IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2019] UKUT 68 (LC)
Case No: LRX/26/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – application to which 399 leaseholders were named as respondents – 277 members of leaseholders' association represented by one firm of solicitors – application under section 20C, Landlord and Tenant Act 1985 in respect of part of proceedings in which leaseholders were substantially successful - relevance of suggested uncertainty over identity of leaseholders for whom solicitors acted – rule 14(4), Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 – appeal allowed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

ARNALDO ROTENBERG

SANDRA ROTENBERG AND OTHERS **Appellants**

- and -

POINT WEST GR LIMITED **Respondent**

Re: Point West,
116 Cromwell Road,
London, SW7 4XA

Martin Rodger QC, Deputy Chamber President

Royal Courts of Justice, Strand, London, WC2A 2LL
on
18 December 2018

Daniel Dovar, instructed by Wallace LLP, for the appellants
Jonathan Wills, instructed by Fladgate LLP, for the respondent

The following cases are referred to in this decision:

G. v G. (Minors: Custody Appeal) [1985] 1 W.L.R. 647

Langford Court v Doren Limited LRX/37/2000, [2001] EWLands LRX_37_2000

Piglowska v Piglowski [1999] 1 W.L.R. 1360

Introduction

1. Section 20C, Landlord and Tenant Act 1985, enables a tenant of a dwelling to apply to a tribunal for an order that costs incurred by the tenant's landlord in connection with proceedings before the tribunal are not to be regarded as relevant costs which may be taken into account in determining the amount of any service charge payable by the tenant or any other person specified in the application.

2. This appeal is against a decision of the First-tier Tribunal (Property Chamber) ("the FTT") made on 28 February 2018 by which it refused an application for an order under section 20C made by a group of leaseholders of flats in the Point West Building in Cromwell Road, London SW7. The order was sought by the leaseholders to exempt them from liability to contribute towards the costs of proceedings before the FTT concerning a 10-year capital expenditure programme proposed to be undertaken to the Building by their landlord, the respondent, Point West GR Ltd.

3. Although in its substantive decision the FTT had significantly reduced the sums payable by the leaseholders towards the capital expenditure it refused their application for an order under section 20C. It did so, in part, because the leaseholders had not been "wholly successful" and, in part, because of what the FTT considered to be a lack of clarity over the identity of the leaseholders on whose behalf the application was made which was said to have caused additional expense and inconvenience to the respondent and to the FTT. The FTT regarded the identity of the parties to the application as a fundamental issue and criticised the leaseholders and their solicitors for failing to be clear about that matter from the outset.

4. The FTT refused permission to appeal but it was granted by this Tribunal to enable it to consider some of the practical issues exemplified by these proceedings which arise where tribunals are asked to determine proceedings involving a large number of leaseholders.

5. At the hearing of the appeal both parties were represented by counsel and solicitors. Mr Daniel Dovar instructed by Wallace LLP appeared for the appellants, who are leaseholders of 93 flats in the Building whose names appear on the list annexed to this decision. Mr Jonathan Wills, instructed by Fladgate LLP appeared for the respondent. I am grateful to all who participated for their assistance.

Background

6. The Point West Building is a mixed residential and commercial development in West London. It comprises 399 leasehold apartments, 320 parking spaces and approximately 20,000 sq metres of commercial space. The Building was originally constructed to house the West London Air Terminal and was converted to residential use in the 1990s; at that time it included 352 flats on floors one to nine, to which a further 47 modern penthouses were later added on nine additional floors served by a separate reception area (referred to as the "sky lobby"). The commercial space comprises a Sainsbury's Supermarket and a David Lloyd Health Club.

7. The landlord is entitled to recoup its expenditure on the Building through an annual service charge payable by the commercial and residential leaseholders. The recoverable expenditure is classified in five categories: estate expenditure, residential expenditure, car park expenditure, commercial expenditure and sky lobby expenditure. By paragraph 4 of the fifth schedule to the residential leases the respondent is entitled to determine into which category an item of expenditure falls and to apportion expenditure between categories as it deems appropriate. By paragraph 11 of the fifth schedule it is given a discretion to vary the service charge percentages prescribed by the leases and to specify different percentages applicable to different items of expenditure in the various categories. It has been common ground in these proceedings that the landlord's discretionary decisions on the apportionment of service charges are liable to review by the FTT.

8. The respondent acquired its interest in the Building in July 2014 from administrators of its predecessor, Point West London Ltd. The decision with which this appeal is concerned is the third substantive decision of the FTT arising out of applications concerning the service charges payable by the leaseholder of the Building. Proceedings concerning service charges payable for the years 2013 to 2016 are the subject of a separate appeal from decisions given by the FTT in 2016 and 2018. The proceedings which gave rise to this appeal arose out of an application made on 10 March 2016 by the respondent under section 27A, Landlord and Tenant Act 1985 concerning costs to be incurred in a ten-year programme of major capital works to the Point West Building which it began to undertake in 2016. The estimated cost of the proposed work excluding professional and administrative costs is approximately £8.36m including VAT.

