LEASEHOLD VALUATION TRIBUNAL for
THE LONDON RENT ASSESSMENT PANEL

LANDLORD AND TENANT ACTS 1985 and 1987 (as amended)

Residential Property
TRIBUNAL SERVICE

LVT/SC/014/049/03
LVT/SCC/014/022/03
LON/OOBK/NAM/2003/00007/02

DECISION UNDER SECTION 20C OF THE LANDLORD AND TENANT ACT 1985

Property: Cumberland Court, London W1H 7DQ

Applicants: Mr L Selsdon & others (as listed in reasons for previous decision dated 10 December 2003)

Represented by: Mr S Gallagher of Counsel instructed by Alan Edwards
Mr J Graham

Respondent: Corvan (Properties) Ltd

Represented by: Mr S Jourdan of Counsel instructed by Manches

Manager/Receiver: Rendall & Rittner Ltd
Represented by Mr D Rendall

Members of the Leasehold Valuation Tribunal:

Mrs V T Barran
Mr R Humphrys FRICS
Mr J Reed FRICS

Date: 10 March 2004

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DECISION

(a) The Tribunal orders that no costs incurred, or to be incurred, by the respondent in connection with the current proceedings brought before the Tribunal are to be regarded as relevant costs which can be included in the service charge payable by the applicants.

(b) No order for the reimbursement of the application and hearing fees is made.

REASONS FOR THE DECISION

BACKGROUND

1. Following a hearing in November 2003 at which the Leasehold Valuation Tribunal considered applications made under sections 19, 20C and 27A of the Landlord and Tenant Act 1985 and section 24 of the Landlord and Tenant Act 1987, an interim decision dated 13 November 2003 was made appointing Rendall & Rittner Ltd as manager and receiver of Cumberland Court. Reasons for the interim decision were published and dated 10 December 2003 on which date a further hearing took place largely concerned with the terms of the Management Order. The Tribunal published its decision on the form of the Order on 18 December 2003 and directed that both Counsel should confer on how to deal with the outstanding s.20C applications.

2. Mr Gallagher and Mr Jourdan assisted the Tribunal by sending in written submissions within the time scale indicated by the Tribunal and agreed that a further oral hearing was not needed.

3. Although this decision treats the section 20C applications as a discrete point, it nevertheless should be read in conjunction with the earlier decisions of the Tribunal on the substantive issues. Mr Jourdan identified three issues and the Tribunal has below adopted his suggested order.

4. **THE LAW**

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 a court or leasehold valuation tribunal, or the Lands 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*
.....

(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.*

Do the residential underleases, on their true construction, entitle the landlord to recover legal costs, incurred in connection with proceedings before the Tribunal, from tenants?

5. This issue was raised in the original application and Mr Jourdan asked the Tribunal to deal with it. Although Mr Gallagher did not address the point in his written submission, at the hearing he had considered that there was room for argument on legal liability within the lease, but he submitted that the tenants have a concern that the landlord **may** have a contractual right to collect legal fees. He stated that in contrast section 20C is a relieving provision and as such the tenants did want to pursue the section 20C application and he asked the Tribunal to make a debarring Order.

6. The specimen underlease provided to the Tribunal obliges a tenant to pay rents "ascertained in accordance with the Third Schedule". The Third Schedule in turn deals with Principal Rent (Part I), Service Rent (Part II) and Maintenance Charge (Part III). Part III is of relevance here and the "Maintenance Cost" of which a percentage will be charged to an individual tenant as a maintenance charge is defined as the total of:

(A) the cost (excluding any tax referred to in Sub-paragraph (c)) to the Landlords ascertained and certified by the Accountant (acting as an expert and not as an arbitrator) as being in his opinion a fair summary of the cost of:

(1) complying with their covenants in Clause 5.05 during the Landlords' Financial Year

(2) such provision for the anticipated expense of complying with their covenants contained in Clause 5.05 in the immediately following years of the Term as the Landlords or the Accountant may in their or his discretion allocate to the Landlords' Financial Year as being fair and reasonable in the circumstances

(3) employing any agent accountant company or person in connection with the estimation carrying out and supervision of works for the purposes of Clause 5.05 and in connection with the keeping and audit of accounts in respect of any expenditure and receipts in connection therewith and in connection with the collection of the Maintenance Charge.

(B) 10 per cent of such cost

(C) the amount of any tax including value added tax paid or payable by the Landlords in respect of any matter in subparagraph (A)

7. Mr Jourdan argued that all costs incurred by the landlord in pursuing a claim against a tenant are costs "in connection with the collection of the maintenance charge" and

would include costs payable to solicitors. This might be a simple debt collection exercise, or he argued, it may be that the landlord has also to deal with some reason put forward by the tenant as to why the maintenance charge is not due and therefore cannot be collected. Furthermore if a tenant refuses to pay a service charge because he claims the service charge costs are unreasonably high, then if the landlord takes legal advice, the costs of that advice are incurred "in collection with the collection of the maintenance charge". Mr Jourdan further argued that if the advice is that the tenant is wrong, and the landlord brings proceedings to recover the service charge, the landlord's costs of those proceedings are incurred "in connection with the collection of the maintenance charge". He contended that on the true construction of the residential underleases, the Respondent is entitled to include its costs in the calculation of the service charge, subject to any order that may be made under Section 20C.

