**FIRST-TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case references** | **:** | **LON/00BK/LSC/2017/0296**<br>**LON/00BK/LDC/2017/0091** |
| **Property** | **:** | **Ivor Court, Gloucester Place, London, NW1 6BJ** |
| **Applicants** | **:** | **(1) Ms Grimshaw**<br>**(2) Lawrence Block (now deceased) and Ruth Block;**<br>**(3) Ms Wanda Cooper-Mordaunt;**<br>**(4) Ms Kathleen Carpenter;**<br>**(5) Ms Lucy George;**<br>**(6) Ms Keenan;**<br>**(7) Mr and Mrs Ramus, through their daughter, Mrs Tessa Atkin; and**<br>**(8) Mr Jonathan Fisher and Mrs Tinya Yang.** |
| **Representative** | **:** | **In Person** |
| **Respondent** | **:** | **Ivor Court Freehold Limited** |
| **Representative** | **:** | **Brethertons LLP** |
| **Tribunal member** | **:** | **Judge Amran Vance** |
| **Venue** | **:** | **10 Alfred Place, London WC1E 7LR** |
| **Date of directions** | **:** | **9 July 2021** |

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**DECISON**

**ON APPLICATIONS MADE UNDER SECTION 20C OF THE LANDLORD AND TENANT ACT 1985 AND PARAGRAPH 5A OF SCHEDULE 11, COMMONHOLD AND LEASEHOLD REFORM ACT 2002**

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## Decision

1. I make an order under section 20C Landlord and Tenant Act 1985 that all or any of the costs incurred, or to be incurred, by Ivor Court Freehold, in connection with the proceedings identified above, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by Ms Grimshaw. No such order is made in respect of the other Applicants.

2. I decline to make an order under paragraph 5A of Schedule 11, Commonhold and Leasehold Reform Act 2002 in the Applicants' favour.

## Background

3. The following persons have made applications under s.20C Landlord and Tenant Act 1985 in respect of the costs of proceedings that culminated in a hearing on 5 and 6 November 2018, and the issue of a tribunal decision dated 7 November 2021 (reviewed and corrected on 15 April 2019):

    - Ms Grimshaw (Flat 133);
    - Lawrence Block (now deceased) and Ruth Block (Flat 130);
    - Ms Wanda Cooper-Mordaunt (Flat 81);
    - Ms Kathleen Carpenter (Flat 92);
    - Ms Lucy George (Flat 87);
    - Ms Catherine Keenan (Flat 91);
    - Mr and Mrs Ramus, through their daughter, Mrs Tessa Atkin (Flat 103); and
    - Mr Jonathan Fisher and Mrs Tinya Yang (Flat 25).

4. In addition, all those leaseholders, except Mr Fisher and Mrs Yang have made applications under paragraph 5A of Schedule 11, Commonhold and Leasehold Reform Act 2002.

5. All of the section 20C/paragraph 5A Applicants are long leaseholders at Ivor Court, a 9-storey, originally Art Deco, residential mansion block in Gloucester Place, London, NW1 6BJ. All were respondents to the two applications made by their landlord, Ivor Court Freehold Limited ("ICFL") that led to the 7 November 2021 decision, and 15 April 2019 corrected decision.

6. The applications pursued by ICFL were for:

    (a) a determination, under s.27A Landlord & Tenant Act 1985, as to the liability of the residential leaseholders at Ivor Court to pay

service charge costs concerning an extensive internal Major Works programme (application LON/00BK/LSC/2017/0296); and

(b) an order, under s.20ZA of the 1985 Act, granting dispensation from statutory consultation requirements imposed by the Act in respect the Major Works (application LON/00BK/LDC/2017/0091).

7. The outcome of the applications was that:

(a) the vast majority of the final costs of the Major Works in the sum of £1,795,385.05 plus VAT were found to be payable by the leaseholders, except for certain heads of expenditure, totalling approximately £144,000 plus VAT (where applicable); and

(b) retrospective dispensation from the whole of the consultation requirements for the works was granted under section 20ZA of the 1985 Act.

8. Directions were issued on the section 20C and paragraph 5A applications on 19 September 2019. ICFL made written submissions on the application on 23 October 2019. On 10 December 2019, I issued further directions on the applications that led to further representations from ICFL in a letter from its solicitors, Brethertons, dated 12 March 2020.

9. On 13 March 2020, I stated that I was persuaded by ICFL's submission that the s.20C and paragraph 5A applications should be determined at the same time as its application for a rule 13 costs order made by it against Mr Moorjani, the lessee of Flat 67. This was to avoid the possibility of double recovery of costs if the tribunal made a costs order against Mr Moorjani. I also considered it be appropriate to quantify any costs payable by Mr Moorjani before making an assessment of the merits of making a s.20C or paragraph 5A order.

