FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/00MC/LIS/2020/0014** **CAM/00MC/LSC/2020/0015** **CAM/00MC/LDC/2020/0032**
HMCTS code (audio, video, paper)	**:**	**P: PAPERREMOTE**
Property	**:**	**Tetbury Court, Prospect Street, Reading, Berkshire RG1 7TR**
Applicants	**:**	**1. John Francis Smith (No. 35)** **2. James Dale (No. 18)** **3. Alan Cossey (No. 36)** **4. The other 16 leaseholders named in Schedule 1 to the substantive Decision**
Respondent	**:**	**June Baker (acting by her attorney Jeremy Baker)**
Representative	**:**	**Womble Bond Dickinson (UK) LLP**
Type of applications	**:**	**Costs** – applications under section 20C of the Landlord and Tenant Act 1985, paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 and rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013
Tribunal members	**:**	**Judge David Wyatt** **Miss M Krisko BSc (Est Man) FRICS** **Mr J E Francis QPM**
Date of decision	**:**	**25 August 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote decision on the papers. A further hearing was not held because it was not necessary; the parties are deemed to have consented to this matter being determined without a further hearing and all issues could be determined on paper. The documents we were referred to are those described in paragraphs 2 and 3 below. We have noted the contents.

Decisions of the Tribunal

The Tribunal:

(1) orders under section 20C of the Landlord and Tenant Act 1985 that all the costs incurred by the Respondent in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants;

(2) orders under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 that any administration charge payable by any of the Applicants in respect of the costs incurred by the Respondent in connection with these proceedings is extinguished;

(3) orders the Respondent to pay £200 to John Smith and £200 to Amanda Prior (on behalf of the leaseholders she represents) to reimburse the tribunal fees paid by them; and

(4) makes no other order in respect of costs.

Reasons

Procedural history

1. In 2020, the Applicants applied for determination of payability of service charges in respect of major repair works and other costs. They also applied for orders under section 20C of the Landlord and Tenant Act 1985 (the "**1985 Act**") and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the "**2002 Act**"). The Respondent applied for dispensation with the statutory consultation requirements in respect of the relevant major works. Following a hearing, our decision on the service charge and dispensation applications was issued on 28 April 2021 ("the "**Decision**"). As arranged at the hearing, the Decision directed that we would determine the applications under section 20C and paragraph 5A without a further hearing, taking into account any written submissions provided by the parties in accordance with paragraph [122] of the Decision.

2. On 12 May 2021, the Applicants represented by Amanda Prior provided written submissions settled by Counsel inviting the tribunal to make the cost protection orders sought under section 20C and paragraph 5A and an order for reimbursement of the tribunal fee. On 21 May 2021, the Respondent confirmed by e-mail they did not oppose the applications for orders under section 20C or paragraph 5A. They opposed the suggestion of any order for repayment of the tribunal fee but (unsurprisingly) decided not to make specific submissions on this, because the cost of doing so would be disproportionate.

3. On 12 May 2021, the Applicants represented by Ms Prior applied for an order under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the "**Rules**"). The application was received within the time limit prescribed by Rule 13(5). On 21 May 2021, the judge gave directions proposing that this new application be determined on or after 21 July 2021 without a hearing, based on written submissions to be provided as set out in the directions, at the same time as the outstanding applications. The directions required any request for a further oral hearing to be made by 2 July 2021. There was no request for a hearing so, by Rule 31, the parties are taken to have consented to determination without a hearing. Pursuant to the directions, Ms Prior prepared an electronic bundle of 150 pages for our use in determining the costs application. We are satisfied it is appropriate for the applications to be determined based on the documents in this bundle, together with the documents described in paragraph 2 above and in the Decision.

4. To avoid repetition, this decision should be read with the substantive Decision, which explains the background and matters in relation to the conduct of the parties in some detail. Unless otherwise indicated, references in square brackets are to the corresponding paragraphs of the Decision.

Section 20C/paragraph 5A

5. As noted in the Decision [122], the Respondent accepted that the leases did not "*explicitly*" provide for the costs of the relevant proceedings to be included in the service charge. The written representations from the relevant Applicants were made without prejudice to their primary contention that the Respondent could not recover such costs under the terms of any of the leases.