The capital works application and the apportionment issue

9. The respondent's application of 10 March 2016 sought a determination under section 27A(3), that costs to be incurred in undertaking the proposed capital works would be recoverable through the service charges payable by the residential leaseholders, all 399 of whom were joined as parties to the application. The application focussed on the total proposed expenditure (other than professional and administrative costs) without breaking that total down into sums attributable to the five different categories of expenditure. That was significant because the leaseholders are liable to contribute different proportions in respect of the different categories and without an apportionment of the total no leaseholder would know how much he or she would be liable to pay.

10. A group of leaseholders who were members of the Point West Leaseholders Association (a recognised tenant's association) ("the Association") were represented in the section 27A application by Wallace LLP, solicitors. In a letter written on 28 February 2017, shortly before the hearing of the application, Wallace confirmed that they were instructed to act on behalf of the members of the Association and provided a schedule identifying 277 separate flats whose leaseholders were members.

11. The application was heard in March 2017 and a decision was handed down on 24 March. The FTT determined that the costs which the respondent intended to incur were reasonable and that the leaseholders would be liable to contribute to them through their service charges.

12. It had been agreed during the hearing that, after the FTT had determined the total amount of the proposed expenditure which was recoverable, the respondent would prepare a breakdown showing how that expenditure was to be apportioned between the different service charge categories so that the contribution by individual leaseholders could be ascertained. If there was any dispute concerning apportionment the parties were to have the opportunity to apply to the Tribunal for a further determination. In paragraph 84 of its decision the FTT placed the onus of making such an application on any leaseholder who wished to dispute the apportionment proposed by the respondent.

13. The respondent provided the breakdown as directed. On 19 May 2017 Wallace wrote taking issue with certain aspects of the respondent's apportionments. It pointed out that professional fees ought not to have been included in the apportionments as it had been agreed before the March hearing that these would not be the subject of consideration by the FTT but would be dealt with as they were incurred during the progress of the works. Wallace also requested copies of the commercial leases showing the extent to which Sainsbury's and David Lloyd were liable to contribute to the service charge expenditure. No response was received to Wallace's letter.

14. On 16 June Wallace informed the FTT that the leaseholders for whom it acted did not accept the respondent's apportionment, and on 19 July it provided details of their disagreement. The leaseholders raised four issues. First, that the apportionment of expenditure was unfairly weighted against the residential leaseholders and in favour of the commercial tenants; although 25% of the total internal floor area of the Building comprised commercial space, only 12.5% of the total estate expenditure was allocated to the commercial leaseholders. Secondly, the commercial leaseholders were to make no contribution towards upgrading and replacement of lifts. Thirdly, the respondent's own contribution towards car park expenditure did not reflect its usage of the car park. Finally, the inclusion of professional fees in the capital expenditure was contrary to the understanding reached before the FTT hearing.

15. On 25 September 2017 the leaseholders represented by Wallace made an offer to settle the apportionment dispute. The offer was expressed to be "without prejudice save as to costs" and was on the basis that the service charge apportionments should revert to their level before adjustments implemented in 2006. The leaseholders agreed to drop the lift issue and proposed a small reduction in the apportionment of car parking expenditure. It was later said that the net effect of the offer, had it been accepted, would have been to reduce the leaseholder's overall service charge liability by a little over £35,000. The offer also proposed that a section 20C order should be made in favour of the leaseholders protecting them against the addition to the service charge of costs incurred by the respondent in dealing with the apportionment issue.

The leaseholders' representation challenged

16. The FTT held a case management hearing on 26 July at which it gave directions for a hearing to resolve the apportionment issues. It recorded in its directions that it had received three applications concerning those issues. The first was the Wallace application on behalf of the leaseholders represented by that firm. Separate applications had also been received from

the leaseholders of flats 514 and 116. Dr Seeds, one of the joint leaseholders of flat 514, had attended the case management hearing but after a brief adjournment he had confirmed that he was represented by Wallace and did not wish to take any additional points of his own. The leaseholder of flat 116, Mr Smith, did not attend the hearing and there remained uncertainty whether he was represented by Wallace. The FTT directed the firm to file an updated list of the leaseholders whom it represented by 2 August 2017. Wallace duly complied by filing a list which identified 276 flats and apartments in the Building together with the names of its clients, including Mr Smith of flat 116.

17. A month after receiving Wallace's list of its clients the respondent's solicitors, Fladgate, wrote to their opposite number on 6 September 2017 asserting that the list was "inaccurate and misleading as there are at least 10 tenants who you claim you represent in these proceedings for whom you cannot be acting". The flats in question were identified in the letter. In four cases the registered proprietor was a limited company but Wallace had identified their client as an individual. In five cases the individual for whom Wallace acted was no longer the registered proprietor of the lease. In the final case a lease had been registered to a new proprietor after Wallace's letter of 2 August had been written.

