cantilevered walkways. The Odeon cinema would have extended well beyond the rear of the flats and shops.

11. The development was built with a reinforced concrete frame. A concrete slab separates the ground floor shops from the flats above. To the front the concrete slab acts as a roof to the shops below and as balconies to the first floor flats. To the rear the concrete slab forms the cantilevered walkways to which we have referred. A similar concrete slab at second floor level separates the first floor flats from the second floor flats and again provides balconies for the second floor flats and the cantilevered walkways to the rear. Over the years most of the second floor flats have extended into the pitched roofs to form 2 storey maisonettes.

12. All the constituent parts of the development were originally let at rack rents including the residential flats. It seems that in about 1970 the development was acquired by the Manny Davidson Discretionary Trust ("the trust") that now owns it through its nominee, the freehold reversioner. By that time large suburban cinemas had become largely redundant and the trust decided to demolish the cinema and replace it largely with offices. It seems that at about the same time the trust decided to sell the flats on long leases as they became vacant.

13. The Odeon cinema closed in 1972. Although the timeline is not entirely clear it seems that the cinema was demolished in the following year. On 18

July 1974 Camden granted planning permission for *"a supermarket, cinema, 6,500 sq ft gross of offices, and 30 flats, with 40 parking spaces"*.

14. This further development, which also included the inner shops on the ground floor of each wing, was completed during the following 2 years. Certainly the construction of the new supermarket, cinema and offices must have been completed by September 1976 because on 30 March 1976 the trust granted a lease of the new supermarket (now Budgens) and rear service area for a term of 35 years from 29 September 1976. On 15 July 1977 the trust granted a lease of the new cinema (that is now the Everyman) for a term of 99 years. The offices above the front of the supermarket and cinema were extended by the erection of an additional floor following a planning consent granted in 1978.

15. The original development was built in a harmonious art-deco style. However the further development was of more modern design and visually there is a disconnect between the original wings that remain and the further development that replaced the Odeon cinema.

16. The block of 30 flats and parking spaces were built to the rear of the original site and is called Tagore House. On 11 January 1982 the trustees granted a 999 year lease of Tagore House to a Housing Association for social housing.

17. Although the trust retained flat 1 until relatively recently it seems that all the other flats were sold on long leases between 1975 and 1982: the first lease being granted on 15 August 1975. It would seem from the official copies of the freehold title included in the hearing bundle that 6 of the leases have been extended under the Leasehold Reform, Housing and Urban Development Act 1993 and a number of the second floor flat leases have been varied to include the loft spaces in the roofs.

18. It is therefore apparent that when the original tenants bought their flats and completed their leases the old Odeon Cinema had been demolished and the supermarket, cinema and offices were either in the course of construction or they had been built.

19. Since the flats were sold on long leases (and possibly before) they have been managed separately from the commercial units within the development. Currently the commercial units are managed by Wolfe Property Services Limited, which is controlled by the freehold reversioner. The residential flats are managed by David Menzies Management Services Limited, which is the management company's managing agent.

20. Annual service charge accounts are prepared by the managing agent and sent to the residential lessees. The accounts include only costs incurred in connection with the flats and do not include any costs incurred in connection with the commercial units. Consequently since the residential

leases were granted the lessees have only contributed towards the cost of maintaining and repairing the flats. In 2003 major works to the flats were completed at a cost of £274,464.68 and apart from a contribution from the freehold reversioner in respect of a retained flat the cost was paid in full by the residential lessees and without any contribution from the owners of the commercial units.

21. The position with regard to buildings insurance is a little more opaque. We were initially told that the flats are insured separately from the commercial units but that is not entirely correct. The freehold reversioner insures the whole of its substantial portfolio under one policy. An insurance certificate is issued for each property within the portfolio that records the perils insured, the sum insured and any excesses. Certificates have always been issued for "Hillfield Mansions" with separate certificates being issued for the commercial units that are referred to by reference to their street numbers on Haverstock Hill. An accompanying Fire Insurance Reinstatement Valuation makes it clear that the term "Hillfield Mansions" refers only to the 20 flats. The certificates do not record the premium contributions and the means by which the total policy premium is apportioned was not explained to us.

The leases

22. All the original flat leases were granted in substantially the same form. Included in the hearing bundle were copies of the leases of flat 15, which was granted on 28 August 1975 and flat 8, which was granted on 8 April 1982.

