FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BG/LRA/2015/0009**
Property	:	**182-228 Campbell Road, London E3 4ED**
Applicant	:	**Campbell Road (182-228) Leaseholders' Association**
Respondent	:	**London Borough of Tower Hamlets**
Type of Application	:	**Application for a Certificate of Recognition of a Residents' Association**
Tribunal Members	:	**Judge Nicol** **Mr ON Miller**
Date and venue of Hearing	:	**28th June 2016** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**14th July 2016**

DECISION

Decisions of the Tribunal

(1) The Tribunal grants a Certificate of Recognition to the Applicant.

(2) There is no order as to costs, save that the Respondent may not recover their costs of these proceedings through the service charge.

Relevant legislation and procedural rules are set out in the Appendix to this decision.

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The parties

1. The Lincoln Estate is a large estate of social housing in east London. It used to be entirely owned and managed by the Respondent but a significant part was transferred to another social housing provider, Poplar HARCA. The parts of the Lincoln Estate which remained with the Respondent are a disparate group of buildings surrounding the part which is now with Poplar HARCA. There is a Tenants' and Residents' Association which the Respondent accepts as representing all of their tenants and other residents on the Lincoln Estate.

2. The Applicant is a tenants' association created by 12 lessees on part of the Lincoln Estate at 182-228 Campbell Road. They sought recognition from the Respondent under section 29(1)(a) of the Landlord and Tenant Act 1985. The Respondent having refused, the Applicant sought recognition by the Tribunal under section 29(1)(b)(i).

The Tribunal's first decision

3. The Tribunal issued a decision on 5th April 2016, reached on the papers, without a hearing, setting out in four bullet points why the application had been refused. By letter dated 2nd May 2016 the Applicant set out extensive objections to the decision. By a further decision dated 11th May 2016 the Tribunal issued directions for a review to be conducted at an oral hearing before a differently-constituted Tribunal.

4. The hearing was held on 28th June 2016 and attended by the Applicant's secretary, Mr Dean Morrison, assisted by three fellow members, and by Mr Jeff Hardman, counsel, and Mr Karl Schooling, solicitor, on behalf of the Respondent. Mr Hardman sought to introduce a new bundle of documents on the morning of the Tribunal. He explained that the Tribunal's directions had only just come to light at the Respondent's offices due to problems arising from an internal reorganisation. Mr Morrison complained that he had made efforts to contact the Respondent without any response. In the event, apart from a previous Tribunal decision (referred to further below), Mr Hardman did not seek to rely on any documents which were not already in the bundle provided by the Applicant and so the Tribunal did not need to refer to the Respondent's bundle.

5. In their letter of 2nd May 2016 the Applicant had sought to have the Tribunal decision of 5th April 2016 set aside under rule 51 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Rule 51 requires there to have been a procedural irregularity, for which the Applicant relied on three alleged factual errors:

   (a) The Respondent had asserted, and the Tribunal had accepted, that half of the officers of the Lincoln Estate TRA were leaseholders. The

Applicant asserts that this is not correct. The Respondent was unable to gainsay this and the Tribunal now accepts that this is the true position.

(b) The Respondent had asserted, and the Tribunal had accepted, that the leaseholders in the TRA were in active discussions with the Respondent regarding major works and service charge issues. The Applicant asserted, and the Tribunal now accepts, that this is not true. The TRA is currently inactive and the Applicant was set up partly for the purpose of entering into such discussions on behalf of their members.

(c) The Respondent had asserted, and the Tribunal had accepted, that the Applicant's members could become involved in the TRA or raise service charge concerns through the TRA. In fact, the TRA is for tenants and residents which, by definition, excludes non-resident leaseholders. Further the TRA has previously passed resolutions excluding leaseholders' service charge concerns – the Applicant's members actually agree with this approach as they believe the Applicant to be a better vehicle for raising such issues.

6. These errors of fact are concerning and the true position weighs in the balance on the substantive issue of recognition considered further below. However, it is not clear that the Tribunal made these errors through any procedural irregularity. The Applicant said that they had reserved their position on whether there should be an oral hearing but, in fact, they should have opted for the oral or the written procedure before a decision was made – they cannot change their mind on seeing that the decision is adverse.

