



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

**Case Reference** : **BIR/17UE/LSC/2022/0004**

**Subject Properties** : **(1) 7 Rockside Hydro  
(2) 5 Cavendish Apartments  
Cavendish Road  
Matlock  
Derbyshire  
DE4 3RX**

**Applicants** : **(1) John Livermore  
(2) Simon Whyld**

**Respondent** : **Rockside Hall Management Ltd**

**Representative** : **Property Management Legal Services**

**Type of Application** : **(1) Application under section 20C of  
the Landlord and Tenant Act 1985 for  
an order for the limitation of costs  
(2) Application under paragraph 5A of  
Schedule 11 to the Commonhold and  
Leasehold Reform Act 2002 for an  
order reducing or extinguishing  
liability to pay administration charges  
in respect of litigation costs**

**Tribunal Members** : **Deputy Regional Judge Nigel Gravells  
David Satchwell FRICS**

**Date of Decision** : **31 October 2022**

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**DECISION**

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## **Introduction**

- 1 On 13 September 2022 the Tribunal issued its Decision on the Applicants' application under section 27A of the Landlord and Tenant Act 1985 Act ('the 1985 Act') in which they sought a determination on the payability and reasonableness of various elements of the service charges for 2020/2021 and 2021/2022 demanded by the Respondent: see BIR/41UE/LAM/2022/0002.
- 2 On the same date the Tribunal invited the parties to make representations on the Applicants' applications (i) under section 20C of the 1985 Act for an order for the limitation of costs ('the section 20C application') and (ii) under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act') for an order reducing or extinguishing the Applicants' liability to pay an administration charge in respect of the Respondent's litigation costs ('the paragraph 5A application').
- 3 Both the Applicants and the Respondent submitted written representations.

## **Legislative provisions**

- 4 Section 20C of the 1985 Act (so far as material) provides –
  - (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.
  - ...
  - (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.
- 5 Paragraph 5A of Schedule 11 to the 2002 Act (so far as material) provides –
  - 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.

## **Representations of the parties**

- 6 On behalf of the Respondent, it was argued –
  - (i) that it is essential that the Tribunal consider the practical and financial consequences of all those who would be affected when deciding on the just and equitable order to make: *Conway v Jam Factory Freehold Ltd* [2013] UKUT 592 (LC);
  - (ii) that, as in *Conway*, the Respondent is owned and controlled by the leaseholders; and it would be manifestly unfair if the Applicants,

- who were unsuccessful in their section 27A application, were to obtain the benefit of a section 20C order or a paragraph 5A order;
- (iii) that a section 20C order should not be made lightly or as a matter of course since the effect would be to interfere with the Respondent's contractual rights (under the terms of the Applicants' leases): *Re SCMLLA (Freehold) Limited* [2014] UKUT 58 (LC);
  - (iv) that the 'default position' therefore is that the Tribunal should make no order under section 20C;
  - (v) the Tribunal found in favour of the Respondent on every point raised by the Applicants in their section 27A application;
  - (vi) that it would therefore be neither just nor equitable to make an order under section 20C or paragraph 5A.
- 7 The Applicants argued –
- (i) that the Applicants had been raising perceived anomalies with the service charge accounts since March 2020 and that the Respondent had persisted in its response that the accounts were correct;
  - (ii) that at the date of their section 27A application (25 March 2022), the only available documents were the uncorrected service charge accounts for 2020/2021 and the service charge budget for 2021/2022 (which perpetuated the perceived anomalies); and that the corrected service charge accounts for 2020/2021 and the service charge accounts for 2021/2022 were not made available until 15 July 2022;
  - (iii) that the Respondent failed to indicate that it was (or would be) reviewing the service charge accounts for 2020/2021 and 2021/2022 in the light of information from the previous managing agent;
  - (iv) that, if the Respondent had kept the Applicants informed, they would not have made (or would have withdrawn) their section 27A application pending the clarification of the service charge accounts.

### **Determination**

- 8 The Tribunal took full account of the representations of the parties.
- 9 The Tribunal finds that under the terms of the Applicants' leases the Respondent is entitled to recover its costs incurred in proceedings before the Tribunal.
- 10 It is obvious that the making of an order under section 20C and/or paragraph 5A would interfere with that entitlement.
- 11 Although the Upper Tribunal in *SCMLLA* stated that a section 20C order (and by analogy a paragraph 5A order) should not be made lightly or as a matter of course since the effect would be to interfere with the Respondent landlord's contractual rights, as Holgate J commented more recently in *Avon Ground Rents Limited v Child* [2018] UKUT 204 (at paragraph 58), that is the very purpose of the paragraph 5A jurisdiction (and by analogy the purpose of the section 20C jurisdiction).