10. On 9 June 2020, I directed that the s.20C and paragraph 5A applications would be considered *after* the Rule 13 costs application being pursued against Mr Moorjani has been determined. This was so that there would be clarity concerning the amount of costs that relevant to the s.20C application.

11. The Rule 13 application was determined on 21 September 2020, with clerical errors corrected on 4 December 2020. A Rule 13 costs order was made against Mr Moorjani. However, because I was unable to quantify the costs payable by Mr Moorjani on the documentation provided, further directions had to be issued.

12. In s decision issued on 24 March 2021, I determined that the amount that Mr Moorjani was ordered to pay, by way of Rule 13 costs, was £4,890.40. On 17 May 2021, I refused Mr Moorjani's request for permission to appeal that decision. He has since sought permission to appeal from the Upper Tribunal, and a decision on his request is awaited.

## The Applicants' Case

13. In a letter to the tribunal dated 20 September 2019, Ms Grimshaw, on behalf of the Applicants, indicated that ICFL was proposing to recover, through the service charge, legal costs in an estimated amount of £30,000, being its legal costs incurred in pursuing its two applications.

14. The Applicants have made the following points in support of case:

    (a) there is no provision in their lease that enables ICFL to recover legal costs incurred in this litigation through the service charge;

    (b) it was ICFL's decision to pursue the two applications, and to the incur legal costs in doing so. Their applications were not prompted by any default by leaseholders, but by ICFL's perception that some of the leaseholders would take issue with some of the costs of the Major Works. It would, they say, be unreasonable for them to have to pay towards ICFL's costs as well as the costs they incurred in seeking legal advice on the applications.

## ICFL's Case

15. In written submissions prepared by Mr Bates of counsel, ICFL argue that it is not just and equitable to make a s.20C order because:

    (a) ICFL is a lessee-owned company which exists to provide services for the benefit of the building and to provide a legal framework for the leaseholders to hold their valuable leasehold interests;

    (b) the proceedings were necessary and sensible, given the problems with the works and the associated costs implications that were not the fault of ICFL

    (c) ICFL was the successful party in the proceedings;

    (d) the proceedings generated collateral benefits for the leaseholders by ensuring that a High Court claim for damages brought by Mr Moorjani was struck out at an early stage, saving leaseholders from having to pay the costs of that litigation; and

    (e) refusing a s.20C order does not prevent a leaseholder from challenging any costs that were unreasonably incurred for the purposes of section 19 of the 1985 Act. By contrast, to make a section 20C order would put ICFL at a significant disadvantage as it would have no opportunity to justify any particular item or cost.

## Lease Provisions

16. In Brethertons letter of 12 March 2020, it was suggested that the tribunal should disregard the leaseholders' representations as to whether their leases enabled recovery of legal costs through the service charge. Reference

was made to the decision of the Upper Tribunal (Lands Chamber) in *Tedla v Cameret Court Residents Association* [2015] UKUT 221 (LC). When I issued further directions on 13 March 2020, I indicated that my reading of the Deputy President's decision in *Tedla* was that there may be circumstances where it was appropriate to consider whether costs are recoverable as a matter of contract (para. 47) before determining the merits of a section 20C application, and that this is what the Deputy President went on to do so in *Tedla*.

17. I also pointed out that Ms Grimshaw had made it clear in her section 20C application, received as long ago as 2 January 2018, that she considered there was no provision in the lease that enables recovery of legal costs incurred by ICFL in these applications through the service charge, and that the other s.20C Applicants agreed with that submission. I stated that given that ICFL had been on notice of this issue for two years, and given that the estimated legal costs incurred by ICFL in pursuing its own applications to the tribunal were in the region of £30,000, it is was my view that in all the circumstances, it was appropriate for the tribunal to address the question of recoverability when making its determination. I directed that if ICFL wished to make additional written representations as to recoverability under the terms of the lease then these should be provided by 3 April 2020. However no further representations have been received from ICFL.

18. Clause 3(5) of the Ms Grimshaw's lease refers to legal costs incidental to the preparation of a notice served under section 146 of the Law of Property Act 1925, or in contemplation of forfeiture proceedings. The clause is clearly not relevant to the legal costs incurred in these applications which did not concern forfeiture.

19. The service charge mechanism in clause 2 provides, at subclause 2(2), for the leaseholder to contribute towards the landlord's expenses and outgoings incurred in the repair, maintenance, renewal and insurance of the Building, and the provision of services therein, and towards the other heads of expenditure set out or referred to in the Fourth Schedule to the Lease.

20. The only explicit provision made in the Fourth Schedule for the recovery of legal costs is at paragraph 10, which enables the landlord to recover costs incurred "for the purpose of enforcing compliance by any of the owners. Lessees or occupiers of any of the flats with any of the leaseholder's covenants contained in the Fifth Schedule". The paragraph is not relevant to these applications which do not concern costs incurred in seeking enforce compliance with such covenants.

