FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case references	:	**BIR/17UB/LIS/2021/0047** **BIR/17UB/LIS/2021/0048**
Properties	:	**Apartments 9 and 12, St George's Court, Cromford Road, Langley Mill, Nottingham NG16 4EH**
Applicants	:	**Gary Aitken & Suzanne Aitken (1)** **Martyn Haines (2)**
Representative	:	**Ms B Lyne of Counsel instructed by Roythornes, Solicitors**
Respondent	:	**The Imperial Decorating Company Ltd**
Representative	:	**Mr T Hammond of Counsel instructed by Richard Nelson LLP, Solicitors**
Type of application	:	**(1) Application for an order under section 20C of the Landlord and Tenant Act 1985** **(2) Application under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 for an order reducing or extinguishing a tenant's liability to pay an administration charge in respect of litigation costs** **(3) Application for costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal members	:	**Judge C Goodall** **Mr G S Freckelton FRICS**
Date and place of hearing	:	**Paper determination**
Date of decision	:	**30 December 2022**

DECISION ON COSTS

Summary

1. Our orders are:

    a. On an application for costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, unreasonable conduct has not been established. The claim for costs is therefore dismissed;

    b. On an application under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, the Applicants liability to pay a particular administration charge in respect of litigation costs in this case is extinguished;

    c. On an application under section 20C of the Landlord and Tenant Act 1985 Act, twenty-five per cent (25%) of any legal costs arising from these proceedings and included in a service charge invoice delivered to the Applicants are not to be regarded as relevant costs to be taken into account in determining the service charge payable by the Applicants.

Background

2. On 18 November 2022, the Tribunal issued a decision ("the November Decision") on applications by the Applicants for determinations on the payability of service charges levied upon them as lessees of St George's Court, Langley Mill ("St Georges").

3. This decision concerns costs applications arising from the November Decision, being:

    a. An application under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 by the Applicants for costs against the Respondent arising from the Tribunal's decision to adjourn the hearing on 30 March 2022 for further documents to be produced;

    b. Applications by the Applicants under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 for the reduction or extinction of any liability to pay an administration charge in respect of litigation costs arising from the November Decision;

    c. Applications by the Applicants for orders under section 20C of the Landlord and Tenant Act 1985 Act ("the Act").

4. The Applicants and the Respondent have both provided written representations on the costs applications, drafted by counsel; the Applicants document is dated 29 November 2022, and the Respondents is dated 2 December 2022. In the November Decision the Tribunal

indicated it proposed to deal with costs applications on the basis of written submissions and without a further hearing.

5. We do not propose to set out the outcome of the November Decision in detail in this decision; the parties are well aware of it. The outcome of the costs applications is set out below.

The Rule 13 application

6. The First-tier Tribunal is not a jurisdiction, unlike the courts, where the unsuccessful party is normally ordered to pay the costs of the successful party. An order for costs is exceptional and can only come about through the application of Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The relevant parts of that rule are:

"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—

(i) an agricultural land and drainage case,

(ii) a residential property case, or

(iii) a leasehold case; or

..."

7. In *Willow Court Management Co (1985) Ltd v Alexander* [2016] UKUT 290 (LC) ("*Willow Court*"), the Upper Tribunal provided guidance on the correct approach to costs claims under Rule 13.

8. Firstly, the Tribunal should adopt a three-stage process:

   a. Consider whether the person against whom an order is sought has conducted itself unreasonably:

   b. If so, ask whether the Tribunal should exercise its discretion to award costs;

   c. If so, determine how much should be paid.

9. Secondly, "unreasonable" conduct is discussed in some detail. The distillation of that discussion in this section is not a substitute for a careful reading of the *Willow Court* decision itself. Nevertheless, it seems clear to the Tribunal that:

a. The Upper Tribunal approved the following passage (from *Ridehalgh v Horsefield* [1994] Ch 2015) as encompassing "unreasonable" conduct:

> "… conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on the practitioner's judgement, but it is not unreasonable."

b. It is improbable that the following conduct would constitute unreasonable conduct (without more): a party who fails adequately to prepare for a hearing; a party who fails to adduce proper evidence for their case; failure to state a case clearly, or the seeking of a wholly unrealistic or unachievable outcome.

c. Tribunals should not be over-zealous in detecting unreasonable conduct.

d. Lay people who are unfamiliar with the substantive law or tribunal procedure, or who fail to appreciate the strengths and weaknesses of theirs or their opponent's cases, or who lack skills in presentation, or who perform poorly in the tribunal room should not therefore be regarded as acting unreasonably.

e. The Tribunal must exercise its own value judgement on behaviours under consideration in the application.

