



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

Case reference : **LON/00BE/LSC/2018/0274**

Property : **19 Flats at Hestia House, City Walk,
London SE1 3ES**

Applicant : **Southern Housing Group Limited**

Representative : **Ms Clare Cullen of Counsel**

Respondent : **Parkbrace Limited**

Representative : **JB Leitch; Solicitors**

Type of application : **Section 20C Landlord and Tenant
Act 1985 (Liability for Landlord's
costs)**

Tribunal members : **Judge Lancelot Robson
Mr S Mason FRICS FCI Arb**

Date of Determination : **22nd July 2019**

**Substantive Decision
Date (as Reviewed)** : **1st June 2019**

DECISION

Decisions of the Tribunal

- (1) The Applicants' Application is refused. No order is made under Section 20C of the Landlord and Tenant Act 1985 (Section 20c).
- (2) The Tribunal made the detailed decisions noted below.

The applications

1. The Applicants seek a determination pursuant to Section 20C that the Respondent's costs of its application under Section 27A of the Landlord and Tenant Act 1985 (determined by the Tribunal in its decision dated 1st June 2019) should not be considered relevant costs chargeable to the service charges and payable under the terms of a lease dated 23rd April 2004 (the Lease).
3. Extracts of the relevant legal provisions are set out in the Appendix to this decision.

Background

4. The Tribunal's decision dated 1st June 2019 was complex, but in essence made decisions on a number of specific matters in favour of both parties, and approved a settlement agreement made by the parties on the first morning of the hearing relating to a number of other items. The Tribunal also attached to that decision Directions for determining an application by the Applicant under Section 20C, which it was agreed would be a determination on the papers.
5. The Tribunal notes that it has seen a further round of correspondence (not pursuant to the Directions) from the Applicant and the Respondent, both dated 11th July 2019. The Applicant submitted that there should be preparation for a further hearing in the light of the Respondent's written submissions in reply to the Applicant's submissions relating to the Section 20C application, as the Applicant wished to challenge them. The Tribunal further notes that the parties agreed at the end of the substantive hearing to one round of written submissions relating to the application, but that the Applicant now considers that there should be a further full hearing. As noted below, the Tribunal is well aware from the evidence at the hearing and submissions already received, of the parties divergent views on the conduct and chronology of the substantive litigation. The Tribunal decided that little more is likely to be gained by further submissions, whether oral or written on this matter, and that it should be wary of allowing ancillary issues to become major pieces of litigation in their own right, at significant cost to the parties and to the public purse. The Applicant's request is therefore refused.

Section 20C

6. The Applicant submitted:
 - a) Properly construed, the Lease contained no power for the Respondent to charge its costs of the substantive application to the service charge. It particularly

relied upon the case of Cannon v 38 Lamb's Conduit Street Ltd [2016] UKUT 37 (LC).

b) The Respondent had been very slow in responding to the Applicant's queries relating to various items of service charge in the period from 27th October 2016 up to the date of the hearing. Relating to some matters it had taken 9 months to reply, and then not very satisfactorily. One item had only been answered in the Respondent's Statement of Case. Certain invoices for service charge years in question (2014 - 2017) had not been provided, which the Applicant required to answer queries from one of its own sub-tenants, Ms Huang.

c) The Respondent had failed to assist the Applicant promptly when Ms Huang made her own Section 27A application to this Tribunal.

d) The Applicant's application was made on 23rd July 2018. Prior to the Case Management Hearing, the Applicant attended the Respondent's manager's office and raised further queries following inspection of the invoices. As a result the Respondent gave credits totalling £7,176.30 to the Applicant.

e) The Respondent made late disclosures in the substantive application, which led to further credits being given totalling £6,553.93.

f) Further issues were narrowed in negotiation immediately prior to the hearing, and again on the morning of the hearing.

g) The Applicant considered that it had succeeded on important issues put to the Tribunal at the hearing, particularly relating to insurance.

h) The Tribunal should make an order in favour of all lessees under Section 20C, not just the Applicant.

7. The Respondent submitted:

a) By Section 20C(1) the Tribunal could only make an order in respect of those tenants who were party to the application, see e.g. Re SCMLLA (Freehold) [2014] UKUT 0058 (LC). Contrary to the Applicant's submission, the Tribunal was only entitled to make an order in favour of the Applicant.

b) Clauses 9a) and 9(h) entitled the Respondent to recover its legal fees of this application via the service charge.

