FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/00ML/LIS/2021/0051
Property:	Block D, New England Street, Brighton BN1 4GS (known as Stepney Court)
Applicant:	Firstport Property Services Limited
Representative:	J B Leitch Solicitors
Respondent:	The Leaseholders of Stepney Court
Representative:	Mr Thorowgood of Counsel for 17 Leaseholders Mr Packer, for himself
Type of Application:	Section 27A and 20C of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002 (Liability to pay service charges) Landlord's application for the determination of reasonableness of service charges for the year 2021. Application For An Order Limiting Payment of Landlord's Costs
Tribunal Member:	Judge A Cresswell
Date of Decision and venue of Hearing:	14 June 2022 on the Papers

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DECISION

The Application

This case arises out of the Applicant landlord's application, made on 4 November 2021, for the determination of liability to pay service charges for the year 2021.

Summary Decision

1. Removing and replacing cladding which represents a fire risk is clearly *a reasonable and proper expense* to be incurred by the landlord and so the reasonable costs of doing so can be demanded from all leaseholders.
2. Removing and replacing cladding which represents a fire risk is clearly an act by the landlord *in and about the maintenance and proper convenient management and running of the Estate including in particular …… any expenses incurred in rectifying or making good any inherent structural defect in the Block or any other part of the Estate (except in so far as the cost thereof is recoverable under any insurance policy for the time being in force or from a third party who is or who may be liable therefor)* and so the reasonable costs of doing so can be demanded from all leaseholders.
3. The Tribunal allows the Respondents' application under Section 20c of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002, thus precluding the Applicant from recovering its cost in relation to the application by way of service charge or administration charge.

Preliminary Issues

4. **James Scicluna v Zippy Stitch Ltd & Ors** (2018) CA (Civ Div) (Longmore LJ, Underhill LJ, Peter Jackson LJ): Where the parties to tribunal proceedings had agreed a list of issues, the matters to be determined in the substantive hearing and on any appeal were properly to be limited to those agreed issues.
5. The Tribunal is asked to make only *a prospective determination that the service charges are payable under the Leases* as the Applicant confirms in "Submissions on Behalf of the Applicant".

Inspection and Description of Property

6. The Tribunal did not inspect the property. The property in question consists of Block D, which is known as Stepney Court. Stepney Court is a mixed-use building, consisting of a number of commercial units on the lower ground and ground floors as well as 46 residential units ("the Flats").

Directions

7. Directions were issued on various dates. These directions provided for the matter to be heard on the basis of written representations only, without an oral hearing, under the provisions of Rule 31 of the Tribunal Procedure Rules 2013.
8. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.
9. This determination is made in the light of the documentation submitted in response to those directions.
10. The Tribunal has regard in how it has dealt with this case to its overriding objective:

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Rule 3(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes:

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it:

(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.

(4) Parties must:

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

Ownership and Management

11. Firstport Property Services Limited ("Firstport") is the management company, with Sainsbury PLC as the freeholder, Abacus Land 4 Limited ("Abacus) as the head lessor of the residential part, Moat Homes as the lessor of most of the residential properties.
12. Stepney Court is a mixed-use building, consisting of a number of commercial units on the lower ground and ground floors as well as 46 residential units ("the Flats"). The parts of Stepney Court let to Abacus under the Head Lease consist of solely the residential parts of the building.
13. The Head Lease is subject to 46 underleases in respect of Stepney Court, relating to each of the Flats ("the Leases").
14. Thirty-six of these underleases were originally granted to Moat Homes Limited ("Moat Homes"), a housing association, who in turn sublet 22 of the flats on shared ownership leases and 14 on short tenancies. However, 8 of these flats have since moved into private ownership, with the shared ownership leaseholder or social housing tenant taking an assignment of the relevant underlease from Moat Homes. The remaining 10 underleases are long residential leases granted to private purchasers from the outset. The Respondents to this application are Moat Homes, and (where applicable) the current private leaseholders and shared ownership leaseholders of the Flats. The private leaseholders' ownership and Moat Homes' ownership is derived from and subject to the terms of the Leases. The shared ownership leaseholders are required under the shared ownership leases to pay by way of service charge all sums payable by Moat Homes under the Leases.