18. Rather than asking Wallace to check the ten suggested discrepancies Fladgate contended that those discrepancies cast doubt on the accuracy of the whole list, and demanded that Wallace obtain a signed confirmation of instructions from each of its leaseholder clients (including every joint leaseholder). Where a flat was owned by a company it was said also to be necessary that evidence of the authority of the person signing on behalf of the company should be provided. Fladgate concluded their letter by stating that they had "no option other than to write to the Tribunal and seek an order on the above basis".

19. Without waiting for a response to their letter Fladgate raised the issue of representation with the FTT on 8 September, seeking an order in the terms they had proposed. In response Wallace explained that, unlike the respondent, the Association by which it was instructed did not always know when changes in the ownership of flats took place, and suggested that before the next hearing on 10 October it would either provide written confirmation that it acted on behalf of the leaseholders of the 10 flats identified by Fladgate or confirm that it did not do so.

20. On the following day Fladgate complained to the FTT that Wallace had failed to confirm for whom they acted and had not explained why they "purported to act for 10 tenants who are not tenants of the Building". Moreover, it suggested that it was likely that the tenants on Wallace's list had no idea that they were represented in the proceedings by that firm. Fladgate referred to a letter from one leaseholder, Mr Whitecross, who had informed the respondent (copying the FTT and Fladgate itself but not, it would appear, Wallace) that he was not sure whether he was a party to the litigation because of his membership of the Association but that he had not received any communications directly from Wallace. Fladgate protested that it was "imperative that our clients know the identity of the respondents in these proceedings … so it knows which leaseholders it can/must contact directly in relation to certain items and which tenants' correspondence must be sent to Wallace." It was said to be "vital that the leaseholders appearing on Wallace's list know that they are so appearing, know that costs are being incurred

in their names (and the risk to them associated with this) and have an opportunity to provide their input)."

21. The FTT accepted Fladgate's submissions and in a further decision issued on 25 September it required Wallace to provide a witness statement by 29 September listing the leaseholders for whom it acted in the proceedings and setting out the steps which had been taken in order to ensure that the list was accurate.

22. Wallace did not file the required witness statement by 29 September but the FTT extended its deadline to 5 October and said that if the order was not complied with the leaseholders' application due to be heard on 10 October was liable to be struck out.

23. I have already referred to the leaseholders' offer of settlement made on 25 September 2017 (see paragraph 15 above). Fladgate responded to the offer on the same day, saying that it could not consider the proposal until it received confirmation of the identity of those by whom the apportionment application was being pursued. This was described as "a fundamental issue for our client in assessing whether the matter can be compromised".

24. On 4 October Mr Simon Serota, a partner in Wallace, filed a witness statement in which he explained that the list of his firm's leaseholder clients was a list of the members of the Association. In view of the Tribunal's directions the members had been contacted and asked whether they agreed to be represented by his firm in the proceedings. Confirmation had already been received from the leaseholders of 102 flats that they did, and a list of their names and flats was provided.

25. On 5 October Fladgate wrote again to the FTT responding to Mr Serota's witness statement. By now the respondent had obtained a copy of the email sent by the Association to its members and Fladgate objected both to the content of Mr Serota's witness statement and to the content of the email. It was suggested that the email did not provide enough information to the leaseholders to enable them to make "an informed decision" thereby risking "biasing the response"; in particular it did not point out the cost to the leaseholders of being involved in the proceedings. Nor was it clear whether Wallace had sent client care letters to all of the leaseholders on the list exhibited to Mr Serota's witness statement. As there were 70 fewer names on the 4 October list than on the list provided on 2 August, Fladgate demanded to know whether Wallace had ever acted for those leaseholders and accused it of "making misrepresentations to us and the Tribunal about who they are acting for". The letter concluded by asking for the FTT's "further guidance", although it does not appear that any was provided before the FTT gave its decision on the issue of apportionment on 17 November 2017.

The FTT's apportionment decision of 17 November 2017

26. In its decision of 17 November 2017 the FTT resolved the issues which had been raised by Wallace on behalf of the leaseholders on 16 June. It concluded that the apportionment of charges to the residential leaseholders should be reduced and those attributed to the commercial

premises should be increased. It had emerged that Sainsbury's was not liable to contribute to the cost of the works through its service charge at all, but that did not affect the contribution which it was reasonable for the residential leaseholders to pay. An adjustment was also made in the leaseholder's favour in respect of 9 car parking spaces, but at only half the rate they had requested. The commercial premises were found not to benefit to any significant extent from the provision of lifts and the FTT made no adjustment on that account. It recorded that the expenditure it had approved in its decision of 24 March 2017 did not include professional fees (as had been acknowledged by the respondent in its statement of case).

27. The effect of the FTT's reapportionment was that the residential leaseholder's service charges were reduced by £339,567, leaving the respondent to fund that shortfall from its own resources if it was not able to adjust the charges payable by the commercial tenants.