8. Mr Jourdan cited the case of *St Marys Mansions Ltd v Limegate Investment Co Ltd* [2002] EWCA CIV 1491, [2003] 5 EG 146 where Ward L J reviewing previous cases stated that they "turn upon the precise terms of the lease, and they do not help solve the problem confronting this court. Our task is to construe this lease". The Tribunal can only agree with this. However some general judicial guidance on the construction of individual leases has been useful to us.

9. In addressing this issue the Tribunal has confined itself to dealing with the point in the context of the section 20C applications, as requested by the parties, i.e. whether on the construction of this underlease the legal costs of the landlord in responding to the applications are recoverable as service charges. These are "litigation" costs. We have not chosen to take a broader view and make a determination on liability under section 27A of the 1985 Act as to legal costs generally. These may include non contentious legal costs, which in certain circumstances may perhaps, as Mr Jourdan argued, fall to be costs in connection with the collection of the management charge. It was pointed out to us at the hearing that in some service charge years legal costs had been added to the service charge accounts. We did not receive details of these and this decision does not address them.

10. In coming to our decision we first looked at the ordinary natural meaning of the above clause, set in the context of the underlease as a whole, as recommended by Ward LJ in *St Mary's Mansions*. Secondly we took heed of the view of Taylor LJ *in Sella House Ltd v Mears [1989] 1EGLR 65*:

> *"For my part I should require to see a clause in clear and unambiguous terms before being persuaded that that result [charging legal fees as part of the service charge] was intended by the parties."*

Thirdly we were aware that if the clause is ambiguous it should be construed against the landlord (contra proferentem).

11. We read the underlease as a whole and noted that there was elsewhere a single mention of legal costs at clause 3.14. This obliges an individual tenant to pay the landlord's costs charges and expenses (**including legal** and surveyors fees and costs) where section 146 notices or schedules of dilapidation are served or where any notice was given by the landlord under that clause. Such costs could also be recovered for

the granting of any consent or approval under the lease. This indicated to the Tribunal that the draftsman had been aware here of the desirability of including specific mention of legal fees and costs.

12. By contrast, the definition of maintenance cost and maintenance charge in Part III of the Third Schedule makes no specific reference to legal fees or costs. We considered that if the draftsman had here intended the word "agent" to cover solicitors and counsel, that he/she would have used more specific wording. We found support for this view from the fact that subclause (A) (3) does mention **accountant** specifically and this term is defined at the beginning of Part III. The word "agent" is also defined as "agent for the time being of the landlord" but this is of no help.

13. We gave a little weight to the fact that subclause (B) allows the landlord to add 10% of the costs as defined in sub-clause (A). In this Tribunal's experience it would be unusual for a lease to provide for 10% of litigation fees incurred to be added to a service charge account.

14. Finally, the present applications do not simply concern the **collection** of maintenance charges. Even if it could be argued (and we do not accept that here) that the legal costs of defending the s19 and s27A applications could be "costs in connection with the collection of the maintenance charge", the application under Section 24 of the 1987 Act was for the appointment of a manager and therefore on the specific facts of these proceedings before the LVT would in our opinion be irrecoverable.

15. On balance this Tribunal was therefore of the view that this residential underlease cannot be construed as entitling the landlord to recover legal costs incurred in the current proceedings before the LVT from tenants. The charging clause was not clear or unambiguous and should therefore be construed against the landlord. We did not consider that it had been the original intention of the parties when the leases were granted, that tenants should bear legal costs incurred by the landlord in litigation proceedings, via the service charge.

What principles should the Tribunal apply in considering the application under Section 20C?

16. As requested by both Counsel we went on to consider whether to make an order under s.20C. No legal costs appear yet to have been quantified, nor had the respondent indicated (as requested by the tribunal in the Directions at the end of the decision of 18 December 2003) whether there was any intention to charge tenants for its costs in defending these applications. However the Tribunal was aware of various estimates both from Manches and from Mr Chater, with the highest given at £80,0000 + VAT.