The Leases

15. There was a number of leases before the Tribunal. They are detailed in the Applicant's submissions below. The Tribunal uses the same descriptive terms for the leases as used by the Applicant.
16. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court:

Arnold v Britton and others [2015] UKSC 36 Lord Neuberger:

15. *When interpreting a written contract, the court is concerned to identify*

the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. 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 (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30.

16. For present purposes, I think it is important to emphasise seven factors:

17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances .... should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the

worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made.

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known

or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is Aberdeen City Council v Stewart Milne Group Ltd [2011] UKSC 56, 2012 SCLR 114, where the court concluded that "any … approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract (see paras 17 and 22).

23. Seventhly, reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in McHale v Earl Cadogan [2010] EWCA Civ 14, [2010] 1 EGLR 51, para 17. What he was saying, quite correctly, was that the court should not "bring within the general words of a service charge clause anything which does not clearly belong there". (120. I agree, if by this it is meant that the court should lean towards an interpretation which limits such clauses to their intended purpose of securing fair distribution between the lessees of the reasonable cost of shared services.)

17. Lord Neuberger's final point above is a reference to the doctrine of "*contra proferentem*", which had been understood to require an ambiguity in a clause in a lease to be resolved against a landlord as "*proferor*".

The Law

18. The relevant law is set out in sections 20C and 27A of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002.

19. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable insofar as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.

20. Under Section 20C and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002, a tenant may apply for an order that all or any of the costs incurred in connection with the proceedings before a Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge or administrative charge payable by the tenant specified in the application.

21. The relevant statute law is set out in the Annex below.

Payability of The Cost of Replacing Cladding

The Applicant

22. The Applicant is aware that Works are required to Stepney Court due to issues relating to the external facade. As the Works will involve the replacement of non-ACM cladding, the Applicant has also applied to the government's Building Safety Fund ("the BSF") in respect of the costs relating to the Works. Given the nature of the Works, the Applicant asserts that they are essential in order to ensure the safety of the Respondents and the building.

23. The Applicant intends to rely upon the Head Lease and Leases for their full terms and effect. In summary, the Applicant believes that the Respondents are required to pay a service charge being a proportion of the costs incurred by the Applicant in providing services to Stepney Court, with such services to include, inter alia, the repair and

maintenance of the structure and external wall system. The immediately pertinent terms of the Head Lease and the Leases are set out below.

The Head Lease

At Clause 5.4.1.1 of the Head Lease, Abacus covenanted as follows:

"*To repair with good quality and sound materials the Premises and keep them in good and substantial repair excepting damage caused by an Insured Risk save to the extent that the insurance money is irrecoverable as a consequence of any act of default of the Tenant or anyone at the Premises expressly or by implication with the Tenants authority or where the Landlord shall pay the insurance monies to the Tenant pursuant to Clause 7.4.7. "*

The Demised Premises (as defined at Clause 1.14 of the Head Lease) consists only of the residential parts of Stepney Court and accessways and service areas serving those parts (as well as parts of Block C at the Development). The commercial parts of Stepney Court are retained by Sainsbury's. The Head Lease was originally an airspace development lease, and the Demised Premises expressly excludes the Main Structure of the building (defined at Clause 1.8) up to the first-floor slab level.

The Leases

The housing association leases

The 'Maintained Property' is defined within the 36 housing association leases as:

"*Those parts of the Estate which are more particularly described in the Second Schedule and the maintenance of which is the responsibility of the Manager*".