The section 20C application and the FTT's decision of 28 February 2018

28. The leaseholders regarded the FTT's apportionment decision as a substantial victory. On 23 November 2017 they applied for an order under section 20C that costs incurred by the respondent in the section 27A proceedings after 16 June 2017 should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the respondents to that application (i.e. all of the residential leaseholders). Submissions were exchanged by the parties and on 28 February 2018 the FTT gave its decision in writing without having conducted a hearing.

29. Having summarised the parties' submissions and having referred to some relevant authorities the FTT reminded itself that there was no automatic expectation of an order under section 20C in favour of a successful tenant, referring to the decision of the Lands Tribunal (Judge Rich QC) in *Langford Court v Doren Limited* LRX/37/2000. It said that it was clear that the leaseholders "had not been wholly successful in these proceedings" and that while that was not determinative it was a matter which it took into account. It then referred to a further factor on which it said it "placed considerable weight", namely "the lack of clarity regarding the identity of the respondents and the consequences which have flowed from this." That issue is central to this appeal.

30. In paragraphs 29 to 37 of its decision the FTT recorded the exchanges over the issue of the leaseholders' representation from its first having been raised at the case management hearing on 26 July 2017 until the extension of the deadline for Mr Serota to file his witness statement and the threat that, in default, the apportionment application would be struck out. I have referred to that material in some detail above and it is not necessary to quote those parts of the decision.

31. The FTT did not refer to the content of Mr Serota's witness statement or to the further correspondence from Fladgate on 5 October. The determinative part of its decision was in the following three paragraphs:

"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."

The relevant procedural rules

32. Before coming to the appeal in detail it is necessary to refer to the relevant provisions of the FTT's procedural rules, which appear to have been overlooked both in the parties' submissions to the FTT and in its decision of 28 February 2018. They are contained in the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

33. The 2013 Rules begin with some unexceptional definitions. Thus, an "applicant" is the person who commences tribunal proceedings, a "respondent" is (so far as relevant) a person against whom an applicant brings proceedings and a "party" is a person who is, or if the proceedings have been concluded, who was, an applicant or respondent. Rule 10(1) provides that the FTT may give a direction adding, substituting or removing a person as an applicant or a respondent. No other route is provided by which a person may cease to be a party. In particular, a person does not cease to be a party to proceedings before the FTT simply because they no longer have an interest in the outcome of those proceedings.

34. Representation is dealt with by rule 14. The following parts of the rule are relevant to this appeal:

"Representatives

14.(1) A party may appoint a representative (whether legally qualified or not) to represent that party in the proceedings.

(2) If a party appoints a representative, that party must send or deliver to the Tribunal and to each other party written notice of the representative's name and address.

(3) Anything permitted or required to be done by or provided to a party under these Rules, a practice direction or a direction may be done by or provided to the representative of that party except—

(a) signing a witness statement; or

(b) sending or delivering a notice under paragraph (2), if the representative is not a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience or the conduct of litigation within the meaning of that Act.

(4) A person who receives due notice of the appointment of a representative—

(a) must thereafter provide to the representative any document which is required to be sent to the represented party, and need not provide that document to the represented party; and

(b) may assume that the representative is and remains authorised until receiving written notification to the contrary and an alternative address for communications from the representative or the represented party."

35. The reference in rule 14(3)(b) to a representative who is an authorised person for the purposes of the Legal Services Act 2007 in relation to the exercise of a right of audience or the conduct of litigation means a person authorised by an approved regulator under the Act (section 18, 2007 Act). As one would expect, the Law Society is an approved regulator and a solicitor is an authorised person in relation to the activities specified in the rule (Sch.4, para. 1, 2007 Act).

36. The effect of rule 14(3)(b) is therefore that a solicitor who has been authorised by the Law Society to conduct litigation is able to give notice to the FTT and to every other party that he or she has been appointed as the representative of a party, with the consequences provided for by rule 14(4). A party who is informed by a solicitor that they represent another party in proceedings is obliged to communicate directly with the solicitor, and may assume that the solicitor is and remains authorised to act in the proceedings for that party until they receive written notification to the contrary and an alternative address for communications from the solicitor or the represented party. No further assurance is required than the statement of the solicitor that he or she has been appointed.

37. The Rules distinguish in this respect between a representative who is a solicitor (or another person authorised under the 2007 Act, such as a barrister) and a representative who is not so authorised, and who may not give notice for the purpose of rule 14(2) that they have been appointed to act. Where a party wishes to be represented by someone who is not authorised to exercise a right of audience or to conduct litigation the party must themselves notify the tribunal and each other party of the representative's appointment (rule 14(3)(b)). The justification for that distinction is not difficult to understand. The tribunal trusts a representation made by a solicitor or barrister as to their appointment because of their regulated professional status, backed by the disciplinary rules and sanctions available in the event that the expected professional standards are not met.

The issues in the appeal

38. The issues for which permission to appeal was sought and granted were the following:

(1) whether the FTT failed to take into account "properly or at all" the respondent's conduct of the proceedings and their outcome when it refused to make an order under section 20C Landlord's conduct;

(2) whether the FTT wrongly took into account the issue of the appellants' representation;

(3) whether the decision was perverse, as being a decision which no reasonable tribunal could have made had it given proper consideration to the relevant matters.

