FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case references	**:**	**BIR/47UC/LIS/2022/0002** **BIR/47UC/LIS/2022/0005** **BIR/47UC/LLD/2022/0001** **BIR/47UC/LLC/2022/0002**
Properties	**:**	**Flats at St Andrews House, 38 Graham Road, Malvern, Worcestershire WR14 2HL**
Applicant	**:**	**Idris Davies Ltd**
Representative	**:**	**None**
Respondents	**:**	**The Lessees listed in the Appendix to this Decision**
Representative	**:**	**None**
Type of applications	**:**	**(1) Applications for determination of liability to pay and reasonableness of service charges under sections 27A and 19 of the Landlord and Tenant Act 1985** **(2) Applications for an order under section 20C of the Landlord and Tenant Act 1985** **(3) Applications 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**
Tribunal members	**:**	**Judge C Goodall (Chair)** **Regional Surveyor V Ward FRICS** **Judge M Gandham**
Date and place of hearing	**:**	**Paper determination**
Date of decision		**10 May 2022**

DECISION

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Background

1. St Andrews House ("the Property") is a block of six residential flats in Malvern, Worcestershire. Idris Davies Ltd ("IDL") is the landlord. The flat numbering is quirky; numbers 4, 5, and 7 are not used, so the six flats are numbered Flats 1, 2, 3, 6, 8, and 9.

2. The applications being determined in this decision are satellite applications arising from proceedings in this Tribunal in 2020/21 which resulted in two determinations being issued, both dated 14 April 2021. The first (under references BIR/47UC/LIS/2020/0047, BIR/47UC/LLC/2020/0006 and BIR/47UC/LLD/2020/0004) was made by the First-tier Tribunal (Judge Morris and Mr R Bryant-Pearson) ("the 2021 Tribunal Decision"). The second was a County Court determination (under reference G2QZ374M) ("the 2021 CC Decision") made by Judge Morris alone.

3. The dispute which was adjudicated upon in 2021 ("the Cronin Litigation") concerned a challenge by Mr & Mrs Cronin, the owners of Flat 2 at the Property, to a service charge demand for what they regarded as excess water charges. IDL had begun proceedings in the County Court for recovery of arrears of service charges. The dispute was transferred to this Tribunal for disposal. Essentially, the Tribunal decided in the 2021 Tribunal Decision that a disputed service charge of £745.86 was payable (together with an additional undisputed sum). Apart from the order referred to in paragraph 4 below, it also refused to make determinations on applications by the Cronins under section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act"), and under paragraph 5A ("paragraph 5A") of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

4. The 2021 CC Decision also determined that the Cronins were responsible for paying IDL's legal costs under a contractual liability in their lease to pay them. IDL had claimed costs of £6,101.20, including VAT (see paragraph 31 of the 2021 CC Decision). However, Judge Morris found that the sum reasonably incurred and reasonable in amount in relation to contractual costs was £3,686.80. Judge Morris also determined that IDL's costs were higher than they might have been because of a lack of information provided to the Cronins which had resulted in the Cronins raising an issue that they would not have raised had they been provided with that information, and he therefore made an order under paragraph 5A extinguishing a further £251.50 plus VAT of IDL's costs, which he therefore assessed in the sum of £3,385.00.

5. In the eyes of IDL, there is a shortfall ("the Shortfall") in what it has spent on the Cronin litigation and what it has recovered from the Cronins directly through the 2021 CC Decision, which it is now seeking to recover from all the lessees at the Property through the service charge. The

difference between the sum claimed and the sum recoverable from the Cronins is £2,716.20 (£6,101.20 minus £3,385.00).

6. Two applications have been made to the Tribunal:

   a. An application by IDL (case number BIR/47UC/LIS/2022/0002) against all lessees for a determination under section 27A of the 1985 Act as to whether the Shortfall can be included in a service charge demand. The amount of the Shortfall is stated in this application to be £2,884.20.

   b. An application (case number BIR/47UC/LIS/2022/0005) from Mr Michael Dunsmore, asking for a determination on the recoverability of the Shortfall of £2,716.20 as an additional service charge in relation to the Cronin Litigation. In this application, Mr Dunsmore also asked for a determination under section 20C and paragraph 5A in his favour, which would have the effect of limiting the recovery from him of any of the costs of the applications being determined in this decision. He did not include a request that the section 20C or the paragraph 5A applications should be for the benefit of any other flat owners.