24. The remaining terms of the housing association leases differ in their description of the Maintained Property in the Second Schedule and the services to be carried out by the Applicant contained within the Sixth Schedule. They describe these different forms of lease below under the headings "Lease Form A" and "Lease Form B".

i) Lease Form A

A total of 22 of the housing association leases define the Maintained Property in paragraph of the Second Schedule as follows:

"The Maintained Property shall comprise (but not exclusively):

1.1 The Accessways and the Communal Areas shown on Plan 1 the drying area (if any) bin and gardeners management stores and other storage facilities (if any) refuse stores and cycle stores

1.2 The internal common parts of the Block

1.3 All doors and window frames not forming part of the demise of any of the Dwellings

1.4 All Service Installations not used exclusively by any individual Dwelling.'

25. The Tenth Schedule of those leases contains the following covenant on the part of the Applicant as Manager:

"1. Conditional on the Manager having first received payment of the Tenant's Proportion then to carry out the works and do the acts and things set out in the Sixth

Schedule PROVIDED THAT:

1.1 The Manager shall not be held personally responsible for any damage caused by any defects or want of repair to the Maintained Property or any part thereof unless such matters are reasonably apparent by visual inspection or until notice in writing of any such defect or want of repair has been served on the Manager and the Manager shall have failed to make good or remedy such matter within a reasonable period following receipt of any such notice"

26. The Sixth Schedule sets out the works and acts which the Applicant is conditionally obliged to undertake. Part B of the Sixth Schedule includes the following works pertaining to the Block, at paragraphs and 5:

" *1 Inspecting, rebuilding, repointing, repairing, cleaning, renewing, redecorating or otherwise treating as necessary and keeping the internal common areas of the Block and every part thereof in good and substantial repair order and condition and renewing and replacing all worn or damaged parts thereof*

5. Inspecting, rebuilding, repointing, repairing, cleaning, renewing, redecorating or otherwise treating as necessary and keeping the internal common areas of the Block and every part thereof in good and substantial repair order and condition and renewing and replacing all worn or damaged parts thereof"

ii) Lease Form B

27. The remaining 14 housing association leases define the Maintained Property in Paragraph 1 of the Second Schedule as follows:

"*The Maintained Property shall comprise (but not exclusively):*

1.1 The Accessways and the Communal Areas the drying area (if any) bin and gardeners management stores and other storage facilities (if any) refuse stores and cycle stores

1.2 The Common Parts

1.3 All doors and window frames not forming part of the demise of any of the Dwellings

1.4 All Service Installations not used exclusively by any individual Dwelling

28. Unlike in Lease Form A, the reference to common parts in paragraph 1.2 is not restricted to internal common parts. In Lease Form B, 'the Common Parts' are defined at Clause 1 as including the external parts of the Block:

"1. Definitions

"the Common Parts" means

(a) the structural parts of the Block including the roofs, gutters, rainwater pipes, foundations, floors and walls bounding individual Properties and all external parts of the Block including all decorative parts thereof ...'

29. The Tenth Schedule contains the same covenant on the part of the Applicant as Manager as in Lease Form A, as set out above.

30. The Sixth Schedule again set outs the works and acts which the Applicant is conditionally obliged to undertake. Part B of the Sixth Schedule includes the following works pertaining to the block, at paragraph 1:

" 1. Inspecting, rebuilding, repointing, repairing, cleaning, renewing, redecorating or otherwise treating as necessary and keeping the Common Parts and every part thereof in good and substantial repair order and condition and renewing and replacing all worn or damaged parts thereof"

The private residential leases

31. *The 10 private residential leases contain the same terms as the 22 housing association leases in Lease Form A, described above, in that they define the Maintained Property by reference to the internal common parts of the Block only. The repairing obligations within Part B of Schedule 6 also refer only to the internal common areas of the Block.*

The Leases generally

32. *Part E of the Sixth Schedule is consistent across all of the Leases and provides, inter alia, for the following works to be carried out by the Applicant:*

"15. All other reasonable and proper expenses (if any) incurred by the Manager:

15.1 in and about the maintenance and proper convenient management and running of the Estate including in particular but without prejudice to the generality of the foregoing any expenses incurred in rectifying or making

good any inherent structural defect in the Block or any other part of the Estate (except in so far as the cost thereof is recoverable under any insurance policy for the time being in force or from a third party who is or who may be liable therefor)"

33. *The definition of 'Estate' within the Leases is set out in the First Schedule, as follows:*

"all that piece of land situate at Blocks A and B and Blocks C and D New England Street Brighton now or formerly comprised in the Title Numbers ESX286590 and ESX296245 … together with any buildings or structures erected or to be erected thereon or on some part thereof".