17. Both Counsel referred us to the principles set out in a decision of the Lands Tribunal *The Tenants of Langford Court (EL Sherbani and others) v Doren Ltd LRX/37/2000* and both pointed out that there was no automatic expectation of an order under Section 20C in favour of successful tenants according to Judge Rich QC. Mr Jourdan also pointed out that the judge had qualified this by stating that a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs in defending such conduct. He also drew the Tribunal's attention to a planning appeal decision *R (oao Hann) v Secretary of State for Local Government, Transport and the*

Regions [2001] EW8C ADMIN 930 where a planning inspector would only order costs if there had been unreasonable behaviour by a party to an appeal causing the other party to incur costs. We did not find this to contain useful guidance, as it was a decision in a different field with different legal criteria.

18. The Tribunal considered that the wording of section 20C to be very clear and in deciding whether or not to make an order agree with Judge Rich that:

> *"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".*

Applying that principle, what is the appropriate order to make here?

19. The Respondent submits and the Tribunal accepts that it did not behave improperly or unreasonably in any aspect of the hearing of the applications. The Tribunal, as mentioned in the earlier decision, was grateful to both counsel and to Mr Graham and Mr Rendall for their co-operation before the resumed hearing, and particularly with regard to drafting and amending the proposed management order.

20. Mr Jourdan considered that because the Respondent was presented with new and detailed complaints, only weeks before the hearing date, it was inevitable that it had to incur substantial costs in considering those complaints. He also argued that three of the Applicants' complaints had not been accepted by the Tribunal. He submitted that looking at the matter overall, this is clearly a case where no order under section 20C is justified, but that if an order is made it should relate only to a portion of the Respondent's costs and should not include costs in respect of issues it had succeeded on.

21. Mr Gallagher submitted that the Applicants had been largely successful in the substantive actions particularly on the "big ticket" items : the section 20 issue in relation to the works to the fire staircases and on the application to appoint a manager. He summarised in some detail the particular findings of the Tribunal.

22. The Tribunal agreed with Mr Gallagher that the Applicants' decision to bring and continue the substantives applications was reasonable and that it would be unjust for the tenants to bear the landlord's costs of these application as well as their own costs. The Tribunal was supported in this view not only by its own previous findings, very largely in favour of the applicants, and which it is not intended to repeat here. These findings led to determinations in favour of the Applicants, albeit some grounds were found not to have been made out; but in particular at no stage had the Respondent made any genuine attempt to address the important issues raised by the Applicants and/or to settle this dispute, in whole or in part. There had been opportunities to achieve a settlement particularly with regard to the works to the external fire staircases, first following the Applicants' opposition to the original defective section 20 notices, then following the steer given by the procedural chairman at the first pre-trial review, then again following the section 22 notice, then again during the meeting between Mr Soulsby and Mr Nixon. We also paid some heed to *Ibrahim v Dovecorn Reversions Ltd [2001] 30 EG 116* where Rimer J held that a landlord's failure to

consult with tenants before defending (unsuccessfully) claims about his repairing obligations justified an order under s.20C.

23. In answer to the specific point made by Mr Jourdan, (para 20 above) the Tribunal noted that the applicants, who were not legally represented, did only provide an outline of their case in the s.24 application form, (July 2003) but then following the second pre-trial review did comply with the Tribunal's directions and submit a detailed case and witness reports on 1 September 2003. The Respondent then did need to address the detail of the argument with two months to go until the hearing, but there would seem to be no sustainable case for this leading to a substantial increase in the solicitor's fees. Detailed research, for example on the existence of the recognised tenant's association (a crucial legal point to the s.20 issue), could have been done at an early stage, as this was highlighted in the s.19 application as well as in the later appointment of manager application. The Tribunal considered that it would not in the circumstances outlined be equitable to allow the Respondent to recoup its litigation costs in these proceedings from the applicants.

24. Finally Mr Jourdan contended that any order under section 20C should not apply to lessees who had not joined in these applications. He again cited the *Sherbani* case where Judge Rich QC referred back to the case of *Iperion Investments Co-operation v Broadwalk House Residents Ltd [1995] 2 EGLR 47.* The Tribunal found this argument persuasive and accepts that section 20C itself refers to an order that 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 tenant or any other person or persons specified in the application"*** (our emphasis).

25. It is the view of this Tribunal that tenants in Cumberland Court, who did not join in the applications would not be affected by the section 20C order made.

REIMBURSEMENT OF APPLICATION AND HEARING FEES

26. The parties made no specific representations on whether or not the respondent should reimburse fees paid by the Applicants. The Tribunal has been informed that application and hearing fees totalling £1,000 have been paid. The Tribunal does have the power to order reimbursement of fees under both the old and new regulations. No specific principles or criteria for such a decision are laid down as guidance.

27. The Tribunal in this case declines to make any order for reimbursement. The Tribunal is aware that the Applicants collected a fighting fund and have shared the fees between them. In the earlier decision the Tribunal has already mentioned that there should be some give and take between the respondent and the applicants and that the Management Order is an opportunity for a fresh start. It may be counter productive to the future relationship between landlord and tenant to order reimbursement of fees.

CHAIRMAN: ..... 10 March 2004