7. A procedural direction was made on 11 February 2022 that the two applications identified above (which in essence had crossed with the other) should be consolidated, with IDL, the applicant in the first application being designated as the Applicant, and the lessees being designated the Respondents. Mr Dunsmore, though being the applicant in the second application, is effectively now one of the Respondents.

8. The procedural directions also allowed any of the other Respondents (i.e., the other lessees) to make their own applications under sections 20C and paragraph 5A if they wished. Mr & Mrs Cronin have made such applications (which have been allocated reference numbers BIR/47UC/LLD/2022/0001 and BIR/47UC/LLC/2022/0002), as has Mr Wilcocks (no separate reference number). Their applications have also been consolidated with the applications by IDL and Mr Dunsmore, and will be determined in this decision. None of the other Respondents have applied as invited.

9. All parties indicated they were content for the applications to be determined without a hearing, and the Tribunal agrees that there is no necessity for a hearing. Nothing appears to turn on the physical characteristics of the Property, and the Tribunal decided it was not necessary to inspect the Property.

10. This is the decision of the Tribunal on the applications, having taken into account the following documents:

a. The application forms submitted by IDL, Mr Dunsmore, and Mr & Mrs Cronin (in relation to their applications under section 20C and paragraph 5A);

b. The documents submitted by Mr Dunsmore with his application including a copy of the lease of his flat (which we assume is in common terms with all flat leases) and a skeleton argument covering two pages of text;

c. IDL's Statement of Case dated 1 March 2022;

d. Mr & Mrs Cronin's Statement of Case dated 24 March 2022;

e. Mr Dunsmore's Statement of Case dated 25 March 2022;

f. The reasoned decisions of the Tribunal in the 2021 Tribunal Decision and of Judge Morris in the 2021 CC Decision.

The issues before the Tribunal

11. This application requires the Tribunal to determine:

   a. Whether the Shortfall can be collected from the Respondents through the service charge; and

   b. Whether we should make determinations under section 20C and paragraph 5A protecting Mr Dunsmore, Mr Willcocks, and Mr & Mrs Cronin from potentially having to pay any of the costs incurred by IDL in making and defending the applications being determined in this decision.

Law

12. Under Section 27A of the Act, the Tribunal has jurisdiction to decide whether a service charge is or would be payable and if it is or would be, the Tribunal may also decide:-

   - The person by whom it is or would be payable
   - The person to whom it is or would be payable
   - The amount, which is or would be payable
   - The date at or by which it is or would be payable; and
   - The manner in which it is or would be payable

13. Section 19(1) of the Act provides that:

   "Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –

   (a) Only to the extent that they are reasonably incurred, and

(b) Where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly."

14. Section 51 of the Senior Courts Act 1981 and Rule 44 of the Civil Procedure Rules governs assessment of costs. The following provisions are relevant:

    a. Section 51(1) and Rule 44.2 clarifies that costs are always ultimately in the discretion of the court

    b. Rule 44.3 provides;

       (1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –
       (a) on the standard basis; or
       (b) on the indemnity basis,
       but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

    c. Rule 44.5 governs costs which are payable under a contract (as in this case. The Rule provides:

       (1) Subject to paragraphs (2) and (3), where the court assesses (whether by summary or detailed assessment) costs which are payable by the paying party to the receiving party under the terms of a contract, the costs payable under those terms are, unless the contract expressly provides otherwise, to be presumed to be costs which –
       (a) have been reasonably incurred; and
       (b) are reasonable in amount,
       and the court will assess them accordingly.
       (2) The presumptions in paragraph (1) are rebuttable. …

The Lease

15. It is not in issue in these applications that the leases of the Flats at the Property contain a contractual obligation upon the Respondents to pay a proportion of any legal costs incurred by IDL "in dealing with any matter relating to the [Property] as a unit" (see clause 4(2) and paragraph 4(5) of Schedule 4 of the lease and paragraph 108 of the 2021 Tribunal Decision). Whether recovery of the Shortfall through the service charge falls within this clause is however in dispute.

IDL's case

16. IDL confirmed in their Statement of Case that they have demanded payment of the Shortfall from the Respondents through the service

charge, being the sum of £2,884.20. This is the Shortfall that is explained in paragraph 5 above, plus an additional advocate fee of £162.00 plus a land registry disbursement of £6.00.