34. The leaseholders under the Leases (being Moat Homes and the current private leaseholders of the Flats) all covenant under the terms of the Leases to pay service charges, pursuant to the Eighth Schedule, Part 1, paragraph 2:

"To pay to the Manager or its authorised agent (or to the Lessor in the event that the Lessor is managing pursuant to paragraph 1 of the Ninth Schedule) the Lessee's Proportion at the times and in the manner herein provided and without deduction or set-off and free from any equity or counterclaim."

35. *The 'Lessee's Proportion'* is defined within the Leases at Clause as: *"the proportion of the Maintenance Expenses payable by the Lessee in accordance with the provisions of the Seventh Schedule."*

36. *The 'Maintenance Expenses'* are also defined within the Leases at Clause as *"the moneys actually expended or reserved for periodical expenditure by or on behalf of the Manager or the Lessor at all times during the Term in carrying out the obligations specified in the Sixth Schedule".*

37. The shared ownership leaseholders (being the remaining Respondents to this application) are required by Clause 3(1) of the shared ownership leases to pay by way of service charge all sums payable by Moat Homes under the Leases.

Payability of the Proposed Works

38. The Applicant contends that if BSF funding is not granted in respect of the Works, the costs of the Works are payable by the Respondents via the service charge provisions of the Leases and the shared ownership leases, as set out above.

39. It is the Applicant's firm belief that those Leases in Lease Form A, which refer twice in Part B of the Sixth Schedule to maintenance of the internal common parts of the Block, do so in error and are evidently capable of correction by construction. The

identical form of paragraphs and 5 of Part B of the Sixth Schedule of those Leases, as set out at paragraph 17 above, indicates a clear intention that one of these paragraphs should have referred to the external common parts of the Block to avoid the Leases being silent on this point.

40. The Applicant therefore believes that either:

a. All the Leases should be read as referring in Part B of the Sixth Schedule to 'Common Parts', defined so as to include both internal and external common parts, as is the case with the 14 housing association leases in Lease Form B; or

b. Paragraph 5 of Part B of the Sixth Schedule of the Leases in Lease Form A should be read to replace the word 'internal' with 'external', so as to expressly include the external parts of the Block.

41. Additionally or in the alternative, paragraph 15.1, Part E of the Sixth Schedule, which is consistent across all the Leases and which refers to the Manager rectifying and making good any inherent structural defects in the block or any part of the Estate, provides that the costs associated with the provision of the external works are payable via the service charges.

42. In summary, the Applicant is of the view that the error in the 10 private residential leases and 22 housing association leases as to the meaning of the 'Maintained Property' should not prevent Part B of the Sixth Schedule and/or paragraph 15.1 of Part E and from being relied upon to recover the costs of the Works. Furthermore, the fact that a proportion of the Leases (namely, the 14 housing association leases drafted in Lease Form B) contain a clear positive obligation to incur costs associated with such Works adds substantially to the viability of the Applicant's position.

The Works

43. A summary of the Works to be carried out, with anticipated costs, is attached at Annex 8 of the submissions. The Applicant has not yet incurred any costs in relation to the Works, nor has the Applicant obtained a final scope of works and finalised priced schedule, but they intend to do so in due course. The information provided by the Applicant for the purposes of determining contractual payability is in outline form at this stage, pending the Tribunal's determination.

44. A matrix of the Respondents' service charge apportionments is provided at Annex 9. The apportionments to each schedule reflect the individual fixed service charge proportions within the Leases.

