FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/37UF/LLC/2019/0006**
Property	**:**	**St Crispins Court, Stockwell Gate, Mansfield, NG18 5GL**
Applicants	**:**	**Mr Aaron Charles (1)** **Mr D Blois (2)** **Mr A Ashford and Ms S E Gregory (3)** **Mrs D Otomewo (4)** **Mr I and Mr P and Ms C L Hanson (5)** **Ms M M McAtee (6)** **Mr B G Caulton (7)** **Mr and Ms Harte-Bunting (8)** **Ms K Kopekova (9)** **Mr G Mercer (10)** **JSB Systems Limited (11)** **Mr N Alphonso & Miss S Bender (12)**
Respondent	**:**	**E&J Ground Rents No 9 Limited**
Type of Application	**:**	**Application for an order under section 20C of the Landlord and Tenant Act 1985 ("the Act")**
Tribunal Members	**:**	**Judge C Goodall** **Mr C Gell FRICS**
Date of Decision	**:**	**1 August 2019**

DECISION

Background

1. On 25 June 2019, the Tribunal issued a decision in proceedings brought by E&J Ground Rents No 9 Limited ("the Respondent") for a determination of the service charge payable by the tenants of St Crispins Court, Stockwell Gate, Mansfield, NG18 5GL ("the Property") for the service charge year 2019 ("the Substantive Decision").

2. The main issue in the Substantive Decision was the appropriate apportionment of the service charge under the three types of lease granted. 86 tenants were residential lessees with a common form of lease. There were two commercial leases; one for car parking spaces, and one for commercial shop type premises.

3. All lessees , including the commercial tenant, had been made parties to the proceedings leading to the Substantive Decision.

4. The Respondent sought a determination that apportionment should be by floor area. The Respondent's argument on that issue was not opposed by any of the residential lessees. It was opposed by the commercial lessee.

5. The Tribunal was not persuaded that applying this method without consideration of the differing types of accommodation occupied at the Property produced a "fair and reasonable" apportionment, and so the Substantive Decision determined a more nuanced apportionment, which resulted in more of the total service charge being payable by the residential lessees.

The Application

6. Mr Aaron Charles ("the Applicant") is one of the residential lessees. His application for a section 20C order was dated 28 March 2019. The application sets out the grounds on which the Applicant seeks the order. Box 2 indicates that the Applicant seeks the order not only for his benefit but also for the benefit of all leaseholders at the Property.

7. Subsequently, eleven further lessees applied to become applicants in the application. These applications were granted by the Tribunal.

8. The application form was served on the Respondent who provided a written response dated 30 April 2019. The Applicant responded to that response in a further document dated 4 May 2019.

9. Neither party requested an oral hearing and accordingly the application has been determined on the basis of these written representations.

Grounds for the application

10. The grounds for the application are that the proceedings leading to the Substantive Decision were taken for the purpose of obtaining a determination on the apportionment issue because the Respondent and the commercial tenant had disagreements over the contribution the commercial tenant should make.

11. Mr Charles also said that he received an assurance from the Respondent that costs would be waived provided all leaseholders supported the budget forecast and the apportionment for 2019.

12. In the event, although some residential lessees did question some elements of the draft budget for 2019, those issues, Mr Charles suggests, did not give rise to significant cost.

The Response

13. The Respondent objects to the making of a section 20C order. Its grounds are set out in a submission dated 30 April 2019.

14. The right to claim costs incurred in applying for a determination of payability of the budgeted service charge for 2019 are said to derive from clause 6.13 of the leases, which provides:

> "6. The Landlord hereby covenants with the Tenant to carry out and otherwise perform the following services:
>
> ...
>
> 6.13 pay all proper costs incurred by the Landlord in the running and management of the Property and in the enforcement of the covenants on the part of the Tenant or any other Tenant insofar as the costs of enforcement are not recovered from the person in breach and in making such applications and representations and taking such action as the Landlord shall reasonably think necessary in respect of any notice or order or proposal for a notice or order served under any statute or order or regulation or bye-law on the Landlord the Tenant or any other Tenant in respect of the Building or the Property."

