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| | | **FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)** |
| **Case Reference** | : | **LON/00AU/LLC/2017/0002** |
| **Property** | | **:1-19 Mount Carmel Court, 20 Eden Grove, London N7 8EQ and other properties** |
| **Applicant** | : | **Mr Aram Balakjian** |
| **Representative** | : | **In person** |
| **Respondent** | : | **Ashmore PM Ltd.** |
| **Representative** | : | **RPC Solicitors** |
| **Type of Application** | | **:s.20C Landlord and Tenant Act 1985** |
| **Tribunal Members** | : | **Judge Dickie**<br>**Mr P Casey MRICS**<br>**Mr P Clabburn** |
| **Date of hearing** | : | **13 September 2017** |

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## DECISION

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An order under s.20C is made in respect of 20% of the Respondent's reasonable costs in the previous proceedings and in favour of all non party residential leaseholders as set out in the body of this decision.

INTRODUCTION

1. Application has been made for an order under s.20C of the Landlord and Tenant Act 1985("the Act") preventing the Respondent from recovering legal costs incurred in defending proceedings before this tribunal in case LON/00AU/LSC/2015/0349. Those proceedings were an application brought by Mr Mohammed Bharadia, leaseholder of 16 Carmel Court 20 Eden Grove, London N7 8EQ under s.27A of that Act, challenging his service charge liability for the period 2008 – 2016 (and associated applications in respect of costs).

2. The properties form part of a mixed use development consisting of five blocks between Hornsey Street and Eden Grove in London N7. The development consists of over 500 residential units of beween one and three bedrooms and approximately 50 commercial units at ground floor level.

3. The Applicant had consented to this application being determined on the papers, but the matter was listed for an oral hearing upon directions of the Tribunal issued on 1 June 2017. A hearing took place on 13 September 2017 at which the Applicant Mr Baram Balakjian (the current chair of the Vizion 7 Residents' Association and the leaseholder of 121 Carronade Court) appeared in person and the Respondent was represented by Mr Duckworth of counsel.

Section 20C provides:

"(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 leasehold valuation tribunal [ or the First-tier 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—
[(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;]

(c) in the case of proceedings before the [Upper Tribunal], to the tribunal;

(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 PREVIOUS PROCEEDINGS

4. Mr Bharadia's claim had been in respect of service charges for the years 2008 – 2016. In its substantive decision of 30 September 2016, the Tribunal determined that it had no jurisdiction to determine the service charge years up to and including the year ending February 2014. This left only two years in dispute before the Tribunal – the actual service charge expenditure for the year ending February 2015, and the budgeted expenditure for the year ending February 2016.

5. In respect of this budget, the Tribunal made a determination as to the reasonable estimated service charges that could be demanded. However, it left it open to the Respondent where appropriate to conduct the apportionment of the service charges actually incurred based on empirical evidence as to the correct apportionment.

6. In a decision dated 21 December 2016 the Tribunal determined the applications by Mr Bharadia for (i) an order under s.20C and (ii) a refund of his Tribunal fees. It refused the former application and allowed the latter one in part (ordering the Respondents jointly to refund to Mr Bharadia his application fee).

7. The Tribunal gave brief reasons for its decisions, proportionate to the small sum of money involved:

*"3. The costs that can be the subject of this application are therefore small – since they can represent only Mr Bharadia's proportionate share of them under the service charge provisions of his lease. The Second Respondent's costs incurred to date are said to be in the region of £120,000 plus VAT, and reasonable service charges may be apportioned to the leaseholders of over 500 units on the Estate who might be liable to contribute.*

*4. The Tribunal has had regard to the degree of the Applicant's success, the financial impact on all concerned of the order sought, and all the circumstances of the case. It in particular refers to his conduct in the litigation which is referred to in the substantive decision. The Tribunal is familiar with the authorities relevant to the consideration of its discretion to make an order under s.20C. It does not consider that it would be just and equitable to make the order sought in relation to any of the costs of these proceedings.*

*5. It is proper in this case that any issues as to the payability of such costs under the lease, if disputed, should be the subject of a s.27A application, pursuant to which the Tribunal's jurisdiction includes a determination as to their reasonableness. Mr Bharadia seeks an order for the refund of his Tribunal fees. Given all of the circumstances, the Tribunal considers it appropriate that the Respondents jointly refund his application fee, but that Mr Bharadia should bear the hearing fee."*

8. Also on 21 December 2016 the Tribunal issued a separate decision refusing the Respondent's application for an order under Rule 13 that Mr Bharadia pay its costs in the proceedings. In a third decision issued on that same date the Tribunal refused the Respondent's application for permission to appeal the substantive decision.