Conclusion

45. It has been discovered that the external wall system at Stepney Court increases the risk of the spread of fire and such issues must be addressed to ensure the safety of the Respondents.

The Respondents

46. The Respondents, leaseholders of some 23 properties, who have taken a part in the proceedings support the Applicant's case.
47. Abacus Land 4 Limited (C/O Homeground Management Limited), describing itself as Second Respondent, also supports the Applicant's case. It also argues that there is an estoppel by convention in relation to the leaseholders by reason of previous payments for repairs.

The Tribunal

48. The Tribunal has been presented with a number of forms of lease, all of which it is told affect different leaseholders at Stepney Court. They are described as Form A, a lease of 20 May 2008, Form B, a lease of 17 December 2007, Private residential lease of 20 May 2008 and Shared Ownership Lease of 7 August 2009 (which lease refers to a Superior Lease of 21 December 2007).
49. The Tribunal is asked to make only *a prospective determination that the service charges are payable under the Leases* as the Applicant confirms in "Submissions on Behalf of the Applicant". The service charges in question would be in respect of the replacement of non-ACM cladding due to the inherent fire risk. It is not asked to make any findings as to the reasonableness of any costs.
50. The Tribunal is asked to ignore the effect of the Building Safety Act 2022 on the requirement for leaseholders to contribute to the costs, and does so.
51. The Tribunal is not asked to determine any form of apportionment of the costs and does not do so.
52. The Applicant relies upon 2 premises for the determination sought.
53. The first would require the Tribunal to read into Form A leases, which refer twice in Part B of the Sixth Schedule to maintenance of the internal common parts, a reference to external common parts on the basis that, given the reference to external common parts in the other forms of lease, there is clearly an error here.

54. The second seeks confirmation that the wording of Part E of the Sixth Schedule of the leases detailed above in the first paragraph of this section of this Decision, excluding the Shared Ownership Lease, and the Shared Ownership Lease by reason of its requirement to comply with the Superior Lease, which has an entirely similar Part E of the Sixth Schedule, requires the leaseholders of those leases to pay their share of the cost of replacing the cladding.

55. The wording of Part E of the Sixth Schedule of the leases detailed above in the first paragraph of this section of this Decision, excluding the Shared Ownership Lease, and the Shared Ownership Lease by reason of its requirement to comply with the Superior Lease, which has an entirely similar Part E of the Sixth Schedule, clearly require the leaseholders of those leases to pay their share of the cost of replacing the cladding. The Shared Ownership Lease defines the service charge in accordance with the Superior Lease (clause 1(2)(b): *"the Service Charge" shall mean all sums payable under the terms of the Superior Lease by the Tenant as defined therein including but not limited to the Rent and the Tenants Proportion as defined therein.*

56. Removing and replacing cladding which represents a fire risk is clearly *a reasonable and proper expense* to be incurred by the landlord and so the reasonable costs of doing so can be demanded from all leaseholders.

57. Removing and replacing cladding which represents a fire risk is clearly an act by the landlord *in and about the maintenance and proper convenient management and running of the Estate including in particular …… any expenses incurred in rectifying or making good any inherent structural defect in the Block or any other part of the Estate (except in so far as the cost thereof is recoverable under any insurance policy for the time being in force or from a third party who is or who may be liable therefor)* and so the reasonable costs of doing so can be demanded from all leaseholders.

58. That being the case, there is no requirement for the Tribunal to consider the Applicant's first premise, which is more problematic, entailing as it does not simply a determination as to the meaning of the relevant terms, but the rewriting of terms so as to give them a different meaning.

Section 20c and Rule 13 Costs and Paragraph 5A Application

59. The Respondents (as listed below) have made an application under Section 20C Landlord and Tenant Act 1985 and Schedule 11 Paragraph 5A Commonhold and

Leasehold Reform Act 2002 in respect of the Applicant's costs incurred in these proceedings.