15. The lessees are obliged to pay an apportioned part of the costs incurred by the Landlord in carrying out the obligations set out in clause 6.

16. The Respondent's case is that this clause is adequate to cover the costs of seeking the determinations set out in the Substantive Decision.

17. In terms of whether it would be just and equitable to grant the application, the Respondent has argued that an order should not be granted in circumstances that make its use unjust, not least because the granting of an order deprives the Respondent of a property right, i.e. the contractual

right to its costs. The discretion to make the order should be exercised cautiously so that it is not turned into an instrument of oppression.

18. The Respondent says it engaged in lengthy discussions with the commercial tenant and a group of residential lessees in an attempt to reach a consensus, but that could not be achieved, and so it was proper for the Respondent to seek a ruling from the Tribunal.

19. The Respondent accepted that the offer to waive the costs of applying to the Tribunal for a ruling was made to the First Applicant, but only if the application had the full support of the residential lessees. As it transpired, this offer was not accepted by the First Applicant, and the offer was not extended to other lessees.

20. On the question of what additional work was required as a result of making the application, the Respondent says that there was "extensive" correspondence with the Respondent's brokers to address technical points raised by the First Applicant, and "protracted" correspondence with the Respondent's architect to answer a number of measurement questions raised by the First Applicant.

21. Finally, the Respondent draws attention to paragraph 3 of the Fifth Schedule of the residential leases, which states that "the object of the Service Charge provisions is to enable the Landlord to recover all the monies the Landlord may be liable to incur in respect of outgoings of the Building and the Property so that there shall be no residual liability upon the Landlord for such matters".

The Reply

22. The First Applicant replied to the Respondent's submissions in a further response dated 4 May 2019.

23. The essence of the reply is that the First Applicant accepts there had been many exchanges with the Respondent regarding various aspects of the management of the Property, including comments on the proposal for apportionment made by the Respondent and on insurance issues, but these exchanges had been helpful to both parties in identifying and rectifying mistakes and errors and ironing out an agreed approach.

The Law

24. Section 20C 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.

25. 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.

26. 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:

"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."

27. In *Conway & Others v Jam Factory Freehold Ltd* [2013] UKUT 0592 (LC), 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."

Discussion

28. We make no determination on the issue of whether the Respondent may recover its costs in the substantive proceedings under the lease. For the reasons set out below, it will become apparent that we do not need to do so.

29. The difficulty that the Respondent has in opposing this application is that on the main issue in the Substantive Decision, none of the residential lessees materially opposed the Respondent's proposed apportionment. As between those parties therefore, it is hard to see why the application was necessary. The dispute about apportionment litigated in the substantive proceedings was between the Respondent and the commercial tenant.

30. With respect to the Respondent, it cannot absolve itself from liability to pay its own costs if it takes legal proceedings, simply by stating in the lease that it does not wish to incur liabilities. It found itself involved in a substantive dispute with the commercial tenant and it is not just and equitable for it to seek to pass on the costs of litigating that dispute to the residential lessees, with whom it was not in dispute.

31. It is true that some lessees queried the amount of the insurance premium in the 2019 budget. This was however an extremely minor point in the scale of the whole case, and, as can be seen in paragraph 112 of the Substantive Decision, was dealt within in one paragraph by stripping out the insurance premium from the 2019 service charge budget as the lease did not provide for it to be within the service charge. Arguably, the Respondent essentially lost on that issue, it having incorrectly allocated the insurance premium to the service charge.

32. The Tribunal has therefore taken the view that it would not be just and equitable for the residential lessees to have to pay the Respondent's costs of the substantive proceedings through the service charge.

33. We also take the view that our determination should apply to all residential lessees. Some have contributed to the proceedings and others have not. We cannot see that it is just and equitable that any residential lessees should receive a service charge bill for costs in proceedings they did not seek nor oppose, whatever the nature of their contributions, or lack of them, to the proceedings.

Determination

34. We determine that all or any of the costs incurred, or to be incurred, by the landlord in connection with the proceedings before the First-tier Tribunal under case reference BIR/47UF/LSC/2018/0017 are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any residential lessees at the Property.

Appeal

35. 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
First-tier Tribunal (Property Chamber)