c) The Respondent referred to the cases of Cannon v 38 Lambs Conduit LLP (noted above), Reston v Hudson 1990 2EGLR 51, Iperion Investments Corp v Broadwalk House Residents [1995] 2 EGLR 47, Bretby Hall Management Company Ltd v Pratt [2017] UKUT 70 (LC), The Tenants of Langford Court v Doren LRX/37/2000 (Lands Tribunal; unreported 2001), Church Commissioners v Derdabi [2010] UKUT 380 (LC), Schilling v Canary Riverside LRX/26/2005 (Lands Tribunal; unreported 2006), in support of its contention above.

d) It would not be just and equitable to deprive the Respondent of recovering costs where there had been no improper or unreasonable conduct on its behalf. The Respondent refuted the Applicant's allegations noted above of confusion and delay in some detail (which the Tribunal finds it unnecessary to rehearse). In the Respondent's submission, the substantive application was premature, the Applicant had refused to attend previously proposed meetings prior to August 2018, it had added a series of further issues through the discussion process, and had not revealed the full extent of its queries, and in sufficient detail, in due time. The chronology of events as submitted by the Applicant was disputed in detail. It was not the case that the Respondent had delayed in providing or withheld information for unduly prolonged periods. At the final hearing, the disputed sums totalled 92,201.85, and the Applicant had been successful in relation to only £3,219.52 (or 3%) of that figure.

Decision

8. The Tribunal considered the evidence and submissions. It considered that the guidance given in the Cannon case (see above) was appropriate. However applying that guidance, the Tribunal disagreed with the Applicant's submission. Clause 9a) is a very wide-ranging clause, and was apparently intended to be so. The full text reads:

"9. FOR the sake of clarity the parties acknowledge that notwithstanding anything herein contained or implied:-

(a) in the management of the Block and/or the Estate and the performance of the obligations of the Landlord shall be entitled to comply or retain the services of any employee agent consultant service company contractor engineer or other advisers of whatever nature as the Landlord may reasonably require and the expenses properly incurred by the Landlord in connection therewith shall be deemed to be an expense incurred by the Landlord in respect of which the Tenant shall be liable to make an appropriate contribution under the provisions set out in the Fourth Schedule hereto."

The Tribunal decided that this is not a "sweeper clause". It forms the basis of the service charge provisions.

9. Clause 9(h) specifically entitles the Respondent to refer service charge issues to a relevant tribunal, and to charge the cost thereof to the service charge. The Applicant's suggestion that this clause should be interpreted so as to prevent the Respondent from charging its costs of successfully defending an application made in such a tribunal, could lead to absurdity. Being able to commence proceedings in a judicial forum necessarily implies the possibility of being obliged to be a Respondent in the same forum in the same or different proceedings. Having considered the Lease as a whole, the Tribunal considered that it did allow the Respondent to charge its costs to the service charge.

10. The Tribunal then considered the merits of the Section 20c application. The Tribunal disagreed with the Respondent's submission that Section 20C orders could only be made in favour of parties to an application. Section 20C in terms to "persons specified in the application". The case of Re SCMLLA (Freehold) (see above) refers (as noted by the Respondent itself) to "any person who has neither made an application of their own under Section 20C or been specified in an application made by someone else".

11. Nevertheless, the Tribunal decided that it should make no order in favour of non-parties to this application. They had not joined the proceedings and, unlike the Applicant, they had incurred no costs or taken any financial risks in the event of an adverse decision. They would, however, benefit from the Tribunal's decision clarifying the terms of the Lease.

12. In exercising its discretion, the Tribunal noted the following matters:
a) the subject property is a block of 49 properties in a larger development.

b) the Applicant is the long leaseholder of (presently) 19 of those properties, and an experienced social landlord. Nevertheless, the Applicant had not sought to seriously dispute the Respondent's charges until receipt of complaints by a sub-tenant, nor had it taken part in the Section 20 consultations relating to major works (forming part of the disputed costs) at the appropriate time.

c) The Respondent's shortcomings alleged by the Applicant were seriously disputed, and the Respondent had complained of lack of detail and the addition of fresh issues to the Applicant's case in the substantive application. Although the Tribunal did not accept the Respondent's submissions entirely on its conduct, aspects of the Applicant's own conduct were not beyond reproach.

d) It seemed to the Tribunal that a hearing in the substantive case appeared inevitable, given the contrary interpretations of the Lease made by the parties. The Tribunal's decision of 1st June 2019 assisted both parties in clarifying that issue.

13. All things considered, the Tribunal decided that it should not exercise its jurisdiction to make a Section 20C order in favour of the Applicant in this case. With the benefit of hindsight the Tribunal considered that both parties could have done better in progressing the dispute, and neither seemed to have been deliberately obstructive, or unreasonable. In such circumstances, the Tribunal decided that a satisfactory case had not been made out for depriving the landlord of its right in the Lease to charge its costs of the application to the service charge.

Tribunal Judge: Lancelot Robson 22nd July 2019

Appendix of relevant legislation

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.