7. In any event, in making the second decision of 11th May 2016, the Tribunal decided, in accordance with rule 56, to treat the Applicant's letter of 2nd May 2016 as an application for permission to appeal. Under rule 53(1), the Tribunal must first consider whether to review the decision in accordance with rule 55. It is for that consideration that the hearing on 28th June 2016 was set down.

8. Mr Hardman submitted that the Tribunal could only review its decision and set it aside on review if there were an error of law (he also suggested that there had been a procedural error in that the review should have been conducted by the same constitution of the Tribunal but he did not pursue that point). The Tribunal reserves its position on whether Mr Hardman's submission is correct but, in any event, is satisfied that the Tribunal did make an error of law in its decision of 5th April 2016.

9. The Tribunal stated in its decision of 5th April 2016:

> The tribunal considers that ... an addition association would place an additional burden on the landlords ...
>
> [It] would be cumbersome in this instance to have a recognised association in relation to only part of a block (182-228), where the service charges levied by the landlord relate to 150-228.

10. An argument that recognising an association would cause an additional burden or would be cumbersome for the landlord is plainly one which a landlord is entitled to raise in response to an application for recognition. However, whether that argument is correct would depend on the factual circumstances in any individual case – the previous Tribunal appears to have accepted this by referring to recognition being cumbersome "in this instance". One of the main purposes of any such association is to allow a single channel of communication between landlord and leaseholders, to their mutual convenience. Without examining the circumstances of the particular case, it is not possible to determine whether recognition of an association would be burdensome or not.

11. However, in making its decision of 5th April 2016, the Tribunal had no evidence that recognition of the Applicant would result in any additional burden on the Respondent or would be cumbersome in any way. While having both the Applicant and the TRA on the same estate would probably require additional communications from time to time, it is not obvious that this would extend to more than adding an extra name to an e-mail distribution list or sending out one extra letter nor whether this could be offset by time or resource savings on other occasions. The Tribunal had simply not been provided with the evidence for this particular case on which the conclusion could be based and could not possibly know whether the Respondent's assertions to this effect were correct or not.

12. In the absence of evidence, the Tribunal may resort to matters of which judicial notice may be taken or to its expert knowledge. However, it is this Tribunal's expert knowledge which leads it to the conclusion that evidence is needed in order to determine such issues. There is no basis on which to infer or assume that recognition of the Applicant would be burdensome or cumbersome.

13. That recognition of the Applicant would be burdensome or cumbersome formed an essential part of the weighing of the issues by the Tribunal. Excising this issue from the rest of the Tribunal's reasoning would upset the balance and it is far from clear that the Tribunal would have reached the same decision even if the rest of its reasoning is regarded as valid.

14. Therefore, in the Tribunal's opinion, the decision of 5th April 2016 contained a clear error of law which would result in its being overturned if it went on appeal. In those circumstances, the Tribunal has decided on review to set it aside. The issue of whether the Applicant should be recognised must be decided again.

15. The Tribunal told the parties of this conclusion and invited representations as to whether the hearing should continue in order for the substantive issue to be considered or whether it should be

adjourned to another date. In the event, both parties submitted that the hearing should continue, without an adjournment, and so the Tribunal proceeded to hear further submissions.

Recognition

16. A positive case was set out on behalf of the Applicant as to why it should be recognised:

   (a) It was argued that section 29 embodies a right for tenants to organise formally in order to pursue their common interests and exercise the rights that come with recognition. Section 29(4) defines qualifying tenants, i.e. those who qualify to form a recognised tenants' association, as those who "may be required under the terms of his lease to contribute to the same costs by the payment of a service charge." It was pointed out that all the Applicant's members satisfy this definition.

   (b) It was argued that there is a real need for leaseholder representation at 182-228 Campbell Road, in particular due to a number of the Applicant's members being in dispute with the Respondent over various aspects of their service charges. For example, it was recently discovered that communal energy services had been shared with neighbouring blocks without an equivalent allocation of charges for those services. The Applicant's members want to be able to exercise the rights of a recognised tenants' association, such as appointing a surveyor under section 84 of the Housing Act 1996 to advise in relation to the disputes.