39. When granting permission the Tribunal indicated that the second issue was of general significance and that the appeal gave rise to important questions concerning the management of proceedings in which a large number of individuals are made parties. In this case all 399 residential leaseholders were joined as parties to the original application made by the respondent under section 27A. Whilst the number of parties to the proceedings was large, it was by no means unprecedented in disputes under the 1985 Act concerning the payability of service charges for work not yet undertaken or dispensation from the statutory consultation requirements. It is important that such cases do not become bogged down in unnecessary procedural complexities. Ensuring that that does not happen is the responsibility both of the FTT itself and of the parties, especially parties with professional representation.

Issues 1 and 3: Failure to take into account outcome and conduct; suggested perversity

40. Having conducted the substantive proceedings and given a decision determining them, the FTT is in an ideal position to assess whether it is just and equitable in the circumstances for tenants who have agreed to contribute through the service charge towards costs incurred by their landlord in proceedings ought nevertheless to be relieved of that obligation. The matters which are relevant to that assessment are likely to be clear from the decision and fresh in the minds of the tribunal and those who participated in the proceedings and do not require to be rehearsed at length in any further decision issued to deal with a section 20C application.

41. The making or refusal of an order under section 20C involves an exercise of judicial discretion. Mr Wills helpfully referred to the guidance provided at paragraph 52.21.5 of the White Book 2018, as to the circumstances in which an appeal against such an exercise of discretion may succeed. As he submitted, although that guidance derives from case law in different fields and generally not in appeals concerning decisions of tribunals, it is equally applicable to such decisions. Its general effect can be appreciated by referring to the speech of Lord Fraser in *G. v G. (Minors: Custody Appeal)* [1985] 1 W.L.R. 647, HL, at 652, where he said that "the appellate court should only interfere when they consider that the judge of first instance has …. exceeded the generous ambit within which a reasonable disagreement is possible." One circumstances in which that "generous ambit" may be exceeded is where the tribunal at first instance has misdirected itself and has taken into account something irrelevant, or failed to have regard to something relevant; in those circumstances the exercise of its discretion may be flawed and its decision may have to be set aside.

42. As Lord Hoffmann suggested in *Piglowska v Piglowski* [1999] 1 W.L.R. 1360, HL, at 1372 F-H, the reasons given by a tribunal for its decision should be read on the assumption that it knew how it should perform its functions and which matters it should take into account:

> "An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

43. Mr Dovar sought to tempt the Tribunal to undertake exactly the sort of narrow textual analysis Lord Hoffmann had warned against when he questioned the FTT's reference to the appellant not having been "wholly successful in these proceedings". It is clear that the FTT was referring to that part of the proceedings concerned with the issue of apportionment (in paragraph 18 it correctly identified the relevant starting point as 16 June 2017 and the events it took into account were all after that date).

44. There is no reason to think the FTT failed properly to appreciate the extent to which the appellants had succeeded. Although substantially successful, they failed on the issue concerning the lift and partially in relation to the landlord's use of car parking spaces, so the statement that they were not wholly successful was correct.

45. Nor is there any reason to think matters of conduct were left out of account. The conduct on which the appellants relied as justifying the making of a section 20C order concerned the lack of responses to the enquiries they had made about apportionment and to the without prejudice offer of 25 September. The former could properly be regarded as of relatively little significance in the context of the dispute as a whole, which arose out of a genuine disagreement which needed to be resolved. As for the offer, the FTT referred specifically to it and explained why it did not give it weight.

46. The FTT referred to the suggested ambiguity over the appellants' representation as "a fundamental issue". Although its explanation for its decision is concise, it is not inappropriately so, and it is clear from reading the decision as a whole that it considered that the representation issue trumped the factors relied on in support of the section 20C application. In particular, the suggested ambiguity caused the FTT to disregard the offer of 25 September. In my judgment if the FTT was entitled to give weight to the representation issue then it is impossible to conclude that its assessment of what was just and equitable was not open to it.

47. For these reasons I dismiss the appellants' first and third grounds of appeal and turn to the critical issue of representation.

Issue 3: Was the FTT entitled to give weight to the suggested uncertainty over the appellants' representation?

48. The application for an order under section 20C was made in respect of that part of the section 27A proceedings which had commenced with Wallace's letter of 16 June 2017.

49. In paragraphs 83 and 84 of the FTT's decision of 24 March 2017 the respondent was directed to inform each leaseholder of the amount it considered they were individually liable to pay in light of its proposed apportionment of expenditure to the five service charge categories. Any leaseholder who wished to raise a dispute concerning that apportionment was required to apply to the FTT for a determination by 19 June. It was in response to that direction that Wallace wrote on 16 June stating that the leaseholders for whom it acted did indeed dispute the proposed apportionment. It asked the FTT to convene a case management hearing so that directions could be given in relation to that dispute.