23. All are tripartite leases made between the trust, the management company and the lessee. The management company has 22 shares: 20 shares are owned by the residential lessees and the remaining 2 shares are owned by the freehold reversioner. However those 2 shares have enhanced voting rights so that the management company is effectively controlled by the freehold reversioner and at the hearing they made common cause.

24. The lease commences with a description of the flat. As this is central to the tenants' case we recite it in full:-

"ALL THAT flat numbered 8 on the second floor of the Building known as Hillfield Mansions Haverstock Hill in the London Borough of Camden (hereinafter called "the Building" which expression shall include any additions or extensions hereafter to be erected thereon) which premises hereby demised are edged red on the plan annexed hereto and are hereinafter referred to as "the demised Premises"....."

25. The plan shows the layout of the 20 flats and the "proposed offices" and the "proposed layout" of the supermarket and cinema although by the time

that the lease of flat 8 was granted they had all been completed. Flat 8 is edged in red.

26. We will refer to other terms of the lease in more detail below. At this point it is sufficient to give an overview of the relevant provisions. The management company is responsible for insuring *"the Building"* and for reinstating *"the Building"* if it is damaged or destroyed by an insured risk. It is responsible for maintaining, repairing and decorating *"the Building"*. Finally it is also responsible for cleaning and furnishing the common parts of *"the Building"*.

27. Each lessee contributes to the costs incurred by the management company in performing these obligations. The contribution is described in clause 5(4) of the lease in these terms:-

"The lessee shall pay to the Company by way of Service Charge such yearly sum as shall represent a rateable proportion of the Annual Service Cost (being the proportion that the rateable value of the demised premises bears to the rateable value of the Building) ..."

Issues in dispute

28. The directions issued following the attended case management hearing on 11 August 2015 identified the issues in these terms:-

- *Whether the term "building" in the residential leases includes the commercial units and/or the cinema.*
- *If so the apportionment of the estimated cost between the respondents and those responsible for paying any proportion attributable to the commercial units and/or the cinema.*
- *In any event the apportionment of the cost of the balcony repair work between the respondents and those responsible for paying any proportion attributable to the commercial units.*
- *The affordability of the respondents' contributions.*

29. The directions also recorded that the tenants *"do not dispute the reasonableness of the estimated cost nor do they take any consultation points"* . Notwithstanding an ambiguity in the tenants' statement of case Mr Brown confirmed that this remained the tenants' position and that they would not in particular take any consultation point.

30. Mr Brown also said that following the Upper Tribunal decision in Waaler v The London Borough of Hounslow [LRX/30/2014] the tenants would not pursue the affordability argument. They had in any event secured finance to pay for the proposed works if the case went against them.

31. After Mr Laser's evidence that the service charges had always been calculated by reference to the relative rateable values of the flats when they last appeared in the rating list the three advocates agreed that (the balcony work apart) any future apportionment should be made on the basis of relative rateable vales.

32. Consequently there were only two issues left to consider. The first was the meaning of the term "the Building" and the second was the apportionment of the cost of the repairs to the first floor balconies.

33. The tenants' primary argument was that the term "the Building" in the residential leases included not only the flats but also either the 10 shops below the flats or the all of the commercial units including the supermarket, cinema and offices. The management company and the freehold reversioner on the other hand argued that the term included only the flats. In the event that they were wrong about that they said that management of the flats since the residential leases were granted created an estoppel by convention that "the Building" included only the flats.

34. If the tenants succeed on their primary argument the issue of the balcony works falls away because the cost of the balcony works would in any event be shared on the basis of relative rateable values. If however the management company and the freehold reversioner are successful the issue of the balcony works turns on the inclusion or exclusion of the first floor concrete slab in the "the Building".

Reasons for our decision

The Building

35. This is an issue of lease interpretation: what is meant by the term *"the Building"* in the residential leases? Although our attention was drawn to a number of authorities we do not consider that it necessary to go beyond the guidance of Lord Neuberger contained in his judgement in Arnold v Britten [2015] UKSC 36 when he said:-

"That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but disregarding subjective evidence of any party's intentions."

36. In the passage that follows Lord Neuberger warns of the dangers of relying on commercial common sense save in very unusual circumstances and it is a warning to which we have had regard.