9. In a fourth decision issued on 21 December 2016 the Tribunal granted in part the Applicant's request for permission to appeal, giving permission to appeal the decision on the disputed interpretation of the lease as to the existence of a requirement (and a precondition for recovery of the balancing charge) that the service charge accounts must be audited. Permission was subsequently granted to Mr Bharadia by the Upper Tribunal to appeal an additional aspect of the substantive decision (in relation to water charges). Mr Duckworth informed the Tribunal that Mr Bharadia's appeal to the Upper Tribunal was settled on confidential terms, which confidentiality the Respondent did not waive in these proceedings (though Mr Duckworth was authorised to confirm that its terms did not relate to the ability of the Respondent to recover costs of the previous proceedings through the service charge from the remaining leaseholders).

10. Mr Duckworth submitted that the present Applicant would need to point to some

significant new or different grounds in support of the instant application if the Tribunal is to reach a different conclusion. The Respondent is understood to have charged in excess of £180,000 to the service charge to date for his legal and other expenses in the previous proceedings (about £52,000 of that amount being in relation the appeal to the Upper Tribunal).

PARTIES TO THE APPLICATION

11. The freeholder Stadium Investments Ltd. was initially named as a Respondent to this application, but (as the freeholder was not seeking to recover legal costs through the service charge) the Tribunal subsequently directed on 13 July 2017 that it was no longer a party to the proceedings.

12. Mr Baram Balakjian was named as Applicant on the application, which specified the persons for whose benefit the order was sought as the leaseholders of the residential units as follows:

    Units 1-19 Mount Carmel Court

    Units 1-20 Culverin Court

    Units 1-107 Garand Court including The Garden Flat

    Units 1-187 Buckler Court, including unit 169a

    Units 1-184 Carronnade Court, including units 1a, 40-46a and 57-58a inclusive.

13. Whereas it was also stated in the application that all the above leaseholders on the development were Applicants, and though the Residents' Association had informed its members that the application was being made and some had written in support, none objecting, it was clear to the Tribunal that no leaseholders other than Mr Balkjian were formally a party to the application. Furthermore the Tribunal did not consider it appropriate to join them as Applicants. This was because the wording of the information given to them about the proceedings and the letters of support was not sufficiently precise to satisfy the Tribunal that they each had the necessary knowledge and intention to become a party, with the possible costs liabilities that brings with it.

14. It was understood and agreed by all at the hearing that Mr Balkjian was the only Applicant and that the Tribunal had jurisdiction to entertain the application for an order in favour of all of the other residential leaseholders on the development as "any other person or persons specified in the application" (other than Mr Bharadia).

15. To the extent that the application under s.20C was made for an order for the benefit of Mr Bharadia and having heard from the parties present, the Tribunal strikes it out under Rule 9(2) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Mr Bharadia's application under s.20C was dismissed on 21 December 2016. That decision related only to himself as no other leaseholders were named in it. For the avoidance of doubt, the application is not made for the benefit of the freeholder in its capacity as owner of a number of flats.

JURISDICTION

16. This is an application under s.20C, and not under s.27A of the Act in relation to the payability and reasonableness of the Respondent's costs. Accordingly, the Tribunal is not required to assess the Respondent's legal costs or otherwise form a view as to whether they are reasonably incurred and/or reasonable in the amount for the purposes of section 19 of the Act.

17. The Tribunal observes in particular that its jurisdiction on this application is limited by statute to those costs incurred in proceedings before this Tribunal (as opposed to costs before the Upper Tribunal). The Respondent accepted this applied to applications for permission to appeal made to the First-tier Tribunal. However, the Tribunal has no jurisdiction to make an order under s.20C in respect of and associated with both the Respondent's and Mr Bharadia's applications for permission to appeal made to the Upper Tribunal.

18. The Respondent relied on paragraph 15.3 of Part E of the Sixth Schedule of the Lease as entitling it to recover legal costs through the service charge. Mr Duckworth submitted, and the Tribunal agrees, that any challenge to the recoverability of legal costs under the lease terms would not be a matter for determination in this application, but would be a matter for consideration on any application under s.27A.

SUBMISSIONS, DECISION AND REASONS

19. The following principles derived from applicable authorities are to be applied by the Tribunal in the exercise of the discretion under s.20C:

    1. The starting point is that the Respondent (in this case the Manager under the leases) has a contractual right to recover legal costs through the service charge provisions. The Tribunal should only interfere with that right, by making a s.20C order, in circumstances in which it would be "unjust" for the Respondent to be allowed to enforce it (*Langford Court (Sherbani) v Doren Limited* LRX/37/2000 per Judge Rich QC at [31] and [33]).

    2. In considering whether it would be unjust for the Respondent to enforce its contractual right to recover legal costs, the Tribunal must take into account the outcome of the proceedings and, in particular, the degree of success which each party has had (*Schilling v Canary Riverside Development PTE Limited* LRX/26/2005 at [14]).