17. The Tribunal has not seen a copy of the demand, but it was apparently sent by IDL's managing agents, Taylor Clarke on 15 October 2021. The individual contributions demanded were as follows:

Flat	Amount
Flat 1	£300.00
Flat 2	£440.00
Flat 3	£540.00
Flat 6	£130.00
Flat 8	£450.00
Flat 9	£140.00
Total	**£2,000.00**

18. The remaining funds to pay the Shortfall were to come from reserves.

19. The owners of Flats 2, 8 and 9 have, according to IDL, paid in full. Partial payment of £65.01 has been received from the owner of Flat 3. The owners of Flats 1 and 6 have not yet paid this demand.

20. The reason that IDL felt able to demand these payments is because they felt that the costs incurred were reasonable costs. Their statement of case quoted their managing agents comments. The managing agents considered the reasons for Judge Morris disallowing some elements of their costs and essentially explained why they believed that Judge Morris had been incorrect to decide that those elements were not reasonably incurred and reasonable in amount.

21. The managing agents then quote the legal advice they had received from the solicitors instructed in the Cronin Litigation. Those solicitors apparently told Taylor Clarke the Shortfall could be put through the service charge account. In what appears to be a direct quote from the solicitors, it is stated that:

"I am confident that the costs not ordered can be put through the scheme. The Tribunal has offered clarification at pages 98 to 110 of the determination because the Respondents made a 20C application for the costs to not go through the scheme. Specifically, page 108 of the determination states

"...The Tribunal agrees that **paragraph 5 of the Fourth Schedule of the Lease is authority for the Landlord to include legal costs as part of the Service Charge** and that Clause 3(1)(f) is authority for the Landlord to claim its legal costs against the Respondents. The Tribunal also agreed that it must follow *Plantation Wharf Management Ltd v Fairman & Ors [2019] UKUT 236 (LC)* and since the respondents did not have the authority of the other Tenants to apply for an order under section

20C if any order was made it could only apply to the Respondents. The Tribunal further agreed that the liability of the Respondents for costs was a matter to be dealt with by the County Court and an order under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 should not be considered by the Tribunal.""

22. In their application form, IDL offer a policy justification for allowing the Shortfall to be recovered through the service charge. They say that "the Managing Agent has raised concern that if the Lease clause is not enforced then Lessees can withhold payment until legal fees escalate to make recovery economically unviable".

The Respondents' case

23. Dealing first with Mr Dunsmore's representations, his case is that IDL are bound by the terms of the 2021 CC Decision, which decided that the Cronins only had to pay £3,385.00. The balance of their legal bill was not reasonably incurred and not reasonable in amount and should not be charged to all the Respondents.

24. Mr Dunsmore also argued that paragraph 4(5) of Schedule 4 of the lease did not allow recovery of costs through the service charge if the fees arise from pursuing an individual leaseholder. He also presented arguments concerning waiver and forfeiture that appear to the Tribunal to concern whether or not the Cronin litigation might have turned out differently if they had been deployed.

25. Another point made in Mr Dunsmore's application form was that the barrister representing IDL in the Cronin Litigation was an "unregistered" barrister; he should not have described himself as counsel. Mr Dunsmore also had some concerns about whether IDL had complied with directions, and whether they should have disclosed legal advice to him.

26. Turning to the Cronins' representations on their section 20C and paragraph 5A applications, they also dispute whether the Shortfall can be recovered through the service charge because the Cronin Litigation did not concern recovery of the costs incurred in dealing with the [Property] as a unit. They suggest Judge Morris's 2021 CC Decision was clear and (by implication) they suggest no further sum is due from them or through the service charge. They also say the additional costs that have been added to the Shortfall should have been included in the costs schedule that was considered in the 2021 CC Decision.

Discussion

27. Clearly this case turns significantly on the correct interpretation of the 2021 CC Decision made by Judge Morris. This was a detailed and carefully reasoned explanation of the decisions made in the County Court as a result of the Cronin Litigation.

28. We reviewed the 2021 CC Decision, and identified that Judge Morris:

a. Firstly, determined that the Cronin's lease contained a contractual obligation to pay IDL's costs in the Cronin Litigation (paragraph 55);

b. Then identified the basis for assessment of the costs as being CPR 44.3, 44.4, and 44.5, determining that costs which have been unreasonably incurred or which are unreasonable in amount would not be allowed (paragraph 56), there being a rebuttable presumption that costs have been reasonably incurred and are reasonable in amount;

c. Against that test, then considered the detail of the costs claimed and decided that an excessive amount of cost had been incurred in sending letters and emails to the claimant, and reduced that element of the claim from £1,062 to £360;

d. Further reduced the costs claimed for reviewing documents (see paragraph 67), preparing witness statements (two had been prepared when directions had only required one (see paragraph 68)), preparing the documents bundle (see paragraph 69), preparing form N260 for the county court claim (see paragraph 70), instructing counsel (see paragraph 71) and in writing letters to the court (see paragraph 72) on the basis that these costs were not reasonably incurred and reasonable in amount.