50. Up to that stage there was no ambiguity over the identity of the leaseholders for whom Wallace acted. A list had been provided by Wallace on 28 February 2017. It received its instructions on behalf of the leaseholders from the Association, and its clients were all of the members of the Association. It did not communicate directly with its clients but did so through the officers of the Association as, I assume, the Association's constitution permitted.

51. No copy of the February 2017 list of Wallace's clients has been produced for the hearing of the appeal but the FTT recorded in paragraph 6 of its decision of 24 March 2017 that 277 of the respondents were represented by Mr Dovar instructed by Wallace (I take this to mean the leaseholders of 277 flats, including joint leaseholders). There was no suggestion in the FTT's decision that anyone was in any doubt about who those leaseholders were, and they were the only respondents who took any part in the section 27A proceedings.

52. I was told by Mr Dovar that no order had been made by the FTT under rule 10(1) of the 2013 Rules removing any of the leaseholders as a respondent to the proceedings. All of those who had been named by the landlord as respondents to the section 27A application were therefore still respondents by June 2017. I was told that the original list of leaseholders named as respondents by Fladgate in March 2016 had included the name of one individual or company for each flat, and that the only additions or amendments which had been made to that list had been to include the names of all leaseholders in cases where a particular flat was owned jointly by more than one person.

53. The effect of rule 14(4)(b) of the 2013 Rules was that the respondent was entitled to assume that each of those named on Wallace's February 2017 list was still represented by the firm, and that the request to the FTT to give directions to resolve the apportionment issue was made on behalf of all those on that list.

54. The representation of the appellants was first raised as an issue at the case management hearing on 26 July 2017. As the FTT recorded in its directions given after that hearing the leaseholders of two flats had made their own applications in response to paragraph 84 of its decision of 24 March, Dr Williams and Dr Seeds of flat 514 and Mr Smith of flat 116. The uncertainty over the status of Dr Seeds and the other owners of flat 514 was resolved at the hearing after a brief adjournment when they confirmed that they were represented by Wallace and did not wish to raise any additional objections to the apportionment. The uncertainty appears to have arisen because of a misunderstanding on the part of Dr Seeds. According to a

letter from Fladgate of 6 September 2017 the February 2017 list had included flat 514; thus, whatever uncertainty there may have been in in the mind of Dr Seeds, as between Wallace, Fladgate and the FTT there ought to have been no uncertainty. In any event, such doubt as there may have been was very short lived and was resolved at the hearing on 26 July.

55. The uncertainty in relation to flat 116 was resolved when Wallace confirmed in its letter of 2 August 2017 that it was instructed by Mr Smith. It is not clear whether Wallace had been instructed by Mr Smith from the start. The February 2017 list has not been shown to the Tribunal and in its letter of 2 August Wallace said Mr Smith "has now instructed this firm". Fladgate did not suggest in their letter of 6 September that Mr Smith's name or flat had appeared on the February 2017 list and it may therefore be that he only became a Wallace client in June. In any event, once again any suggested ambiguity was short lived.

56. The first direction given by the FTT on 26 July was that Wallace was to file and serve an updated list of those whom it represented. The directions are described as having been agreed with the parties at the hearing and no further reason is given by the FTT for requiring that confirmation. With the parties' agreement (and perhaps without it under its general power to regulate its own proceedings by rule 6(1) of the 2013 Rules) the FTT had power to require such a list. The direction may also have been sensible given the large numbers of leaseholders involved, the regularity with which Central London flats change hands, and the facts that the proceedings were moving into a distinct new phase which would result in a further hearing.

57. Wallace provided an updated list on 2 August 2017. That list must be taken to have superceded the February 2017 list. It must also be taken to have the same procedural significance as the original list so far as rule 14(4) is concerned.

58. While in the circumstances there can be no objection to Wallace being required to provide a list of those whom it represented, the argument which then ensued over the content of the list provides a disturbing example of wasteful satellite litigation. A matter of peripheral procedural significance was taken up by one party for tactical advantage and to discomfort its opponent and was allowed to command a wholly disproportionate share of both the FTT's and the parties' resources which ought properly to have been devoted to the resolution of the main issues in dispute.

59. In Fladgate's letter of 6 September it identified ten of the 277 flats in respect of which it claimed that the August list provided inaccurate and misleading information. It did not at that stage suggest that Wallace did not represent those whom it claimed to represent, but rather that the list "does not represent the true ownership position of ten flats".

60. One of those flats, 359, was said to have been the subject of a sale which completed on 16 June 2017 and registered on 18 August. It was not suggested that the vendor was not a party to the proceedings, nor that they had ceased to be a party by reason of the sale. The suggestion that the list produced on 2 August was incorrect or misleading was therefore wrong. Fladgate

may have been in possession of more recent information but that gave it no reason to doubt that the named leaseholder of the flat in question was represented by Wallace in the proceedings.