37. As observed above 6 of the leases have been extended under the Leasehold Reform, Housing and Urban Development Act 1993 whilst we were told

that a number of others had been extended by agreement. All those transactions would operate as surrenders and re-grants. We asked the advocates whether we should have regard to *"the facts and circumstances"* when the original leases were granted or when they were surrendered and re-granted. They agreed that we should have regard to the *"the facts and circumstances"* when the original leases were granted and we have proceeded on that basis. Equally they agreed that we must have regard to *"the facts and circumstances"* between 1975 and 1982 when all but one of the leases were granted.

38. The tenants' case rests largely on two related propositions. Firstly that the flats alone could not be said to be a "building" as that word is commonly understood. That is a vertically severable structure with a roof, walls and foundations. Secondly because the management company's obligations to insure the "building" and to reinstate the "building" would not be viable if the "building" included only the flats. An effective insuring obligation would require the insurance of the flats and the commercial units under one policy because it would be impossible to reinstate the flats alone if the shops below them were not also reinstated.

39. This reasoning however contains its own contradictions. Although Mr Brown was confident that the flats alone could not be the "building" he had some difficulty in deciding what might be included in that term. He suggested that it could be either the whole development including the offices, supermarket and new cinema or either or both of the wings of the development with just the flats and the shops directly below them. In fairness to Mr Brown it should be said that by the end of the hearing he no longer sought to persuade us that it could be the whole development although he did not entirely abandon that possibility.

40. There are problems with all these possibilities. If the leases had been granted before the demolition of the Odeon cinema the argument that the building included the whole development might have been superficially attractive. However by the time that the first lease was completed in 1975 the Odeon cinema had been demolished.

41. By the time that the offices, supermarket and cinema had been built the two wings were no longer vertically severable from the central section, in the manner suggested by Mr Brown, because both the supermarket and the cinema incorporated one of the original inner shops so that they were oversailed by the flats.

42. A purchaser of a flat between 1975 and 1982 would have recoiled from the suggestion that they might find themselves liable to contribute towards the repair and maintenance of extensive commercial units including a supermarket and cinema with extensive flat roofs that extended well beyond the rear wall of the flats.

43. The word "building" has to be read in the context of the flat description as a whole. In the lease the flat is described as being "*on the second floor of the Building known as Hillfield Mansions*". Much as "building" may indicate a vertically severable structure the word "mansions" indicates a block of flats rather than a mixed use development let alone, as in this case, with high commercial content.

44. Turning to the insurance provisions it has to be remembered that the leases are a product of their time. As we pointed out at the hearing, in the 70s and 80s it was common for leases to apportion the insuring and reinstatement obligations between different parties. Indeed many leases placed these obligations on the individual flat owners so that a building could be insured under a large number of policies. Although the impracticality of such arrangements have come to be recognised they were common when the lease were granted and it cannot be inferred that the parties must have intended that the whole development would be insured under one policy.

45. However if these are the high points of the tenants' argument everything else in the lease points in the opposite direction. The flat description continues by reserving a number of rights in favour of "*the Lessor and the tenants of the other flats in the Building*". If the parties had intended the "building" to include all or any of the commercial units one would have expected the rights to be also reserved in favour of the tenants of those units.

46. At clause 2(7) the lessee covenants "*to permit the tenants of the other flats in the Building*" to enter the demised flat in certain circumstances. At clause 2(9) the lessee covenants not to do anything that might invalidate the insurance on "*the Building or the individual flats therein*". At clause 3(1) the lessor covenants to pay any rates "*in respect of the Building not payable by the tenants of the individual flats*". At clause 3(8) the lessor covenants to include similar lessee covenants "*in every Lease of a flat in the Building*". At clause 11 the lessor covenants to pay a service charge "*in respect of each flat in the Building from time to time retained*" by it. If the parties had intended the "building" to include all or any of the commercial units these clauses would also have referred to them and not just to the flats alone.

47. At clause 3(7) the lessor covenants "*to furnish and keep furnished the entrance hall of the Building used in common as aforesaid as would normally be furnished in a block of flats of similar character to the Building*". The clear implication is that the "building" is a block of flats and does not include any of the commercial units. Indeed the commercial units do not share an entrance hall.