6. The applications under section 20C and paragraph 5A were not opposed by the Respondent. For the reasons summarised below, we find that the Respondent did not conduct the proceedings with an appropriate level of co-operation, and that contributed to the parties being entrenched, distrustful and difficult. We also consider that the Applicants enjoyed a significant measure of success, securing reduction of scaffolding costs and set-offs for damages as a result of the Respondent's failure to repair the garages. In these respects, we accept the written submissions from Counsel for the relevant Applicants, which refer to specific paragraphs of our Decision. It appears the Respondent has no intention of attempting to recover the costs of these proceedings from any leaseholders through the service charge. Even if they did make such an attempt in relation to leaseholders other than the Applicants, those leaseholders could make their own applications for orders under section 20C. We consider that in all the circumstances it is just and equitable to make orders under section 20C of the 1985 Act and paragraph 5A of Schedule 11 to the 2002 Act, for the reasons summarised above and to ensure there is no dispute about whether or not the costs of these

proceedings can be recovered through the service charge or from individual Applicants as administration charges.

Rule 13

7. Rule 13(2) gives the tribunal discretion to make an order requiring a party to reimburse to any other party the whole or part of any tribunal fee paid by that other party.

8. There has (rightly) been no application under Rule 13(1)(a), which deals with wasted costs. This leaves Rule 13(1)(b), which provides that the tribunal may make an order in respect of costs only "*…if a person has acted unreasonably in bringing, defending or conducting proceedings…*" in the relevant case(s). When considering whether a party had acted unreasonably in this context, the Upper Tribunal in Willow Court Management Company 1985 Ltd v Alexander [2016] UKUT 0290 cited with approval the judgment of Sir Thomas Bingham MR in Ridehalgh v Horsefield [1994] Ch 2005. It did so at paragraph 24 of its decision in these terms:

> ""*Unreasonable" conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test": is there a reasonable explanation for the conduct complained of?*".

Did the Respondent act unreasonably?

9. Ms Prior made detailed submissions dated 8 June 2021 in support of the application under Rule 13(1)(b). Pursuant to the directions, the Respondent provided a statement in response. Ms Prior was given permission to produce a brief reply and did so on 30 June 2021. All these documents, with enclosures, were included in the electronic bundle prepared by Ms Prior for this determination.

10. The Respondent received some difficult correspondence, but they were in some respects (as set out in the Decision) at fault. In particular, they had been in breach of their repairing covenant in relation to the garages for a long time. They were professionally represented and dealing with lay leaseholders. It was unfortunate they did not endeavour to take the heat out of the situation by providing more information and attempting to engage more constructively with aggrieved leaseholders. Their conduct in relation to the proceedings was one cause, but not the only cause, of the approach taken by some of the Applicants. Some of the Applicants raised a very wide range of issues and arguments, which had to be answered and on many of which the Applicants were not successful. Despite encouragement in case management hearings, the parties did not do enough to co-operate to provide information, focus on the issues

and take a realistic approach. As a result, they ended up fighting tooth and nail about every point, good, bad and indifferent. The Respondent failed to keep or disclose requested documents, but we have considered that as part of the conduct summarised above and the consequence was that we determined relevant matters against them. We do not consider that it was unreasonable for the purposes of Rule 13(1)(b) for the Respondent to fail to make a settlement proposal after it suggested without prejudice discussions (even if that suggestion would not have resulted in genuine discussions, as the relevant Applicants suggest) and the relevant Applicants asked for a written proposal instead. None of the parties made enough effort to seek to settle the matter or narrow the issues. Locking access to the garages was questionable and probably made relations worse, but even if that could be said to relate to the conduct of the proceedings we are satisfied that (whether or not it should have been done) it is sufficiently explained by the unsafe condition of the garages at the time. We do not propose to summarise in this decision every argument in the submissions made by the relevant Applicants, but we have considered them carefully. In all the circumstances, while we accept Ms Prior's submission that an order for costs can include pre-commencement costs, we are not satisfied that the Respondent acted unreasonably (in a Willow Court sense) in bringing, defending or conducting the relevant proceedings. Accordingly, we cannot make an order under Rule 13(1)(b).

11. However, we are satisfied that the Respondent should reimburse the tribunal fees paid by the Applicants. Its failure to repair and make any realistic proposal in respect of the scaffolding and the disrepair, and conduct in the proceedings, probably made the applications and the hearing unavoidable. We understand that totals of £200 were paid by Mr Smith and £200 by Ms Prior on behalf of the Applicants she represents, but if that is incorrect the parties should inform the tribunal office by 3 September 2021.

Name: Judge David Wyatt **Date:** 25 August 2021

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 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).