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

**Case reference** : LON/00AW/LSC/2016/0115

**Property** : Point West Building, 116 Cromwell Road, London SW7 4XA

**Applicant** : Point West GR Limited

**Representative** : Mr K Gunaratna of Counsel instructed by Fladgate LLP

**Respondents** : The lessees listed in the updated schedule filed by Wallace LLP

**Representative** : In part represented by Mr D Dovar of Counsel instructed by Wallace LLP

**Type of application** : Application for an order pursuant to section 20C of the Landlord and Tenant Act 1985

**Tribunal members** : Judge N Hawkes  
Mr L Jarero BSc FRICS

**Venue** : 10 Alfred Place, London WC1E 7LR inspection.

**Date of paper determination** : 28 February 2018

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**DECISION**

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## Decision of the Tribunal

The Tribunal determines that it will not make an order under section 20C of the Landlord and Tenant Act 1985.

### The background

1. The Point West Building, 116 Cromwell Road, London SW7 4XA (“Point West”) is a mixed residential and commercial development on the Cromwell Road which is situated close to the junction with Gloucester Road, on the site of the old West London air terminal.
2. Point West comprises 399 apartments (352 flats on floors one to nine and 47 penthouse flats on floors 10 to 18); 320 parking spaces; approximately 20,000 square metres of commercial space; and a private road on three out of four sides of the complex.
3. By an application dated 10 March 2016, the applicant sought a determination pursuant to s.27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) in respect of the proposed service charge expenditure for a ten year programme of major works which the applicant intended to undertake to Point West in the years 2016 to 2025. The programme is referred to by the parties as the “Capital Expenditure Plan” or “CAPEX Plan”.
4. By a decision dated 24 March 2017, the determinations made by the Tribunal on the issues raised in the application dated 10 March 2016 included the following:
  - (5) *The Tribunal determines in respect of the costs set out in the CAPEX Plan for the years 2016 to 2020 inclusive that the sums claimed by the applicant in respect of each service charge year are reasonable and payable.*
  - (6) *The Tribunal directs that, by 4pm on 8<sup>th</sup> May 2017, the applicant shall serve a breakdown of the CAPEX Plan expenditure for the service charge years 2016 to 2020 on the leaseholders, in accordance with Paragraph 83 below.*
  - (7) *Any leaseholder who wishes to raise a dispute concerning the issue of apportionment shall, on or before 4pm on 19<sup>th</sup> June 2017, apply to the Tribunal for a determination.*
5. In accordance with paragraph (7) of the Tribunal’s Decision dated 24 March 2017, certain of the respondents (“the respondents”) applied to the Tribunal for the determination of a dispute concerning the

proposed apportionment of the sums which the Tribunal had determined were reasonable and payable.

6. By a decision dated 17 November 2017, the Tribunal made the following determinations:
  - (1) The total sum allocated to Total Residential Expenditure falls to be reduced by £339,567.60 and the total sum allocated to the Commercial Expenditure falls to be increased by an identical amount.
  - (2) It is reasonable for each of the nine additional car parking spaces to carry the weight of 50% of one of the pre-existing car parking spaces when determining the percentages payable by the car park lessees.
  - (3) The Tribunal is not satisfied that it is reasonable to allocate any part of expenditure relating to the lifts to Commercial Expenditure.
7. The Tribunal has recently been asked to give urgent consideration to matters arising in separate litigation concerning the Point West complex. Accordingly, in prioritising the Tribunal's time, this determination was put back in order that the other matters could be dealt with.

### **The application**

8. On 23 November 2017, the respondents made an application for an order under section 20C of the 1985 Act so that any costs incurred by the applicant in these Tribunal proceedings subsequent to 16 June 2017 would not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the respondents.
9. Further submissions were received from the parties dated 14 December 2017, 19 December 2017, 29 December 2017, 8 January 2018, 12 January 2018, 24 January 2018 and 2 February 2018. In reaching this determination, all of these representations together with the enclosures, have been taken into account.

### **The submissions**

10. In their letter of 23 November 2017, the respondents argue that they have been substantially successful in their application and that the

Tribunal's decision is significantly more beneficial to them than a without prejudice offer which they made on 25 September 2017.

11. In response, the applicant submits that the application should be denied in its entirety. The applicant states that only one of the issues raised and argued by the respondents was successful, that being the allocation of a percentage of the Total Estate Expenditure to the Commercial Expenditure.
12. In respect of the car parking, the applicant states that the only permission given to the tenants was to challenge the apportionment into the five CAPEX headings and that the amount apportioned to this line item has remained at 5%. It also argues that an effect of the decision of 17 November 2017 will be to increase the necessary administrative work and that the cost of this increased administrative burden will be borne by the tenants.
13. Further, the applicant states the issue in question was not a point which was pleaded in any detail by the respondents and (for reasons which are set out more fully in its written submissions) that the percentage of the overall costs spent by the applicant in respect of this issue was very limited.
14. In the alternative, the applicant proposes that the costs be broken down on an issue by issue basis in order for a just and equitable position to be reached. Detailed submissions are advanced in respect of each of the issues which were before the Tribunal.
15. As regards the circumstances and conduct of the parties, the applicant points to the fact that significant time and expense has been incurred by the applicant in seeking to clarify the identity of the respondents. The applicant states that it still has concerns in this regard and requests a further hearing before this section 20C application is determined.
16. Further, the applicant argues that the respondents were late in particularising their claim. The applicant accepts that it made some errors in its initial allocations but states that, as soon as these were noticed, they were immediately rectified.
17. As regards the without prejudice offer, the applicant argues that the offer was not in relation to the issues before the Tribunal in these proceedings. The applicant states that whereas the respondents' offer included a proposal that the percentages chargeable to them would be those provided for in the leases when granted, there was no application to vary the service charge percentages in the tenants' leases before the Tribunal.