48. It is also helpful to have regard to the service charge provisions in the leases. The use of relative rateable values was commonly used in residential blocks of flats to apportion the service charge costs prior to the

abolition of the domestic rating system. However as Mr Brown acknowledged under the old rating system commercial property was more highly rated than residential property. Consequently that methodology was generally not adopted in mixed use developments such as this.

49. The lessor's obligations that give rise to the service charge costs are contained in clause 3 of the lease. The obligation to repair at clause 3(4) omits any reference to foundations indicating that only the upper flats are included in the "building". The service charge costs themselves are identified in clause 5 (6). Clause 5(6)(g) identifies *"The cost of such other services for the benefit of the Lessees and other tenants of the flats in the building"*. The same clause concludes by obliging the lessor *"to maintain the Building as a block of first-class residential flats"*. If the parties had intended the "building" to include the commercial units the cost of providing other services to those units would have been expressly recoverable but it is not. Again the obligation to maintain the "building" as a *"block of first-class residential flats"* implies that it does not include any of the commercial units.

50. Having regard to the changing structure of the development between 1975 and 1982 it is clear that when the lease is read as a whole the parties must have intended the word "building" to include only the flats. Ultimately we agree with Mr Gallagher and Mr Loveday that the "building" is no more than a label to identify the flats.

51. Consequently and for each of the above reasons we determine that the "building" does not include either the shops below the residential flats or the cinema, supermarket and offices that are either below or adjacent to the residential flats.

Estoppel by convention

52. At the hearing Mr Gallagher advanced the argument that the parties subsequent conduct amounted to an estoppel by convention that precluded the tenants from asserting that the "building" included not only the flats but also some or all of the other commercial units. The argument was adopted by Mr Loveday.

53. From the applicants' perspective the advantage of the argument is that it allows them by the backdoor to introduce evidence of the parties' subsequent conduct that Lord Neuberger rules out. As Lord Denning MR said in Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd:-

"So here we have available to us, in point of practice if not in law, evidence of subsequent conduct to come to our aid. It is available, not so as to construe the contract, but to see how they themselves acted upon it. Under the guise of estoppel we can prevent either party from going back on the interpretation they themselves gave to it".

54. Superficially the argument in this case is persuasive. Since the leases were granted the various lessors and lessees have always operated the service charge provisions of the leases on the basis that the "building" included only the flats. That reached its high point in 2003 when major works to the flats were completed at a cost of £274,464.68. Apart from a contribution from the freehold reversioner in respect of a retained flat the cost was paid in full by the residential lessees and without any contribution from the owners of the commercial units.

55. However as we pointed out at the hearing there is a potential flaw in Mr Gallagher's reasoning. Over the years most if not all of the flats will have changed hands and many of them will have been sold on a number of occasions. It would seem unfair if a purchaser of a flat were estopped from asserting that the "building" included also some or all of the commercial units by the conduct of a predecessor in title of which that purchaser knows nothing.

56. Mr Gallagher had anticipated our objection. He drew our attention to the comments of Judge Edward Cousins in Clancy and Nunn v Sanchez & others [2015] UKUT 0387 (LC) at paragraph 36 when he said, in finding an equitable estoppel:-

"or the Respondents have waived any right to resile from the position that has been adopted throughout the period of 19 years or so both by themselves and their predecessors in title".

57. This is tenuous authority for the proposition that an estoppel can be founded on the unknown conduct of a predecessor in title. Judge Cousins did not decide the case primarily on that ground. His comment is at best obiter and we agree with Mr Brown that it appears to be no more than an aside.

58. Estoppel by convention was not pleaded by either applicant and Mr Brown had to meet it at short notice. Having found in favour of the applicants in any event we are not required to decide the estoppel argument and we decline to do so.

Apportionment of the balcony works

59. Although the hearing bundle did not include a full specification of the proposed work, the summary that was included indicates that all the work falls above the concrete slab separating the ground and first floors. If that is right no apportionment will be necessary. We are nevertheless conscious that the work is urgent and everyone appears to want it completed without any undue delay. Consequently we deal with the issue briefly in the hope of forestalling a request for a further hearing.

60. There is a convention that in traditionally built properties the demise of a flat includes the whole of its floor. That convention was given judicial recognition in Graystone Property Investments Ltd v Margulies [1984] 47 P &CR 472. Applying that convention by analogy to this concrete framed building it is logical to conclude that the concrete slabs that forms the floors of the flats fall wholly within the management company's repairing obligation and that consequently the cost is recoverable from the residential tenants alone.