    3. The outcome of the proceedings will often be the "most important feature of the proceedings" as far as a section 20C application is concerned (*Conway v Jam Factory* [2013] UKUT 0592 at [55]), in which the provisions set out in the above two paragraphs were cited with approval). "Success" in this context involves a comparison between (i) the quantum of reduction claimed by the tenant in section 27A proceedings, (ii) the reduction ultimately made by the Tribunal in its determination and (iii) the total amount of service charges over the relevant period (*Schilling* at [14], see further *Church Commissioners v Derdabi* [2011] UKUT 380 at [18] per HHJ Gerald).

    4. Where the tenant is substantially the unsuccessful party in the main proceedings, it would require "some unusual circumstances" before a Tribunal will be justified in making a section 20C order. (*Schilling*, cited with approval in *Jam Factory*).

5. Consistent with the first principle above, a tenant who achieves a reduction in the amount of service charge does not automatically qualify for some form of section 20C order – contractual costs do not follow the event (*Langford Court* at [3], *Schilling* at [13-14], cited with approval in *Jam Factory* at [53-55] and in *Bretby Hall Management Co. Ltd.* [2017] UKUT 70 at [46] per HHJ Behrens). Mr Duckworth observed that the suggestion made by HHJ Gerald in *Church Commissioners v Derdabi* at [19] that a section 20C order should usually be made if and to the extent that a tenant has achieved some reduction is wrong and contrary to authority.

6. The conduct of the parties is a relevant factor. If the party who is otherwise entitled to recover its legal costs has behaved "oppressively", "abusively" or "unreasonably" that is a factor to be weighed in the balance. Mr Duckworth submitted that the consequences of the conduct of the freeholder in this case (to whom the placing of insurance was delegated), should not justly be visited on the Respondent. However, though the Tribunal considers it unlikely that substantial costs were expended in any event by the Respondent in respect of insurance matters, the Respondent was well aware that the freeholder did little claims handling (see in particular paragraph [127]) for which commission was being overcharged, and Mr Duckworth's argument was therefore not compelling.

7. The particular circumstances of the party entitled to collect the service charges are a factor to be taken into account (*Schilling* at [15], cited with approval in *Jam Factory* at [56]). This includes comparing the situation of party and non party leaseholders. The Tribunal also has regard to the nature of this Respondent, which has resources deriving from the development. It is not a leaseholder owned company.

20. The Applicant submitted a lengthy statement of case, which (other than certain without prejudice matters improperly raised within it) the Tribunal has considered. With the Respondent's consent the Tribunal also read a narrative witness statement from Mr Martin Gibril, former Residents' Association chair, though he was unwell and could not attend the hearing.

21. The Applicant argued that it would be inequitable given the Respondent's conduct and the relative success of the parties for the Respondent to be able to recover its costs in full through the service charge. He submitted that this recovery should be limited, at most, to 25% of the Respondent's overall legal costs. The Applicant argued that the decision of the Tribunal was adverse to the Respondent in many respects, in that the Respondent failed to apportion several service charge items between the commercial and residential lessees in the manner explicity prescribed in their leases. He also observed that in its substantive decision the Tribunal had made comments critical of the Respondent.

22. The Tribunal reminds itself of its reasoning in the decision, which is not set out in this decision. Some was critical of Mr Bharadia, some of the Respondent. Some was appreciative of the contribution of Mr Bharadia's representative and of the professionalism of Mr Duckworth. The Tribunal considered the proceedings were not likely to have been brought if the Manager had approached the allocation of service charges with a view to transparency and objectivity.

23. The Tribunal in general recognises the obstacles to negotiation and settlement

which the Respondent faced given the manner in which Mr Bharadia put his case, and that it received no warning of the application under s.27A before it was made. However, the Tribunal does not understand Mr Duckworth's point that the Respondent could not settle with Mr Bharadia because any reduction would then be demanded by the other leaseholders on the development. The Respondent has refused to adjust the service charges for the year 2014/15 for the other residential leaseholders, Mr Bharadia having received a deduction of about £140 for that year (and of about £540 in total across the two years), so there is no evidence that the Respondent would have acted differently in the event of a settlement with him. At the close of the hearing Mr Duckworth advised that he was instructed that the Respondent might make a refund to the other leaseholders for the year 2014/15 if, when further evidence on the correct apportionment was available, it would result in a significant adjustment for that year. However, the Tribunal has already decided the correct apportionment for that year and Mr Duckworth said the Respondent offered no guarantee of a refund and that its position was reserved. The Applicant considers it grossly unfair to recover through the service charge legal costs of these proceedings so disproportionate to the benefit obtained, but in respect of this issue the Tribunal is not determining the reasonableness of the Respondent's legal costs in this decision, and proportionality is understood to be part of the notion of reasonableness.