21. Nor do I consider the litigation costs in issue can be recovered under paragraph 1 of the Fourth Schedule which refers to costs "incidental to the performance and observance of the landlord's covenants in clause 5". The covenants in clause 5 refer to the landlord's obligation to repair, maintain, insure etc the Building. The litigation costs incurred by ICFL were not, in my view "incidental" to the Major Works carried out by ICFL. To be incidental they would, I consider, need to be ancillary, subsidiary, or

peripheral to the physical works carried out. Litigation costs incurred in seeking a determination that the costs of Major Works are payable by leaseholders. and in seeking dispensation from ICFL's s.20 consultation obligations. are too remote to be "incidental" to the performance or observation of any of the clause 5 covenants.

22. However, paragraph 8 provides for recovery of the "reasonable charges and expenses of the Lessor or the fees of managing agents employed by the Lessor for the general management of the Building on behalf of the Lessor and/or the collection of the rents (including service charges) of the flats thereon.

23. It is arguable that the general charging provision in paragraph 8 is, in principle, wide enough to cover the litigation expenditure incurred by the landlord in these applications, on the basis that such costs were incurred for the general management of the Building and/or in respect of the collection of service charges from the leaseholders. A similar conclusion was reached in *Iperion Investment Corporation v Broadwalk House Residents Ltd* [1995] 2 EGLR 47, where the Court of Appeal accepted that legal costs incurred in respect of proceedings concerning a tenant's breach of covenant were recoverable as part of the expenses of managing a building. See also *Assethold Ltd v Watts* [2014] UKUT 0537 (LC) where the Upper Tribunal (Lands Chamber) allowed a landlord to recover litigation costs on the basis that the proceedings in question had been "necessary or desirable for the proper maintenance safety amenity and administration of the Development".

24. However, although the point is arguable, ICFL has not advanced it. It is a point identified by me, on which the leaseholders have not had the opportunity to comment. As such, I do not consider it appropriate for me to determine whether these litigation costs are contractually recoverable under paragraph 8 of the Lease and I decline to do so. Nor do I consider it necessary for me to do so in order to determine the section 20C or paragraph 5A applications before me. As the Deputy President stated at paragraph 47 of the decision in *Tedla* is clearly not necessary to consider the meaning of a lease before it is possible to make a determination under section 20C, although there may be circumstances in which it would be appropriate to do so. This, in my view, is not one of those cases.

25. If the leaseholders still wish to argue that there is no contractual provision in the Lease that allows for the recovery of the litigation costs incurred, they retain their right to pursue a challenge under section 27A of the 1985 Act once those costs have been demanded.

26. An application for an order under s.20C is predicated on the presumption that the costs in question are recoverable under the lease, and I now turn to that application.

**The section 20C Application**

27. Section 20C of the 1985 Act, so far as is material, provides as follows:

"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-…

(ba) 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."

28. As far as Ms Grimshaw is concerned Mr Bates confirmed at the end of the hearing on 6 November 2019 that ICFL consented to a s.20C Order in her favour. In light of that concession, I consider it just and equitable to make that order. However, ICFL made no such concession in respect of the other leasehold Applicants.

29. I have considerable sympathy for the leasehold Applicants. ICFL's s.20ZA application for dispensation arose, in part, because of its failure to summarise leaseholders' observations to its initial consultation notice, and the ICFL's response to them, when preparing its statement of estimates dated 12 June 2015. In addition, it was ICFL's decision to pursue its pre-emptive s.27A. It is understandable, therefore that the leaseholders query why they should have to contribute towards ICFL's legal costs where its s.20ZA application, arose, in part, from its own failure to correctly follow the statutory consultation procedure, and where it decided, of its own volition, to issue a s.27A application, rather than being required to do so in response to non-payment of service charges demanded from one or more of the leaseholders.

30. However, I do not consider ICFL can be criticised for pursuing either application. Whilst the need for a s.20ZA application was partly due to its own error, an application would, in any event have been required because substantial additional unforeseen works were only identified after commencement of the Major Works in March 2016, and those additional works went beyond what was consulted on (see paragraphs 197-202 of the tribunal's corrected decision of 15 April 2019). The additional works included the costs of asbestos removal, initially identified as amounting to £370,512 If no application for dispensation had been made there was a substantial risk that ICFL's ability to recover some of the costs of the additional Major Works would be limited to the statutory maximum of £250 per leaseholder in accordance with s.20(1) of the 1985 Act. That would clearly have had serious financial consequences for ICFL, as a lessee-owned company, whose only source of income appears to be the

service charges it receives from leaseholders, and which could be at risk of insolvency if it could meet its liabilities.