61. The management company's repairing obligation at clause 3(4) of the lease is *"to keep the main structure of the Building including the roof ceilings floors and external and external walls ..... and also the balconies ..... in good and substantial order and condition"*.

62. The concrete slab is both the balcony and the floor of each flat. Furthermore the rear concrete walkways form part of the concrete slab and they serve only the flats: they are of no benefit to any of the shops below them. It would be illogical to expect the owners of the commercial units to contribute either directly or indirectly to their repair.

63. Clause 5(6) (a) of the lease identifies the costs of maintaining party structures that might be recovered through the service charge. If the parties had intended the floors to be repairable as a party structure one would have expected them to be listed in this clause. However no mention is made of them. The only party structures identified are *"party walls, private roadways, and forecourts gutters common sewers and drains"*. The clear implication is that the floors are not a party structure.

64. Consequently and for each of the above reasons we are satisfied that the original parties to the lease would have assumed that the slab that forms the floor to the first floor flats was repairable by the management company and the cost recoverable from the residential tenants alone.

Section 20C

65. The parties agreed that we should deal with the tenants' 20C application on the basis of written representation after we have issued this decision. In considering that application we are prepared to consider whether the costs of these proceedings can in fact be recovered through the service charge under the terms of the lease. In respect of that application we make the following further directions:-

    a. The respondents shall by **15 January 2016** send to the applicants with three copies to the tribunal a statement of their case together with copies of any authorities on which they rely.

b. The applicants shall by **29 January 2016** send to the respondents with three copies to the tribunal a statement in response together with copies of any authorities on which they rely.

c. The respondents may by **5 February 2016** send to the applicants with three copies to the tribunal a brief statement in reply.

d. We shall determine the 20C application within **14 days of the 15 February 2016** and shall issue a short decision shortly thereafter.

Name: Angus Andrew **Date: 18 December 2015**

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/LSC/2015/0290**
Property	:	**Hillfield Mansions, 1-21 Haverstock Hill, London NW3 4QR**
First applicant	:	**Quayglade Limited ("the management company")**
Representative	:	**Comptons Solicitors LLP**
Second applicant	:	**MDDT Nominees SA and Wolfe Nominees SA ("the freehold reversioner")**
Representative	:	**Brecher Solicitors**
Third applicant	:	**Jeffrey Stone**
Respondents	:	**The 20 long residential leaseholders listed in the application form ("the tenants")**
Representative	:	**Guillaumes LLP, solicitors apart from the tenants of flats 1, 2, 7 and 19 who were not represented**
Type of application	:	**For an order under section 20C of the Landlord and Tenant Act 1985**
Tribunal members	:	**Angus Andrew** **Mr C Gowman MCIEH, MCMI, BSc** **Mrs L Hart**
Date of decision	:	**5 May 2016**

DECISION

Decision

1. We decline to make an Order under section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act").

Background

2. By our decision of the 18 December 2015 ("our original decision") we decided that the tenants alone were liable to pay a service charge in respect of the major works costs then estimated at £459,861.60 plus professional fees. There was no appeal against our original decision. At the request of the parties we did not deal with the tenants' application under section 20C of the Act. Paragraph 65 gave directions for the determination of the 20C application on the basis of written submissions.

3. We have received written submissions from both the 16 represented tenants and from the management company. We gave further time to the other parties to respond but no submissions have been received from the freehold reversioner, the third applicant or the unrepresented tenants.

4. The detailed background to this case is set out in our original decision and no useful purpose would be served by repeating it in this decision that may be regarded as an addendum to it.

5. It was generally accepted that on a section 20C application this tribunal should not determine a landlord's entitlement to recover the costs incurred in tribunal proceedings. However at least one recent Upper Tribunal decision has criticised that approach and suggested that a landlord's entitlement to recover the cost of proceedings through the service charge should be considered on a section 20C application if only to avoid the necessity of a subsequent application under section 27A of 1985 Act. It was for that reason that in paragraph 65 we said that we would be prepared to consider whether the costs of these proceedings can in fact be recovered through the service charge. The parties have however declined to accept that invitation with the result that if the management company's entitlement is questioned the issue will have be determined on a future section 27A application.