61. In relation to five flats Fladgate provided the name and date of registration of the current proprietor, which was different from the name given by Wallace as that of its client. In one case the current registration had occurred after the proceedings were commenced in March 2016. In two other cases the registration was within the three months before the proceedings. In relation to a further four flats Fladgate complained that the registered proprietor was a company, but that Wallace had identified its client as an individual.

62. In a further letter of 14 September Fladgate claimed to have identified an additional eleven discrepancies between the August list and the identity of leaseholders whom Wallace represented in separate appeal proceedings. In nine instances the suggested discrepancies were either insignificant variations in spelling or in forenames, or arose because in the section 27A proceedings the Wallace client was identified as a single leaseholder while in the appeal, in relation to the same flat, joint leaseholders were named. In one case a company was party to the appeal but individuals were parties to the section 27A application. Very few of the suggested inconsistencies were of any apparent substance.

63. The respondent was aware that Wallace received their instructions in the section 27A proceedings from the Association, and Fladgate said so in their letter of 6 September. It was also aware of the identity of each registered proprietor, and therefore of every person whom it had made respondent to the proceedings. Despite that knowledge, Fladgate did not suggest that the relatively few discrepancies between the individuals whom Wallace represented and the registered proprietors might be explained either by the records of the Association not being up to date or by a degree of informality in the identification of the Association's member as an individual despite a flat being owned by a company controlled by the individual. Those possibilities cannot have failed to occur to experienced solicitors looking at the list, yet they did not cause Fladgate to take a more measured approach (for example, by accepting Wallace's proposal that it would clarify the suggested discrepancies) or to consider whether the suggested discrepancies were of any significance to the resolution of the dispute. Instead, ten discrepancies in a list of 277 were seized on by Fladgate as a second front in the proceedings, entirely unrelated to the merits of either parties' case.

64. In their letter of 6 September Fladgate asserted (correctly, if its own researches were accurate) that those individuals "have no locus in these proceedings". On 21 September they complained that "Wallace has failed to explain how they purport to act for 10 tenants who are not tenants of the building". It is apparent that Fladgate did not believe that those whose names it highlighted on the August list were either leaseholders or parties to the proceedings.

65. Having received the August list the respondent was entitled to rely on it in the proceedings, just as it had relied on the original February list without question or apparent difficulty for seven months. The inclusion of the names of a small number of former leaseholders who had never been party to the section 27A application, or who had disposed of their flats since the

proceedings commenced, could make no difference to the respondent. Nor could the presence on the list of a few individuals named in relation to flats which were known to be owned by companies; the individual may have been a representative of the company or a person in occupation, but in either case they were not parties to the proceedings and their presence on the list did not make them parties.

66. The reasons given by Fladgate for the suggested critical significance of the accuracy of the list overlook the effect of rule 14(4). It was said to be necessary to know who Wallace acted for "so [the respondent] knows which lessees it can/must contact directly in relation to certain items and which tenants' correspondence must be sent via Wallace". The August list identified those whom Wallace acted for and rule 14(4) allowed the respondent to take it at face value. The respondent would have no reason to contact anyone who was not a leaseholder and it could safely make direct contact with any leaseholder it chose whose name was not on the August list. In fact only the leaseholders who instructed Wallace and whose names were on the August list had indicated an intention to participate in the hearing on 10 October, so there was no need to communicate with any other leaseholder about preparations for that hearing. Fladgate must already have been in communication with those leaseholders who were not represented by Wallace because it had named them all as respondents to its own application.

67. Wallace was only instructed in the proceedings, not for routine matters concerning the building, so if Fladgate's reference to contacting leaseholder "in relation to certain items" was intended to refer to communications outside the scope of the proceedings it was an unjustified concern. If it was intended to be a reference to the offer of settlement of 25 September 2017 and to the suggested uncertainty over the identity of those on whose behalf it had been made, that question was answered by the 2 August list. Mr Wills suggested that it was essential to know on whose behalf the offer was made because it proposed a variation to the apportionment percentages, but that purpose does not change the reliance which the respondent was entitled to place on the list of clients provided by Wallace.

68. Fladgate's suggestion that it was "vital that the lessees appearing on Wallace's lists know that they are so appearing, know that costs are being incurred in their names (and the risk to them associated with this) and have an opportunity to provide their input" was not only misconceived, it was positively mischievous. Having been informed that Wallace acted for all of those on the August list it was of no concern to the respondent or its solicitor whether an individual leaseholder chose to inform themselves of the proceedings, or appreciated that Wallace acted for them, or understood the costs consequences; those were all matters for the individual leaseholders, the Association which represented them collectively with their agreement, and the solicitors appointed by it to act on their behalf. Those were not relationships which the respondent had any legitimate business to inquire into.

69. The demand made by Fladgate on 6 September that Wallace produce to it a signed statement by each individual leaseholder confirming their instructions to Wallace to act on their behalf was entirely inconsistent with rule 14(4) and ignored the privilege afforded to solicitors by rule 14(3)(b). The FTT's order that Wallace provide a witness statement, supported by a statement of truth, listing the leaseholders for whom it acted and explaining what steps had

been taken to ensure the list was accurate was not justified by the respondent's agitation and ought never to have been made.