- 12 The Tribunal must therefore determine what is just and equitable in all the circumstances of the case; and, in making that determination, the Tribunal should take account of the practical and financial consequences for all those who would be affected by making – or not making – an order.
- 13 It is clear that the Tribunal found in favour of the Respondent on every point raised by the Applicants in their section 27A application, although in most instances the Tribunal only found in favour of the Respondent because the Tribunal made its determination by reference to the final service charge accounts for the relevant years.
- 14 By contrast, when the Applicants made their section 27A application they only had available to them the *uncorrected* service charge accounts for 2020/2021 and the service charge *budget* for 2021/2022. The Tribunal finds that for two years the Applicants had been questioning perceived anomalies that continued to be reflected in those documents but that the Respondent failed to engage in meaningful discussions with the Applicants.
- 15 In the circumstances, the Tribunal accepts that the Applicants felt that they had no alternative but to apply to the Tribunal for a resolution of the issues.
- 16 On the other hand, even after the final service charge accounts for the relevant years were made available, the Applicants persisted with their section 27A application to challenge the *uncorrected* service charge accounts for 2020/2021 and the service charge *budget* for 2021/2022, advancing arguments that were unsustainable.
- 17 In conclusion, the Tribunal determines (i) that it would not be just and equitable for the Applicants to be liable for all the Respondent's costs when the Respondent's lack of engagement left the Applicants with no real choice but to start proceedings before the Tribunal; but (ii) that it would be just and equitable for the Applicants to be liable for the Respondent's costs consequent upon their continuation of the proceedings after the final service charge accounts for the relevant years were made available.
- 18 Perhaps the more complex issue is to determine how to give effect to that determination.
- 19 The consequence of not making a section 20C order would be that the Respondent could include its costs in the service charge accounts and recover those costs from all 34 leaseholders in the development. Even if the Tribunal does make a section 20C order, that order could only benefit the three leaseholders named in the Applicants' application, leaving the Respondent free to recover its costs from the remaining 31 leaseholders, who took no part in the Applicants' section 27A application (although the other leaseholders would be able to make their own section 20C application). In the view of the Tribunal that would be manifestly unjust and inequitable. Any costs should be borne by the Applicants alone.
- 20 The Tribunal therefore determines that it would be just and equitable to make a section 20C order.
- 21 However, as already indicated, the Tribunal is of the view that the Applicants should be remain liable under their leases for some (but not

all) of the Respondent's costs. That result can be achieved by making an order under paragraph 5A, *reducing* the Applicants' (potential) liability to pay an administration charge in respect of litigation costs.

- 22 As to the quantification of such an order, the Respondent has not provided a detailed schedule of legal costs. However, on 9 May 2022 Omnia, the management company appointed by the Respondent, wrote to the second Applicant (and presumably the other leaseholders) in connection with the 2020/2021 service charges. In that letter Omnia stated that the Respondent's costs in responding to the Applicants' section 27A application were 'likely to be in region of £5,000 to £10,000 plus VAT and disbursements' but they expressed the hope that the Directors' and Officers' insurance would cover the costs.
- 23 The wide range of likely costs suggests that the quoted figures were not considered estimates.
- 24 Bearing in mind the conclusions on the just and equitable apportionment of costs (see paragraph 17 above), and work involved in dealing with the continuation of the Applicants' section 27A application and the appropriate level of fee earner, the Tribunal determines that the Applicants' liability for the Respondent's costs should be limited to £1,000.00 (plus VAT if applicable).
- 25 The Tribunal is doubtful whether those costs will be covered by insurance. However, since the Respondent has raised that possibility, the Tribunal determines that the Respondent is not entitled to recover any costs unless and until the Respondent demonstrates to the Applicants and to the Tribunal that the costs have not been covered by insurance.

### Summary

- 26 Exercising its discretion under section 20C(3) of the 1985 Act, and applying the test of what is just and equitable, the Tribunal is of the view that, for the reasons set out above, it would be just and equitable to order that the costs incurred by the Respondent in connection with the proceedings before the Tribunal in relation to the Applicants' applications are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants and the other leaseholders specified in the section 20C application.
- 27 Exercising its discretion under paragraph 5A(2) of Schedule 11 to the 2002 Act, and applying the criteria of what is just and equitable, the Tribunal orders that, for the reasons set out above, the liability of the Applicants to pay an administration charge in respect of the Respondent's litigation costs should be reduced to £1,000 (plus VAT if applicable).
- 28 However, no costs are recoverable by the Respondent unless and until the Respondent demonstrates to the Applicants and to the Tribunal that the costs have not been covered by insurance.

31 October 2022

Professor Nigel Gravells  
Deputy Regional Judge