10. The Applicants Rule 13 application is limited; the application is only for "the costs occasioned by the adjourned hearing on 30 March 2022". The reason for the adjournment was that copies of invoices and other documents supporting the service charges claimed from the Applicants were not available on 30 March 2022, despite the Tribunal having directed on 7 December 2021 that they should be provided by 21 January 2022.

11. The 7 December 2021 Directions also required that witness statements and a bundle of documents were to be provided at least 7 days before the hearing on 30 March 2022. The Applicants say they experienced some difficulty in obtaining co-operation from the Respondents solicitors in the preparation of the bundle.

12. Mr Stevenson is one of the joint freeholders of St Georges and a director and shareholder of the Respondent. So far as the Tribunal can discern, he has been the person who has been providing instructions and information to the Respondents legal team. On 24 February 2022, Mr Stevenson's son died. The Applicant's solicitor was informed the following day.

13. On 23 March 2022, the Respondent's solicitors emailed the Tribunal to ask for a "further short indulgence from the Tribunal for filing statements and serving the bundles for the hearing" arising from Mr Stevenson's bereavement and a clash with the funeral, which was taking place that day.

14. Any indulgence was strongly objected to by the Applicants solicitors.

15. At the 30 March hearing, Mr Stevenson showed the Tribunal the bundle of invoices he had prepared to assist with the hearing, but he said that his bereavement had significantly affected his ability to comply with the procedural requirements imposed upon him. It was also entirely apparent at that hearing (and indeed had also been apparent at the Tribunal's inspection on 28 March 2022) that Mr Stevenson was in an emotional and somewhat unstable state at the end of March 2022.

16. In these circumstances, the Tribunal does not consider the Respondents conduct meets the test of being conduct which is vexatious or designed to harass the other side. We also bear in mind the general guidance from *Willow Court* that we summarised in paragraph 8(b) and (c) above.

17. It is certainly true that there appears to have been a failure to comply with directions regarding provision of the invoices between 21 January and 24 February 2022 which is unexplained. Failures thereafter are understandable.

18. In our view, a failure to comply with a time limit in Tribunal Directions can give rise to a number of sanctions (including, ultimately, debarring), but it cannot be the case that such failure will always, or indeed often, be regarded as unreasonable conduct sufficient to constitute grounds for a Rule 13 costs order.

19. Our decision on the Rule 13 application is that unreasonable conduct has not been established. We therefore dismiss this claim for costs.

Paragraph 5A

20. The statutory provision is:

> "Limitation of administration charges: costs of proceedings
>
> 5A (1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.
>
> (2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable."

21. It is common ground between the parties that any litigation costs which the Respondent seeks to recover personally and directly (rather than through the service charge) from the Applicants under the leases resulting from the November Decision would be an administration charge, and thus

that this Tribunal has the power to reduce or extinguish the Applicants liability to pay such costs.

22. It also needs to be understood that this provision does not impact any attempt to recover costs through the service charge. Statutory control of service charges arises (inter alia) under section 27A and 20C of the Act.

23. Thus, the Tribunal needs to identify which provisions in the lease the Respondent could rely on to claim its legal costs from the Applicants directly.

24. Mr Hammond relies on paragraphs 7 and 16 of Schedule 4 of the sub-leases (which are in the same form in the Headlease). His case is that these paragraphs are sufficiently broad so as to allow the Respondent to pursue the Applicants directly for the litigation costs it has incurred in this case.