18. Further, the applicant disputes that the Tribunal's decision was significantly more beneficial to the respondents than the offer of 25 September 2017. The applicant also states that the respondents' solicitors failed to respond to a request for confirmation on whose behalf the offer was made and that, in the absence of clarification, the offer was of no effect.
19. In reply, the respondents state that the applicant delayed in correcting errors in the initial allocations; that they were unable to initially fully particularise their claim because they were awaiting disclosure from the applicant; and they assert that they clearly "won" in respect of the matters set out at both Paragraphs 6(1) and 6(2), above having regard to the financial effect of the determinations.
20. The respondents assert that the car parking issue formed part of the relevant subject matter of the proceedings on the basis that the Tribunal directed the applicant to submit a demand to each tenant and the demands that each car parking tenant received were incorrect.
21. Further, the respondents' solicitors, Wallace LLP, state that they were acting on behalf of the members of the Leaseholders' Association. They state that, in the limited time which was available to comply with the Tribunal's Directions (which are described more fully below), confirmation was received from the leaseholders of 122 flats that they wished to be represented. They state that no other lessees were involved in the Tribunal proceedings.
22. They accept that "the identity of parties to litigation is a fundamental principle". However, they submit that the precise number or identity of those on whose behalf they act is irrelevant for the purposes of the outstanding issue before the Tribunal, namely whether or not to make an order under section 20C.

### **The determination**

23. The applicant has requested a further hearing in this matter. However, having carefully reviewed the extensive submissions which have been filed by both parties, the Tribunal is not satisfied that a further hearing is required and it is of the view that it would not be proportionate to hold a further hearing.
24. Section 20C of the 1985 Act provides that 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 residential property 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. The discretion is a wide one for the Tribunal to exercise having regard to all the circumstances of the case.

25. In *Tenants of Langford Court v Doren Ltd (LRX/37/2000)*, HHJ Rich said as follows:

*“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.... Where, as in the case of the LVT there is no power to award costs, there is no automatic expectation of an order under s.20C in favour of a successful tenant ... In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under section 20C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that makes it use unjust. Excessive costs unreasonably incurred will not, in any event, be recoverable by reason of s.19 of the Landlord and Tenant Act 1985.”*

26. In *Conway v Jam Factory Freehold Ltd [2013] UKUT 0592*, the Upper Tribunal observed that it is important to consider the overall financial consequences of any order, and in particular that an order made under section 20C of the 1985 Act will only affect those persons specified. The Tribunal has had regard to this.
27. As stated above, there is no automatic expectation of an order under section 20C in favour of a successful tenant. Further, it is clear that the respondents have not been wholly successful in these proceedings. Whilst this is not determinative, these are factors which the Tribunal has taken into account.
28. A further factor and one upon which the Tribunal has placed considerable weight is the lack of clarity regarding the identity of the respondents and the consequences which have flowed from this.
29. In advance of the oral case management conference on 26 July 2017 (“CMC”), individual tenants initially contacted the applicant’s solicitors, Fladgate LLP, directly being unaware that Wallace LLP was representing them.
30. This culminated in two of the tenants contacting the Tribunal directly; one made a written application to the Tribunal in advance of the CMC and the other attended the CMC by separate representation.
31. The CMC was adjourned to allow the position to be clarified. Wallace LLP then confirmed that it was instructed in relation to one of these tenants but the position was not clarified in relation to the other.

32. As a result, the Tribunal Judge directed Wallace LLP to confirm the position by 2 August 2017 and Wallace LLP filed and served a list naming the respondents in accordance with this direction (“the List”).
33. The applicant’s solicitors, on carrying out preliminary checks, then ascertained that ten people named on the List were not in fact tenants at the Point West complex. Further, they informed the Tribunal that at least one tenant on the List was not aware that they were party to these proceedings. This called into question the reliability of the List.
34. Fladgate LLP submitted that it was imperative that their client knew the identity of the respondents to these proceedings so that it would know which lessees it could/must contact directly in relation to certain items and which tenants’ correspondence must be sent via Wallace
35. It was also submitted that it was vital that the lessees appearing on Wallace LLP’s lists knew that they are so appearing; knew that costs were being incurred in their names (and the risks associated with this); and that they had an opportunity to provide their input.
36. The Tribunal Judge accepted the applicant’s submissions and, on 11 September 2017, directed Wallace LLP, by 4 pm on 29 September 2017, to file and serve a witness statement with a signed statement of truth attached: “(i) listing the lessees who it acts for in these proceedings; and (ii) setting out the steps which have been taken in order to ensure that this list is accurate”.
37. This direction was not complied with and, on 2 October 2017, the Tribunal Judge directed that, in the event of non-compliance by 5 October 2017, the respondents were to file and serve any representations as to why their application should not be struck out.
38. The Tribunal is of the view that the identity of the parties to this litigation is a fundamental issue and that the respondents should have been clear about their identities from the outset. The Tribunal accepts that the applicant has been put to additional expense as a result of the respondents’ failure to properly identify themselves. Further, it became necessary for the Tribunal to apply its limited time and resources in seeking to resolve this issue.
39. As regards the offer of 25 September 2017, the Tribunal accepts the applicant’s assertion that it was entitled to know on whose behalf the offer was being made and that the identity of the respondents was unclear.
40. In all the circumstances, the Tribunal does not consider that it is just and equitable to make an order under section 20C.

**Name:** Judge N Hawkes

**Date:** 28 February 2018

### **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).