



LRX/41/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – application for costs of Lands Tribunal appeal– application for order to disregard costs as relevant in determining service charge- s.20C Landlord and Tenant Act 1985 – criteria – Iperion Case and Tenants of Langford Court case followed – applicant given costs – order made.

BETWEEN

DR C. J. AND MRS J. M. SCHILLING

Appellants

and

**CANARY RIVERSIDE
ESTATE MANAGEMENT LTD**

Respondent

**Re: Mixed Use Residential / Commercial Estate
32,36,38 & 48 Westferry Circus London E14**

APPLICATION FOR COSTS

1. Dr and Mrs Schilling apply for their costs in this matter and further argue that I should make an order under section 20C of the Landlord and Tenant Act 1985 that the costs of the landlord in these proceedings should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenants of the Canary Riverside Estate residential lessees. The Respondent contends that since the proceedings have not yet been finally disposed of and the applicants may not ultimately succeed, the decision should be left to the LVT to which the matter is remitted. But were I not to accede to that course it is argued that I should make no such order. I am referred to the decision of Judge Rich QC in *Tenants of Langford Court v Doren Ltd* (LRX/37/2000). It is said that the respondent has a proprietary right to recover by way of service charge costs incurred in litigation and that right should be respected in the absence of some factor that would make it unreasonable for the respondent to rely upon it. It is claimed that there is no such factor; it was reasonable of the respondent to seek to raise the res judicata and abuse preliminary issues before the Lands Tribunal.

2. In the *Tenants of Langford Court* case Judge Rich said this:

“28. In my judgment the only principle upon which the discretion (to make an order under section 20C) should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise.

29. I think that it can be derived from the decision of the Court of Appeal in the *Iperion* case that where a Court has power to award costs, and exercises such power, it should also exercise its power under s 20C, in order to ensure that its decision on costs is not subverted by the effect of the service charge.

30. Where, as in the case of the LVT, there is no power to award costs, there is no automatic expectation of an Order under s.20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct.

31. In my judgment the primary consideration that the LVT should keep in mind is that the power to make an order under s. 20C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust. Excessive costs unreasonably incurred will not, in any event be recoverable by reason of section 19 of the Landlord and Tenant Act 1985. Section 20C may provide a short route by which a tribunal which has heard the litigation giving rise to the costs can avoid arguments under section 19, but its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant, in circumstances where even although costs have been reasonably and properly incurred by the landlord, it would be unjust that the tenants or some particular tenant should have to pay them.

32. Oppressive and, even more, unreasonable behaviour however is not found solely amongst landlords. Section 20C is a power to deprive a landlord of a property right. If the landlord has abused its rights or used them oppressively that is a salutary power, which may be used with justice and equity; but those entrusted with the discretion given by section 20C should be cautious to ensure that it is not itself turned into an instrument of oppression.”

3. The reference to the *Iperion* case is a reference to *Iperion Investments Corporation v Broadwalk House Residents Ltd* [1995] 2EGLR 47 in which the Court of Appeal considered the mischief which section 20C was designed to address. At page 49H Peter Gibson LJ said

“To my mind, it is unattractive that a tenant who has been substantially successful in litigation against his landlord and who has been told by the court that not merely need he pay no part of the landlord's costs, but has an award of costs in his favour should find himself having to pay any part of the landlord's costs through the service charge. In general, in my judgment the landlord should not “get through the backdoor what has been refused by the front”.”

4. Judge Rich commented (at paragraph 22) “Precisely because the LVT has no power to award costs, there is no danger of its order being undermined by the landlord's contractual rights. It is however, in the context of the absence of any such power that the LVT has to exercise its discretion as to whether to make an order under section 20C.”

5. Dr and Mrs Schilling have succeeded in this appeal to the Lands Tribunal on an important point. So far as this appeal is concerned, neither side has behaved unreasonably. Dr and Mrs Schilling should have their costs, in my view, and, so far as the costs of this appeal to the Lands Tribunal are concerned it seems to me just and equitable that I should make an order under section 20C. In striking a balance between the principle articulated by Peter Gibson LJ and the view expressed by Judge Rich in paragraph 32, quoted above, I find the former more persuasive in the circumstances of this case.

6. For the avoidance of doubt, noting that Dr and Mrs Schilling applied not only for costs incurred but costs "to be incurred" by the landlord (following the wording of section 20C), I make it plain that this order applies only to the landlord's costs already incurred in the current proceedings before the Lands Tribunal. Any application in relation to the remitted proceedings in the LVT will be entirely a matter for the LVT at the appropriate time.

Order

1. The respondent, Canary Riverside Estate Management Ltd, is to pay the applicant's costs of this appeal to the Lands Tribunal;
2. Those costs are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the applicants or any other Canary Riverside Estate residential lessee.

Dated 15 October 2008

His Honour Judge Mole QC