17. The majority of the arguments before the Tribunal concerned the Respondent's objections to recognising the Applicant. In letters dated 26th January 2016 (mis-dated 2015) and 24th March 2016 the Respondent opposed the application on two grounds:

   (a) The Respondent defines the block for service charge purposes as 150-228 Campbell Road, thereby including numbers 150-180 as well as 182-228. In another case which the Respondent brought against the lessee of number 202 (ref: LON/00BG/LSC/2015/0243), the Tribunal held that it was consistent with the lease and reasonable for the Respondent to do so.

   (b) It was argued that it would be administratively onerous for the Respondent to consult both the Applicant and the existing Lincoln Estate TRA. It was further argued that recognising the Applicant would cause duplication resulting in increased cost.

18. The Respondent seemed to regard the first point as weighing heavily in the balance. By e-mail dated 30th October 2015, they offered to recognise the Applicant if its membership were reformulated to include the lessees in numbers 150-180 so that the organisation covered the whole of what they defined as the block. Mr Hardman argued that, if and when regulations are made under section 29, it is likely that they would require any putative association to invite participation from all

qualifying tenants by analogy with similar provisions in the regulations for the right to manage and enfranchisement.

19. The Tribunal does not accept the analogy. The right to manage and enfranchisement have a direct effect on non-participating tenants to a degree which requires their involvement. However, an association is a group of people who want their voice to be heard together. There is nothing intrinsically wrong with that group consisting of only some of the potential participants – there is certainly nothing in section 29 to suggest that such a situation would be wrong in any way.

20. Mr Hardman asserted that there is no presumption in favour of recognising a tenants' association under section 29. Equally, however, there is no presumption against it. The fact is that there is nothing to stop the Applicant's members organising in the way they have, if that is what they want to do, even if the Respondent is right to define the block in the way they have. It would almost certainly be different if there were one or more lessees who were eager to be involved but were being excluded – three of the 5 lessees in 150-180 were contacted but had no interest in being involved.

21. It would be even more significant if the association were limited in its membership for improper motives such as racism or personal animosity. However, the Respondent accepted (even as they thought it misguided) that the Applicant's members genuinely see 182-228 as being a separate block. Whether it actually is seems to the Tribunal to be somewhat irrelevant in this context, although it is noteworthy that the block is defined in all but one of the leases at 182-228 as being 182-228. It is also noteworthy that the Government's non-statutory guidance in *Residential Long Leaseholders: A guide to your rights and responsibilities* suggests that an association should represent at least 60% of the flats in the block in respect of which variable service charges are payable and the Applicant satisfies this criterion even if 150-180 are included.

22. The statutory policy behind section 29 clearly regards tenants' associations and their recognition as meritorious. It seems to the Tribunal that it is not enough for a landlord to point out that any association seeking recognition could potentially organise themselves in a way other than the one they have used or that, if they did, it might be more efficient or less onerous for them. Once the association in question has set out and established, with evidence, a positive case for recognition, it is the Tribunal's opinion that recognition should only be denied if the landlord provides a counter-argument of at least equal weight.

23. However, the Respondent has not done so. As already discussed above, they did not provide any evidence in support of their assertion that it would be onerous for them to recognise the Applicant. They were

provided with an opportunity to seek an adjournment which would have given them the time to assemble such evidence but they eschewed it.

24. Further, the Respondent's argument rested in part on the ability of the Applicant's members to exercise their rights and their voice through the Lincoln Estate TRA but, even on their own case, that ability does not exist:

    (a) By e-mail dated 12th March 2013 the Respondent stated (contrary to their later written submissions) that the recognition they have given the Lincoln Estate TRA is not recognition under section 29. This does seem to be correct as the lessee members of the TRA are not required under their leases to contribute to the same service charge costs, being in buildings which are dispersed geographically. Even if that is not the case, the TRA is unable to exercise the statutory rights of a recognised tenants' association and so it is patently not an alternative to the recognition of the Applicant.