60. The relevant law is detailed below:

Section 20C Landlord and Tenant Act 1985: 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 a … … leasehold valuation 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.

61. *The … tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.*

Commonhold and Leasehold Reform Act 2002 Schedule 11 Paragraph 5A Limitation of administration charges: costs of proceedings

(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.

Proceedings to which costs relate

First-tier Tribunal proceedings

"The relevant court or tribunal"

The First-tier Tribunal

Section 20C

62. In considering an application under Section 20C, the Tribunal has a wide discretion, having regard to all relevant circumstances. It follows a similar course when considering administration charges. *"Its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant, in circumstances where even although costs have been reasonably incurred by the landlord, it would be unjust that the tenant or some particular tenant should have to pay them." "In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise."* (**Tenants of Langford Court v Doren Ltd** (LRX/37/2000).

63. "*An order under section 20C interferes with the parties' contractual rights and obligations, and for that reason ought not to be made lightly or as a matter of course, but only after considering the consequences of the order for all of those affected by it and all other relevant circumstances."*
"The scope of the order which may be made under section 20C is constrained by the terms of the application seeking that order…;
"The FTT does not have jurisdiction to make an order in favour of any person who has neither made an application of their own under section 20C or been specified in an application made by someone else".
(**SCMLLA (Freehold) Limited** (2014) UKUT 0058 (LC)). *"In any application under section 20C it seems to me to be essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make."* (**Conway v Jam Factory Freehold Limited** (2013) UKUT 0592 (LC)).

64. The Respondents recognise that the Applicant may feel they should be able to recover the costs of this application from lessees, as they needed to make the application as part of a process of responsible block management, but are of the view that the need for this application was not of lessees' making. It is not lessees' fault that this lease

was unsuitably drafted; this responsibility lies with the Landlord and it is therefore the Landlord's responsibility to make this application to resolve this issue. They do not think it is fair or reasonable that lessees should bear any costs relating to this application.

65. The Tribunal has weighed up the relevant factors here. It notes that the Applicant was substantially successful in its application, but that the result was obvious and did not require an application to the Tribunal and was taken forward out of an abundance of caution.

66. This Decision may not be relied upon in any event, should another source of funding, be it the developer or government, meets the costs of the works.

67. The Applicant has not sought to argue that the application should not be granted, yet has had an opportunity to do so.

68. The Tribunal agrees with the Respondents that this application resulted from a request by the landlord's side to seek clarity for something drafted by its side, such that it would be unfair to expect them to pay.

69. The Tribunal is aware that any costs will fall upon the Applicant, which may try to recover them from the other tenants by way of service charge, but the other tenants are able to challenge the ability of the Applicant to do so in accordance with the terms of the lease and the reasonableness of the Applicant seeking to do so and the reasonableness of any sums sought to be charged.

70. Taking a rounded view, the Tribunal allows the application under Section 20C of the Landlord and Tenant Act 1985. It directs that the Respondent's costs in relation to this application are not to be regarded as relevant costs to be taken into account in determining the amount of the service charge for the current or any future year.

Paragraph 5A

71. For the same reasons the Tribunal allows the Respondents' application under Section 20C above, the Tribunal allows their application under Paragraph 5A, so that the costs incurred by the Applicant in connection with the proceedings before the Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any administration charge payable by the Respondents in this or any other year.

List of Section 20C Paragraph 5A Respondents

Rachel Robertson
John Packer
Robert Moffatt
Artur Kozlowski
Maria RC Sanchez and Johan F Claesson
Jorge EB Mora
Jon Derbyshire
Heidi Maseyk
Anna Belabbes
Clara KS Molin
Alice and Graham Bromelow
Steven Parry
Nick White
Maria Nouri
Ashish K Garg
Mr J Morris
Thomas Hodkinson
James Thomas
Peter J Lamper

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

ANNEX

Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002

27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a postdispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration
agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject of an application under subsection (1) or (3).
(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.