25. Paragraph 7 provides:

> "7. Costs
>
> To pay to the landlord on demand the costs and expenses (including any solicitors surveyors or other professional's fees costs and expenses and any VAT on them) assessed on a full indemnity basis incurred by the landlord (both during and after the end of the term) in connection with or in contemplation of any of the following:
>
> (a) the enforcement of any of the Tenants Covenants;
>
> (b) preparing and serving any notice in connection with this lease under section 146 or 147 of the Law of Property Act 1925 or taking any proceedings under either of those sections, notwithstanding that forfeiture is avoided otherwise than by relief granted by the court;
>
> (c) preparing and serving any notice in connection with this lease under section 17 of the Landlord and Tenant (Covenants) Act 1995;
>
> (d) preparing and serving any notice under paragraph 4(c) of Schedule 3; or
>
> (e) any consent applied for under this lease, whether or not it is granted (except to the extent that the consent is unreasonably withheld or delayed by the landlord in circumstances where the landlord is not entitled to unreasonably withhold or delay consent)."

26. Paragraph 16 provides:

> "16 Indemnity
>
> To indemnify the landlord against all claims, liabilities, costs, expenses (including any solicitors surveyors or other professional's costs and expenses, and any VAT on them, assessed on a full indemnity basis), damages and losses (including any diminution in the value of the landlord's interest in the building and loss of amenity of the building) arising out of or in connection with:
>
> (a) any breach of any of the Tenants Covenants; or
>
> (b) any act or omission of the Tenant, any undertenant or their respective workers, contractors or agents or any other person at the Property or the Building with the express or implied authority of any of them."

27. With respect to Mr Hammond, we disagree that these provisions allow recovery of the Respondents legal costs in this case. The Respondent has incurred costs in order to defend a section 27A application for a determination of the payability of service charges. The only costs covered by paragraphs 7 and 16 are those set out in the lettered sub-paragraphs (a) to (e) in paragraph 7, and (a) to (b) in paragraph 16. None of those sub-paragraphs cover the type of cost incurred in this case. There is no right to pursue the Applicants directly for payment of an administration charge that would reimburse the Respondents legal bill.

28. We will make a paragraph 5A order to clarify our decision on this point. Technically, it is not necessary to do so, for any claim that was launched on this basis would be bound to fail, but it is not in any parties interests for there to be any further avoidable litigation between them and so we make the order to prevent any attempt to claim the costs directly from the Applicants.

29. We determine that the Applicants liability to pay a particular administration charge in respect of litigation costs of defending the section 27A application that was adjudicated upon in the November Decision, which might arise under paragraphs 7 or 16 of Schedule 4 of the leases, is extinguished.

20C

30. Section 20C of the Act provides:

> "20C.— Limitation of service charges: costs of proceedings.
>
> (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 … the First-tier Tribunal, … 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—
…
(aa) in the case of proceedings before the First-tier 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."

31. The purpose of section 20C is to give the Tribunal the power to prevent a landlord actually recovering its costs via the service charge when it was not able to recover them by a direct order from the Tribunal. The discretion given to the Tribunal is to make such order as it considers just and equitable.

32. In *Tenants of Langford Court (Sherbani) v Doren Limited LRX/37/2000*, which concerned an application for the appointment of a manager under section 24 of the Landlord and Tenant Act 1987 in which the applicant tenants had been successful, the Lands Tribunal (Judge Rich QC) made the following remark in relation to section 20C:

"28. In my judgement the only principle upon which the discretion 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."

33. In *Conway & Others v Jam Factory Freehold Ltd* [2013] UKUT 0592 (LC) ("*Conway*"), which was a case involving a tenant owned management company, Martin Rodger QC, Deputy President of the Upper Tribunal (Property Chamber), said that:

"75. In any application under section 20C it seems to me to be essential to consider what will be the practical and financial consequences for all of those who will be affected by the order, and to bear those consequences in mind when deciding on the just and equitable order to make."

34. The Applicants primary case is that the leases under which liability to pay service charges for St Georges arise do not provide a right for the Respondent to charge its costs in defending the application that led to the November Decision through the service charge in any event. If correct, that would, in effect, dispose of the 20C application. We will deal with this question first.