    (b) As already mentioned, the TRA is for residents and thereby excludes non-resident lessees. This is consistent with the extensive guidance the Respondent has published to support the establishment of TRAs which says virtually nothing about lessees' service charges.

25. The Tribunal accepts that the Applicant complies with both the explicit criteria in and the policy behind section 29. It is also accepted that the Applicant's members have disputes, actual and potential, with the Respondent which appear to be genuine and substantial. They would like to pursue their case collectively, through the Applicant, and the Respondent has presented no good reason as to why they should not be permitted to do so. Therefore, the Tribunal has concluded that the Applicant should be granted their certificate of recognition.

26. Neither party made submissions as to the duration of the certificate. The aforementioned non-statutory Government guidance suggests four years. However, there is nothing in section 29 which necessarily limits a certificate by time, nor was there anything in the facts of the case which suggested there should be a limitation or what it should be. If and when regulations are made under sub-section (5), they are required to address both the procedure for cancelling a certificate and its duration. It seems to the Tribunal that, if the Applicant's recognition becomes arguably inappropriate for any reason at any time in the future, and the circumstances become such that it is worth the time and expense of a Tribunal application, the Respondent may always apply for cancellation. In the Tribunal's opinion, this is preferable to requiring the Applicant to return for an extension of the certificate at some arbitrary future point in time.

Costs

27. The Respondent applied under rule 13 of the Tribunal Procedure Rules for their costs of the proceedings. Mr Hardman argued that the Applicant could and should have accepted their conditional offer set out in their aforementioned e-mail of 30th October 2015 and, if they had, the hearing would have been avoided.

28. Costs are only payable under rule 13 if the paying party has acted unreasonably. The Tribunal is satisfied that the refusal to comply with the Respondent's conditions cannot possibly be regarded as unreasonable within the meaning of rule 13. As already set out above, there is no reason why the Applicant should not have organised themselves in the way they have chosen.

29. The Applicant's written submissions had contained an application for costs under rule 13 but this was withdrawn at the hearing. However, an application was made for an order under section 20C of the Landlord and Tenant Act 1985 that the Respondent's costs of the proceedings should not be added to the service charge.

30. The Tribunal is satisfied that it is just and equitable to make an order under section 20C. On the basis of their presentation to the Tribunal, the Respondent had no adequate reason for refusing recognition to the Applicant. They had it within their own power to grant recognition and, if they had, the proceedings would never have taken place.

Name: NK Nicol **Date:** 14th July 2016

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 29 Meaning of *"recognised tenants' association"*

(1) A recognised tenants' association is an association of qualifying tenants (whether with or without other tenants) which is recognised for the purposes of the provisions of this Act relating to service charges either—

(a) by notice in writing given by the landlord to the secretary of the association, or

(b) by a certificate—

(i) in relation to dwellings in England, of the First-tier Tribunal; and

(ii) in relation to dwellings in Wales, of a member of the local rent assessment committee panel.

(2) A notice given under subsection (1)(a) may be withdrawn by the landlord by notice in writing given to the secretary of the association not less than six months before the date on which it is to be withdrawn.

(3) A certificate given under subsection (1)(b)(i) may be cancelled by the First-tier Tribunal, and a certificate given under subsection (1)(b)(ii) may be cancelled by any member of the local rent assessment committee panel.

(4) In this section the *"local rent assessment committee panel"* means the persons appointed by the Lord Chancellor under the Rent Act 1977 to the panel of persons to act as members of a rent assessment committee for the registration area in Wales in which the dwellings let to the qualifying tenants are situated, and for the purposes of this section a number of tenants are qualifying tenants if each of them may be required under the terms of his lease to contribute to the same costs by the payment of a service charge.

(5) The Secretary of State may by regulations specify—

(a) the procedure which is to be followed in connection with an application for, or for the cancellation of, a certificate under subsection (1)(b)(ii);

(b) the matters to which regard is to be had in giving or cancelling a certificate under subsection (1)(b);

(c) the duration of such a certificate; and

(d) any circumstances in which a certificate is not to be given under subsection (1)(b).