70. In the short period allowed between the FTT's order sent on 25 September and the witness statement of Mr Serotta of 4 October direct confirmation of instructions was received by him from the leaseholders of 102 flats. Fladgate's response five days before the hearing suggesting that the other Wallace clients whose identities had been provided on 2 August were no longer represented by the firm, and that they might never have been represented, was blatant gamesmanship. Its allegation (see paragraph 25 above) that Wallace had made misrepresentations to the FTT about whom it acted for was entirely unjustified.

71. The correspondence over the suggested inaccuracies in the list not only ignored the effect of rule 14, it completely lost sight of the general significance of the apportionment issue. The issue of apportionment was relevant to all leaseholders, and its resolution was necessary to the determination of the issues in the section 27A application to which all leaseholders were parties. It had been identified at the hearing in March 2017 and it had to be determined by the FTT no matter how few or how many leaseholders raised it again specifically when they received the respondent's proposed apportionment in May 2017. It was inconceivable that the respondent might apply different apportionments to hundreds of leaseholders who had actively objected to its proposal, and a different, less favourable, apportionment to those who had not. The suggested need for precision over which leaseholders were represented by Wallace was not justified by the subject matter of the dispute.

72. The proper response by the FTT to Fladgate's letter of 6 September would therefore have been to dismiss the complaint on the basis that both the tribunal and the respondent were entitled to rely on the assurance by Wallace that it represented those whom it had identified. If the respondent was concerned that's of those named were not parties to the proceedings it could quite properly point that out, but in itself it was a matter of no consequence. If the respondent wished to make the serious allegation that Wallace was purporting to act for individuals for whom it had no authority to act, that was a matter it could take up with the solicitors' regulatory authority and it was not a matter for the FTT. The FTT might also have reminded Fladgate that although in so large a piece of litigation it was inevitable that individual flats might change hands, such changes had no effect on the identity of the parties to the proceedings.

73. For these reasons, in my judgment, the FTT ought not to have given weight to the issue of suggested discrepancies in the list of Wallace clients when it determined the application under section 20C. If anything, the raising of the issue ought to have weighed in the leaseholders' favour, rather than against them, as it demonstrated that part of the costs against which they sought protection had been incurred without justification.

Conclusion and disposal

74. It is apparent from the FTT's decision that its refusal of an order under section 20C was influenced to a very substantial extent by the view it had formed on the representation question.

Had it directed itself that the issue was irrelevant it is impossible to suggest that its decision would have been the same. It is therefore necessary to allow the appeal and set aside the decision of 28 February 2018.

75. The parties disagreed over the course which the Tribunal should take if it allowed the appeal. Mr Dovar invited me to determine the section 20C application. Mr Wills suggested that the better course would be to remit the matter to the FTT for redetermination; in particular, he submitted, the FTT was in a better position than this Tribunal to assess the significance of the relative success achieved by the parties in the apportionment proceedings.

76. I am satisfied that I have a sufficient understanding of the background and issues to enable me to deal with the section 20C application fairly. I also have the benefit of the parties' submissions on the application to the FTT, which I have read. In my judgment this is a case in which an order is clearly justified, and no purpose would be served by remission.

77. The starting point in the assessment is that, by the terms of the residential leases, the respondent is entitled to add its costs of proceedings to the service charge (I have not been shown the standard form of lease but I assume this is the case otherwise the application would have been unnecessary). There is no automatic presumption that a successful leaseholder should be entitled to an adjustment of that contractual obligation, but section 20C allows such an adjustment to be made if it would be just and equitable.

78. The relevant part of the dispute concerned the use by the respondent of its power of apportionment, which the FTT considered produced a result which was unfair to the leaseholders. The reduction in the leaseholders' contribution was matched by an increase in the sum which the respondent would have to find from its own resources. The net effect of the adjustment was to take about £340,000 out of the respondent's pocket and put it into the pockets of the leaseholders. I bear in mind the respondent's suggestion that the appellants achieved that success on the back of only one of the issues, and that other issues were resolved in its favour, but I give that factor little weight. This was not a dispute in which there was a large number of issues, or a lengthy hearing, such as to justify an issue based assessment of success. The appellants achieved a substantial success, much greater than they had been prepared to concede, and no good reason has been advanced why they should meet the respondent's costs of unsuccessfully defending its apportionment.

79. I am satisfied that the just and equitable order in this case is that costs incurred by the respondents in the FTT proceedings after 16 June 2017 are not to be regarded as relevant costs to be taken into account in determining the amount of the service charges payable by any of the leaseholders whose names appeared on either of the lists provided by Wallace on 28 February 2017 and 2 August 2017 (or their successor if flats have changed hands since the lists).

80. An order to the same effect in respect of the costs of this appeal may also be appropriate and the parties may make submissions on that or any other consequential matter within 14 days of the date of this decision.

Martin Rodger QC
Deputy Chamber President
28 February 2019