35. As set out in the November Decision (see paras 20 – 33 of that decision), the lease structure in this case is slightly unusual. The freeholders, Mr &

Mrs Stevenson, must maintain the building and provide various services, in return for which they are entitled to charge a service charge to the Headlessor, which is the Respondent in this case. Each of the residential lessees at St Georges has an underlease, in which that lessee covenants to pay a fair and reasonable proportion of the costs the Headlessor/Respondent has to pay to Mr & Mrs Stevenson.

36. The key clause governing what must be paid in the headlease is the definition in clause 1 of "Service Costs". That definition provides:

"Service Costs" means "the total of:

(a) all of the costs reasonably and properly incurred or reasonably and properly estimated by the Landlord to be incurred of:

(i) providing the Services; and

(ii) complying with all laws relating to the Retained Parts.

(b) the reasonably and properly incurred costs and fees and disbursements of any managing agent or other person retained by the Landlord to act on the Landlord's behalf in connection with the Building or the provision of the Services; and

(c) all rates, taxes, impositions and outgoings payable in respect of the Common Parts, their use and any works carried out on them (other than any taxes payable by the Landlord in connection with any dealing with or disposition of its reversionary interest in the Building)."

37. The Services are defined as:

"Services" means

(a) cleaning, maintaining, decorating, repairing and replacing the Retained Parts and remedying any inherent defect;

(b) providing heating to internal areas of the Common Parts during such periods of the year as the Landlord reasonably considers appropriate, and cleaning, maintaining, repairing and replacing the heating machinery and equipment;

(c) lighting the Common Parts and cleaning, maintaining, repairing and replacing lighting, machinery and equipment in the Common Parts;

(d) cleaning, maintaining, repairing and replacing the furniture, fittings and equipment in the Common Parts;

(e) cleaning, maintaining, repairing, operating and replacing security machinery and equipment on the Common Parts;

(f) cleaning the outside of the windows of the Building other than those comprised within the demise of the Commercial Premises;

(g) maintaining any landscaped and grassed areas of the Common Parts;

(h) cleaning, maintaining, repairing and replacing the floor coverings on the internal areas of the Common Parts; and

(i) complying with the requirements of the insurer of the building

(j) any other service or amenity that the Landlord may in its reasonable discretion (acting in accordance with the principles of good estate management) provide for the benefit of the tenants and occupiers of the Building."

38. In our view, the costs incurred in defending a Section 27A application by lessees are costs incurred in providing the Services, because the dispute about the service charge arises from the provision of those Services, and providing services must involve more than just the physical services set out in one of the provisions in the definition of "Services" above. It must include activities incidental and ancillary to the provision of Services, including dealing with disputes about the provision of those Services.

39. Alternatively, or in addition, the Respondents legal fees are "costs .. of any managing agent or other person retained by the Landlord to act on the Landlord's behalf in connection with the Building or the provision of the Services" (paragraph (b) of the definition of Service Costs in the Headlease).

40. Neither counsel provided any detailed legal analysis of this question, though we were referred to a number of cases, including *Conway*.

41. In *Conway*, the Upper Tribunal said (paragraph 43):

"It seems to me to be clear that the landlord's participation in proceedings which challenge the amount of the service charge, including the service charge payable on account for services which have not yet been incurred, is properly to be regarded as an act of management."

42. We do not place complete reliance upon this very short extract from *Conway*, but it does provide an indication to us that our general approach of construing the definition of Service Costs broadly so as to include costs of defending a section 27A application, is a reasonable interpretation.

43. We are therefore clear that the provisions discussed above provide a contractual basis for any litigation costs incurred by the Respondent in defending the Applicant's section 27A application to be included within the service charge for the year they were incurred.

44. Should we make a section 20C order? We may make such order as we consider is just and equitable in the circumstances.

45. Mr Hammond submitted that an order should not be made lightly (see *Re: SCMLLA (Freehold) Ltd* [2014] UKUT 58 (LC)) as an order interferes with the parties contractual rights and obligations.