(6) Regulations under subsection (5)—

(a) may make different provisions with respect to different cases or descriptions of case, including different provision for different areas, and

(b) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Section 20C

(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 court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

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

Orders for costs, reimbursement of fees and interest on costs

13.—(1) The Tribunal may make an order in respect of costs only—
- (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—
  - (ii) a residential property case, or
  - (iii) a leasehold case; ...

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs—
- (a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and
- (b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—
- (a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
- (b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(a) written reasons for the decision;
(b) notification of amended reasons for, or correction of, the decision following a review; or
(c) notification that an application for the decision to be set aside has been unsuccessful.

(3) The date in paragraph (2)(c) applies only if the application for the decision to be set aside was made within the time stipulated in rule 51 or any extension of that time granted by the Tribunal.

(4) If the person seeking permission to appeal sends or delivers the application to the Tribunal later than the time required by paragraph (2) or by any extension of time under rule 6(3)(a) (power to extend time)–
(a) the application must include a request for an extension of time and the reason why the application was not received in time; and
(b) unless the Tribunal extends time for the application under rule 6(3)(a) (power to extend time) the Tribunal must not admit the application.

(5) An application under paragraph (1) must–
(a) identify the decision of the Tribunal to which it relates;
(b) state the grounds of appeal; and
(c) state the result the party making the application is seeking.

Tribunal's consideration of application for permission to appeal

53.–(1) On receiving an application for permission to appeal the Tribunal must first consider, taking into account the overriding objective in rule 3, whether to review the decision in accordance with rule 55 (review of a decision).

(2) If the Tribunal decides not to review the decision, or reviews the decision and decides to take no action in relation to the decision, or part of it, the Tribunal must consider whether to give permission to appeal in relation to the decision or that part of it.

(3) The Tribunal must send a record of its decision to the parties as soon as practicable.

(4) If the Tribunal refuses permission to appeal it must send with the record of its decision–
(a) a statement of its reasons for such refusal; and
(b) notification of the right to make an application to the Upper Tribunal for permission to appeal and the time within which, and the method by which, such application must be made.

(5) The Tribunal may give permission to appeal on limited grounds, but must comply with paragraph (4) in relation to any grounds on which it has refused permission.

Review of a decision

55.–(1) The Tribunal may only undertake a review of a decision–
(a) pursuant to rule 53 (review on an application for permission to appeal); and
(b) if it is satisfied that a ground of appeal is likely to be successful.

(2) The Tribunal must notify the parties in writing of the outcome of any review, and of any right of appeal in relation to the outcome.

(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by—
   (a) summary assessment by the Tribunal;
   (b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");
   (c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998, section 74 (interest on judgment debts, etc) of the County Courts Act 1984 and the County Court (Interest on Judgment Debts) Order 1991 shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.

(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.

Setting aside a decision which disposes of proceedings

51.—(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—
   (a) the Tribunal considers that it is in the interests of justice to do so; and
   (b) one or more of the conditions in paragraph (2) are satisfied.

(2) The conditions are—
   (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
   (b) a document relating to the proceedings was not sent to or was not received by the Tribunal at an appropriate time;
   (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
   (d) there has been some other procedural irregularity in the proceedings.

(3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received—
   (a) within 28 days after the date on which the Tribunal sent notice of the decision to the party; or
   (b) if later, within 28 days after the date on which the Tribunal sent notice of the reasons for the decision to the party.

Application for permission to appeal

52.—(1) A person seeking permission to appeal must make a written application to the Tribunal for permission to appeal.

(2) An application under paragraph (1) must be sent or delivered to the Tribunal so that it is received within 28 days after the latest of the dates that the Tribunal sends to the person making the application—

(3) If the Tribunal takes any action in relation to a decision following a review without first giving every party an opportunity to make representations, the notice under paragraph (2) must state that any party that did not have an opportunity to make representations may apply for such action to be set aside and for the decision to be reviewed again.

Power to treat an application about a decision as a different type of application

56.– The Tribunal may treat an application for a decision to be corrected or set aside or for permission to appeal against that decision, as an application for any other one of those things.