31. As for its s.27A application, ICFL said in its initial statement of case that the application was being brought because some of the leaseholders had indicated that they disputed some of the items of works. Whilst the extent of that dispute has not been particularised, its application subsequently resulted in heavily contested litigation involving Mr Moorjani and, to a much lesser extent, several other lessees, including Ms Grimshaw. On balance, I accept that the evidence indicates that ICFL's application was made following a group of leaseholders disputing some of the costs incurred in the Major Works. Given the existence of this dispute, I consider it reasonable and appropriate for ICFL to have pursued its s.27A application. Given that Mr Moorjani has appealed every decision made by the tribunal, up to and including seeking permission to appeal from the Court of Appeal, I doubt that litigation to determine the payability of the costs of these works could have been avoided.

32. I agree with Mr Bates that ICFL was the successful party in both applications. Retrospective dispensation was granted, and although some reductions were made to the final costs of the Major Works payable by the leaseholders, the reductions were modest in the context of works costing £1,795,385.05 plus VAT.

33. At paragraph 24 of the decision in *SCMLLA (Freehold) Ltd, Re Cleveland Mansions, and Southwold Mansions* [2014] UKUT 58 (LC) the Deputy President stressed that as an order under section 20C interferes with the parties' contractual rights and obligations, it ought not to be made lightly, or as a matter of course, but only after considering the consequences of the order for all of those affected by it and all other relevant circumstances.

34. At paragraph 75 in *Conway & Ors v Jam Factory Freehold Ltd* [2013] UKUT 592 (LC) he said:

> " 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."

35. When considering whether it is just and equitable to make a s.20C order, the fact that ICFL is a lessee-owned company is a highly relevant circumstance. Aside from Ms Grimshaw, the leaseholders of seven flats seek a s.20c order. If granted, the remainder of the 153 residential leaseholders, who did not oppose ICFL's applications, would have to contribute, through the service charge, to ICFL's costs of pursuing the applications, whereas the s.20C Applicants would not. In circumstances where Ivor Court is owned by leaseholders, through their own company, where I have found that it was reasonable for it to have pursued these applications, and where it has been the successful party, I do not consider this would be a just and equitable outcome. If, as ICFL maintain, there is a

contractual obligation on leaseholders to contribute towards the costs it has incurred, then it appears to me that that this liability should be met by the leaseholders as a whole.

36. The s.20C Applicants should note, however, that ICFL is only entitled to costs that it has reasonably incurred. Excessive costs, unreasonably incurred, are not recoverable by reason of s.19 of the 1985 Act. As Mr Bates' acknowledges, my refusal to make a s.20C order does not prevent any of the leaseholders from challenging any costs that were unreasonably incurred in separate 27A proceedings.

**The paragraph 5A Application**

37. Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") provides:

> "(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.
>
> (3) In this paragraph—
>
> (a) "litigation costs" means costs incurred, or to be incurred, by the landlord in connection with proceedings …" [including proceedings in the FTT]

38. Paragraph 5 enables this tribunal to determine whether an administration charge is payable under a lease, in what amount, and by whom and when. Paragraph 1 of Schedule 11 to the 2002 Act defines an administration charge, so far as is relevant as: "… an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly-

> "… (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
>
> (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease."

39. Paragraph 2 of Schedule 11 provides that such a charge "is payable only to the extent that the amount of the charge is reasonable".

40. Neither the Applicant leaseholders, nor ICFL, have made any written representations in respect of the paragraph 5A application. There is nothing to suggest that ICFL's legal costs have been demanded as administration charges. I presume therefore that the leaseholders

application anticipates a future demand by ICFL to recover its costs of these proceedings as an administration charge.

41. My discretion under Paragraph 5A is to decide whether those future charges should be extinguished or reduced, or whether I should refuse the application.

42. I am not prepared to make a paragraph 5A order in circumstances where: (a) the leasehold Applicants have not identified the relevant clause, or clauses, in their lease, that they contend gives rise to a potential liability to pay a future demand made by ICFL, as an administration charge; and (b) they have made no representations in support of their application. This was not, in my view, a properly prepared and presented Paragraph 5A application.

43. In any event, in *Ramjotton v Patel* [2021] UKUT 19 (LC) Upper Tribunal Judge Cooke concluded that the same principles apply to Paragraph 5A as apply to section 20C, and that in the appeal before her there were no special circumstances that would point to the view that the tenant should not pay the landlord's litigation costs insofar as the landlord was successful before the FTT. In the s.20ZA and S.20C applications this tribunal considered, ICFL has been the successful party, and given the decision I have reached on the leaseholders' s.20C application, I can see no reason why a different conclusion should be reached in respect of a Paragraph 5A application concerning a future demand from ICFL. The application is therefore refused.

Amran Vance

9 July 2021

## APPENDIX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.