24. In the present case it falls for consideration whether a different decision is justified in respect of the present application that was made in respect of Mr Bharadia's application. Mr Duckworth submitted that there is nothing new or different about the instant application that would warrant the Tribunal from reaching a different conclusion to that on Mr Bharadia's s.20C application.

25. The position must be considered carefully, since the non parties did not participate in the proceedings, and making an order in their favour might be thought of as an attempt to "squeeze the landlord out of its property" (as Judge Rich QC speculated in *Doren* at [25] was the reason for the LVT's refusal to make such an order). The Tribunal would need strong reasons for such an order, more favourable to non parties than it made to a party. Notably, in *Schilling*, Judge Rich QC only said at [14] that the outcome is to be given weight in considering whether to make an order "at least so far as the actual Applicants are concerned". However, the statute empowers the Tribunal to make such an order, and its discretion is broad. In the present case the Tribunal does consider it would be unjust not to make an order under s.20C in respect of part of the Respondent's cost, particularly considering the unusual circumstances described in this case and the following matters.

26. Mr Duckworth observed that Mr Bharadia had set out in his schedule of specific discounts that the total deduction he sought was £4,622, but he actually challenged all of the service charge (in the sum of £32,741.68) because of his argument over the requirement to audit the service charge accounts. Mr Duckworth therefore calculated that Mr Bharadia achieved a 1.74% deduction in the service charge. The Applicant however rejected this calculation as the accounts were audited up to 2012 and the Tribunal had no jurisdiction prior to 2014. In respect of the deduction of £4,622 sought, Mr Bharadia obtained a reduction of about 12%, and the Tribunal prefers to approach consideration of success in light of this (and not only the two years in respect of which the Tribunal found it had jurisdiction).

27. However, one difference between the consideration of Mr Bharadia's s.20C application and today is that the appeal to the Upper Tribunal has been settled on confidential terms. Mr Bharadia obtained permission to appeal on two points, one of which (the need for audited accounts) had wide ranging implications for the recoverability of the service charges in dispute. It is therefore not possible for the Tribunal to know the ultimate extent of Mr Bharadia's success. That of course might be a factor the Upper Tribunal would consider on any application under s.20C it was required to consider. However, it has some relevance to this Tribunal's consideration also.

28. The Tribunal's assessment of success in the application is therefore not straightforward, but it bears in mind that the tenant was successful in respect of the apportionment of gardening and landscaping costs; cleaning in 14/15; fire equipment servicing; electricity charges; concierge and security; lift maintenance and insurance; car park insurance and management fees. He was also successful on reserve fund contributions. Mr Duckworth submitted that the Respondent was not responsible for the failures prior to it becoming the Manager, but it handled the apportionment of the service charges in the end of year accounts for 14/15, including the apportionment, and thus adopted those failures.

29. Clearly, the conduct of parties is relevant. By definition, such conduct cannot be that of a non party to the proceedings. In *Iperion Corporation v Broadwalk House Residents Limited* [1995] EGLR 47 (CA), the distinction was made between the party and non party leaseholders in that the s.20C order was made in respect of the former, but not the latter (there was no such application and it was noted such an orderwould make the leaseholder owned company insolvent).

30. In the same decision the Tribunal in the exercise of its discretion did order the Respondents to refund the application fee of £440 to Mr Bharadia (each paying half). The Tribunal considered what was equitable in light of his own conduct and did justice between the parties, and this was not at no cost to the Manager. It dealt with his application under s.20C smartly, on the papers, with brief reasons, and without seeking representations from the Respondents (though there was much in Mr Duckworth's submissions on the Rule 13 application against Mr Bharadia that was relevant). The Tribunal takes the view that, having heard full submissions after a hearing, and in light of the unusual circumstances set out in this decision, it is fully entitled to take a different view of the exercise of its discretion in favour of the non party leaseholders.

31. Mr Bharadia had been successful in respect of a number of items of the service charge. However he did not get the benefit of the (further) exercise of the Tribunal's discretion in his favour because he did not deserve it. He had made the proceedings longer and more complicated than they would otherwise have been. He had tested the patience of the Tribunal with the minutiae of the detail he had relied upon and the way he had prepared his case. This complexity could be associated with more costs incurred by the Respondent, which the Tribunal bears in mind. For this reason in particular, any s.20C order could not be made in respect of the majority of the Respondent's reasonable costs, or anything close.

32. Nevertheless the Respondent defended an indefensible service charge items, and its failure to deal more transparently with service charge allocation was the catalyst for

these proceedings. In all of the circumstances, the Tribunal determines that it is just and equitable to make an order under s.20C in favour of all the residential leaseholders specified in the application that 20% of the Respondent's reasonable costs in the previous proceedings are not to be regarded as relevant costs for the purpose of the service charge.

**Name:** F. Dickie **Date:** 25 October 2017