46. Mr Hammond's view is that if we were to make section 20C orders in favour of the Applicants, that would mean the other lessees at St Georges would have to pay the Applicants share to "make up the shortfall caused by the Applicants' non-payment". Respectfully, we disagree. The other lessees would be obliged to pay <u>their</u> share of the costs if the Respondent chooses to recover the costs through the service charge (subject to their rights to bring their own applications to restrict those costs under section 27A or section 20C, if advised), but the Respondent has been clear that he divides the costs equally between all twelve lessees in order to arrive at a fair and reasonable proportion. It seems to us (without this being a determination of the Tribunal, as the question is not before us) that any lessee who was asked to pay the Applicants share of the legal bill as well as their own would have a remedy under section 27A and/or a right to make their own 20C application. The shortfall would therefore fall (and rightly fall, in our view) upon the Respondent.

47. Ms Lyne's submissions request a section 20C order in favour of both Applicants, thus relieving them of any liability to contribute anything towards the Respondents legal costs through the service charge, even though they would be contracted to pay this contribution under the lease. She acknowledges that the proceedings have been only "partially successful". In fact, the Applicants secured a reduction in the amounts of service charges payable of £34.52 each for 2017/18, £49.00 each for 2018/19, and £123.81 each for 2019/20, an average 7.5% reduction over the three-year period. No reduction on the on-account service charge invoices for the following two years was achieved.

48. Ms Lyne also drew the Tribunal's attention to outcomes of a wider value than simply a reduction in the service charge, being the obtaining of information about some charges, a concession concerning non-compliance with section 21B of the Act and section 47 of the Landlord and Tenant Act 1987 ("the 1987 Act"), and issues concerning the adequacy of records and documents. These points have some force, and we take them into account, whilst saying that the section 21B and section 47 concerns were conceded by the Respondent and in our view had only a very limited impact upon the costs of the proceedings.

49. The Tribunal had the advantage of meeting Mr Haines and Mr Stevenson on 28 and 30 March 2022 (the second date by video) and at the face-to-face hearing in Nottingham on 8 November 2022. In order to make a decision that is just and equitable, we cannot ignore the fact that the personalities of these two individuals have clashed very badly. It is clear that conduct can be an issue in a section 20C decision (see para 31 above). Mr Haines pursued this case with considerable, and in our estimation, excessive vigour. We fully understand that he expects compliance with the law. That is his right and it is reasonable for him to do so. But he should

not have brought issues into the case that did not concern the Tribunal, and we were not able to detect any attempt on his part to understand and acknowledge the pressures upon Mr Stevenson of managing St Georges. His approach to the case meant it became an acrimonious dispute, and, with regret, we consider Mr Haines must take the greater part of the responsibility for that.

50. However, the Respondent's conduct is not without concern. It has made a number of mistakes in its management of St Georges (as is evident in the November Decision), chiefly focussed on record-keeping and compliance with legal requirements imposed upon residential landlords. But our view is that Mr Stevenson (as the driving force behind the Respondent) was more motivated by a desire to make St Georges an attractive place to live than for any other motive, including financial gain. He sought to keep service charges low, and to involve lessees as much as he could. He will undoubtedly have lost money by doing so, and in our view it was a lack of experience, or failure to take good quality professional advice that caused the problems that have arisen, not any malign or inappropriate motivation on the part of Mr Stevenson.

51. In our view, the limited level of financial success, and the conduct issues, have a significant impact upon what a just and equitable outcome is on the 20C application, off-set by our view that some process would have been required to rectify non-compliance with sections 21B of the Act and section 47 of the 1987 Act.

52. We do not think we can make no order under section 20C, as we consider the proceedings were justified in order to resolve the undoubted problems with the calculations of the service charges levied, and they may result in management of St Georges being put on a more sound and professional footing in the future. But we are only going to make a limited order as we think that these proceedings could have been avoided or substantially reduced in scope had there been a more co-operative and understanding relationship between the main protagonists in the case.

53. Our order is that 25% of any legal costs arising from these proceedings and included in a service charge invoice delivered to the Applicants are not to be regarded as relevant costs to be taken into account in determining the service charge payable by the Applicants. This means that, if the Respondent chooses to do so, it may charge the non-participating lessees their ten twelfths share of the costs (subject to any challenge made by them under section 27A or 20C), but it may only charge the Applicants three-quarters of the remaining two twelfths.

Appeal

54. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days

of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)