29. The outcome of the assessment was that Judge Morris reduced the costs payable by the Cronin's to £3,686.80. Paragraph 76 of the 2021 CC Decision gives the detail.

30. As identified in paragraph 4 above, Judge Morris also made a paragraph 5A determination further reducing the sum payable by the Cronin's by £251.50 plus VAT. The amount payable by the Cronin's was therefore £3,385.00.

31. We then turned to the issue identified in paragraph 11 above; whether, having failed to persuade Judge Morris that the Cronins should pay the whole of the legal bill it had incurred, IDL is entitled to ask the Respondents to pay it through the service charge.

32. We firstly consider what the amount of the Shortfall is, bearing in mind that IDL has increased it from the shortfall between the amount it originally claimed in costs and the amount it recovered from the Cronins by adding further costs as identified in paragraph 15 above.

33. So far as an additional advocate fee of £162.00 is concerned, the Tribunal is disturbed to hear from Mr Dunsmore that counsel at the 2021 hearing might have been "unregistered", but this Tribunal cannot re-run the

Cronin Litigation, and that issue is for the Cronins to pursue if they wish. It is not a matter for us.

34. What is a matter for us is whether IDL, having been allowed all the counsel's fees and disbursements that it asked for in the Cronin Litigation, can now claim an extra counsel's fee and a £6 Land Registry fee that it failed to claim in that litigation. We have no hesitation in determining that it cannot. It could have asked for these fees in the claim for costs in the Cronin Litigation. No explanation for its failure to do so has been offered. It can only be a result of inadvertence or incompetence, and it is not reasonable to expect the Respondents to pay the additional sums.

35. The main issue is the Shortfall amount of £2,716.20.

36. There is an initial point that we have to determine, namely whether these costs are caught by paragraph 4(5) of Schedule 4 to the lease. Mr Dunsmore and the Cronins say they are not.

37. We disagree with them, although the point is not straightforward. The phrase "dealing with the [Property] as a unit" does not, and cannot, mean that legal costs must be for a dispute involving every flat – that in our view would unduly restrict the words in the lease. The operation of a "unit" depends on every part functioning together. If one part requires addressing specifically and individually, the outcome can be for the benefit of the whole unit. Accordingly, we find that the lease may sometimes require the Respondents to pay legal costs incurred by IDL even if costs relate only to one flat at the Property, subject of course to the statutory controls in section 19 of the 1985 Act.

38. We also note that the same conclusion was reached in paragraph 108 of the 2021 Tribunal Decision. Whilst we are not bound by a previous tribunal's decision, we are supported in our view on the interpretation of the lease by it.

39. The test that we have to apply in considering recoverability of the Shortfall through the service charge is whether that expenditure has been reasonably incurred (see section 19 of the Act cited above). The Shortfall is the amount that was assessed by Judge Morris as being the sum that was **not** reasonably incurred and reasonable in amount when he assessed the costs that the Cronins were to pay in the Cronin Litigation.

40. We have taken into account that in reaching his decision, Judge Morris directed himself (correctly) concerning the basis on which he had to carry out his assessment of costs. The receiving party in a contractual costs claim (i.e., IDL in this case), has the benefit of the Civil Procedure Rules which require:

    a. The court to assess the costs on the indemnity basis (the most favourable basis for the receiving party) which means there is no

requirement only to allow costs that are proportionate to the amount in issue;

b. The requirement for doubts to be resolved in favour of the receiving party; and

c. A presumption that costs have been reasonably incurred.

41. Despite the benefit of these rules, Judge Morris still decided that the amount allowed should be reduced by the Shortfall as he clearly took the view that the Shortfall costs were unreasonable.

42. We accept that a claim against an unsuccessful party in litigation is not the same as a claim for costs incurred through a service charge. There could be circumstances where there was a good contextual reason for disallowing some element of a costs claim against an individual flat owner which examination of the whole surrounding context reveals that it would be reasonable nevertheless to find that all service charge payers should contribute towards. We cannot find any reason to hold that is the situation in this case.

43. IDL's argument is that Judge Morris was wrong to find that the Shortfall costs were unreasonably incurred, and in their managing agent's view the costs were reasonable. With respect to the manging agents, a decision by a court is binding and conclusive, unless it is set aside on appeal. It cannot be disregarded on the basis that the managing agent did not agree with it.