Reasons for our decision

6. In our original decision we found in favour of the management company and the freehold reversioner. The tenants nevertheless submit that we should make an order under section 20C that would prevent either the management company or the freehold reversioner from recovering the cost of these proceedings through the service charge. In support of their application the tenants essentially rely on two grounds. Firstly they say that during the course of these proceedings the management company shifted its position. The tenants suggest that initially the management company did not contend that *"the building"* included only the residential flats but rather it relied on a number of other arguments that were either

abandoned or later considered to be irrelevant. It is suggested that in consequence the management company in particular set a number of *"hares running"* that increased the tenants' costs and thus justify at least a partial section 20C order.

7. Secondly, the tenants rely on the management company's repeated threats to apply for costs under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. That rule permits a tribunal to make a cost order against a party that *"has acted unreasonable in bringing, defending or conducting proceedings in ... a residential property case"*.

8. Before dealing with each of these arguments it is helpful to stand back and look at the intention behind section 20C. It was summarised by HHJ Michal Rich QC in the Tenants of Langford Court v Doren Limited (LRX/37/2000) when at paragraph 22 he quotes from the decision of Peter Gibson LJ in Iperion Investments Corporation v Broadwalk House Residents Ltd [1995] 2 EGLR47. Peter Gibson LJ said:

> *"The obvious circumstance which Parliament must have taken to have had in mind in enacting 20C is a case where the tenant has been successful in litigation against the landlord and yet the cost of the proceedings are within the service charge recoverable from the tenant"*.

9. At paragraph 32 of the Langford Court decision HHJ Michael Rich QC points out that:

> *"Section 20C is a power to deprive a landlord of a property right. If the landlord has abused its rights or used them oppressively that is a salutary power, which may be used with justice and equity; but those entrusted with the discretion given by section 20C should be cautious to ensure that it is not itself turned into an instrument of oppression"*.

10. This cautious approach was reinforced by a HHJ Rich QC in the subsequent decision of Schilling v Canary Riverside Development PTE Limited (LRX/26/2005) when he said at paragraph 13 when speaking of the Langford Court decision:

> *"The ratio of the decision is "there is no automatic expectation of an Order under 20C in favour of a successful tenant". So far as an unsuccessful tenant is concerned, it requires some unusual circumstance to justify an order under section 20C in his favour"*.

11. In this case the tenants' were wholly unsuccessful. Consequently even if we were to make only a partial order we would have to find some unusual circumstance that would, in the words of section 20C, make it *"just and equitable in the circumstances"* to make such an order.

12. We now turn to the two arguments advanced by the tenants. Although the details of the management company's case may have changed as the case progressed the essential issue between the parties was constant throughout: that is did the cost of the major works have to be paid by the residential tenants alone or by both the residential tenants and the commercial tenants?

13. Parties in contested litigation and especially in a case that turns on the interpretation of a lease will jettison some arguments and adopt others as the case progresses. That is part and parcel of the litigation process. From the outset the tenants must have understood the central issue and neither the management company nor the freehold reversioner should be criticised for refining their arguments as the case progressed to a hearing. We do not consider that their conduct comes close to justifying an order under section 20C.

14. Turning to the tenants' second argument we agree that the management company's threat of a rule 13 application was clearly intended to dissuade the tenants from proceedings with their case. Even at the hearing Mr Gallagher held open the possibility of a subsequent rule 13 cost application. Since the introduction of the 2013 rules such threats are now commonly made by represented parties. When made against unrepresented parties they may rightly be considered as oppressive but in cases such as this, where both parties are represented, they are simply part of the cut and thrust of litigation that is conducted in an adversarial forum.

15. Furthermore in this case the threat was never realised no doubt because following the hearing those representing the management company and the freehold reversioner appreciated that an application under rule 13 would have no reasonable prospect of success. The tenants were never put to any additional cost as a result of the threatened rule 13 application: they saw the threat for what it was and were not intimidated by it. The unrealised threat of a rule 13 application alone does not make it just and equitable to make an order under section 20C.

16. For each of the above reasons we are satisfied that there are no unusual circumstances that would make it just and equitable to make a section 20C order and consequently we decline to make one.

Name: Angus Andrew **Date: 5 May 2016**