44. IDL also received legal advice to the effect that the Shortfall could be recovered via the service charge. Paragraph 108 of the 2021 Tribunal Decision is quoted in support, but all that said was that in principle the lease allowed recovery of legal costs via the service charge in general terms, which we agree with (see above). That paragraph did not say that the Shortfall was recoverable. In our view, the advice was incorrect.

45. Finally, IDL claim that not to allow recovery of the Shortfall will encourage service charge payers not to pay as it will encourage the running up of irrecoverable costs. We disagree. Costs reasonably incurred are recoverable, but those that are not reasonably incurred are not. Care must always be taken in litigation not to incur more cost than might be recoverable.

46. We think that if it was unreasonable to require the Cronins to pay the Shortfall (as was determined by Judge Morris), it is equally unreasonable to burden the service charge payers with that liability, as under section 19 of the Act, only costs that are reasonably incurred are recoverable through the service charge.

47. Our decision is that the Shortfall is not recoverable from the Respondents through the service charge. It is not reasonably incurred. To the extent

that any Respondents have already paid a contribution towards the Shortfall, that contribution was not payable.

48. IDL, and their advisers, have fallen into the trap of assuming that they can pass on all costs they incur in managing the Property to the Respondents. That is an error. They can only pass on costs that are reasonably incurred, and the outcome of the Cronin Litigation was that some costs were held not to be so. Their remedy was to appeal that decision if they disagreed with it. It is wholly inappropriate to have demanded payment of sums that they and their advisers should have been aware were irrecoverable. Absent an appeal, liability for the Shortfall lies at the door of the party which contracted to incur the irrecoverable costs, namely IDL.

49. This Tribunal has no jurisdiction to order repayment of any service charges paid. The Respondents who have paid service charge demands for a contribution towards the Shortfall may however wish to take advice on how they can recover sums wrongly demanded through the courts.

50. Mr Dunsmore raised other arguments in his submission dated 25 March 2022, as identified in paragraphs 24 and 25 above.

51. Without meaning any disrespect to Mr Dunsmore, in our view none of these issues are relevant to the issue we have had to decide in these applications, and we have not considered them. Any of these arguments that may have affected the outcome of the Cronin Litigation would have been, in any event, matters for the Cronins to pursue if they had so wished.

Costs orders

52. We have to determine the section 20C and paragraph 5A applications from Mr Dunsmore, Mr Wilcocks, and Mr & Mrs Cronin. In our view, the decision we have made leads inexorably to a decision that it would be wholly unreasonable for any of these parties to contribute towards any costs that IDL has incurred in these proceedings. We order, under section 20C, that no costs incurred in these proceedings can be regarded as relevant costs to be taken into account in determining any service charge payable by Mr Dunsmore, Mr Wilcocks, and Mr & Mrs Cronin.

53. Regarding the paragraph 5A application, strictly, any suggestion that any individual lessee should be charged anything towards the costs of these proceedings under any covenant in the lease requiring payment of costs by an individual should be very quickly discounted. Certainly, clause 3(1)(f), under which Mr & Mrs Cronin were liable to pay costs in the Cronin Litigation, is of no assistance here, as the application under consideration in this case was not made incidentally to the preparation and service of a section 146 notice.

54. However, bearing in mind that IDL saw fit to demand payment of service charges which we have determined they had no basis for doing, we will put

the matter beyond doubt and made a determination under paragraph 5A that any liability for any costs of these proceedings against any of Mr Dunsmore, Mr Wilcocks, and Mr & Mrs Cronin, is extinguished.

55. Three Respondent lessees did not apply for costs protection orders. They do benefit from our determination that they do not have to contribute towards the Shortfall as it was not reasonably incurred. We would be very surprised if IDL thought it appropriate to look to them for any contribution towards the costs of these proceedings in which IDL have wholly failed.

Fees

56. Under Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal may of its own volition order reimbursement of any fee paid to bring an application to a Tribunal. It would be unfair for Mr Dunsmore to be out of pocket as a result of him bringing his application and we order IDL to reimburse his application fee of £100.00.

Appeal

57. 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)

Respondents

Flat 1	Ms Juliet Evans & Mr Henry Tootal
Flat 2	Mr Richard & Mrs Mary Cronin
Flat 3	Mr Tim Willcocks
Flat 6	Mr Michael Dunsmore
Flat 8	Mr Scott Rayson
Flat 9	Mr Paul & Mrs Wendy Thompson