FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LBC/2022/0020**
Property	**:**	**Flat C, 33 Clifton Gardens, London, W9 1AR**
Applicant	**:**	**33 Clifton Gardens Ltd**
Representative	**:**	**RLS Law**
Respondents	**:**	**Pietro Lamberti & Carmen Maria Lamberti**
Representative	**:**	**SCS Law**
Type of application	**:**	**Commonhold & Leasehold Reform Act 2002 - Section 168(4)** **Section 20C of the Landlord and Tenant Act 1985**
Tribunal member(s)	**:**	**Judge Sheftel** **Mr Leslie Packer**
Date of decision	**:**	**22 March 2023**

DECISION ON APPLICATION UNDER SECTION 20C of the LANDLORD AND TENANT ACT 1985

Introduction

1. By a Decision dated 11 October 2022, the tribunal made a determination that the Respondents have breached the terms of their lease, pursuant to section 168 of the Commonhold and Leasehold Reform Act 2002 (the "2002 Act").

2. Subsequently, the Respondents (tenants) made an application for an order under section 20C of the Landlord and Tenant Act 1985, i.e., an order that all or any of the costs incurred, or to be incurred, by the

landlord in connection with proceedings before the 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 tenants.

3. On 20 January 2023, the tribunal gave directions for the Applicant (landlord) to submit a response to the application and gave the tenants a right of reply. Both further submissions have been received and considered by the tribunal, along with the original application.

4. The application for an order under section 20C specified that the tenants were content for the matter to be determined on the papers. In the tribunal's directions, it was stated that the tribunal proposed to determine the matter on the papers unless any party requested a hearing. As no such request has been made, the tribunal has proceeded to determine this application on the basis of the parties' written representations.

The legal test

5. Section 20C of the 1985 Act provides as follows:

> "(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 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.
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> ...
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> (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."

6. Essentially, the tribunal has discretion to make a section 20C order where it is just and equitable in the circumstances. There was no dispute between the parties that this is the test to be applied.

7. The landlord's written submissions sought to expand on this. In particular, it was asserted that the 'circumstances' to which the tribunal must have regard in determining what it considers just and equitable include (but are not limited to) the outcome of the proceedings (*Schilling v Canary Riverside Development PTE Ltd* LRX/26/2005) – although it was not suggested that this will be ultimately determinative of the issue.

In addition, it was said that regard should be had to the nature of the landlord, for example a resident and management company with no resources apart from the service charge income (*Church Commissioners v Derdabi* [2011] UKUT 380 (LC)). Further it was said that it is essential to consider what will be the practical and financial consequences for all those who will be affected by the order and bear those consequences in mind and deciding on the just and equitable order to make (*Conway v Jam Factory Freehold Ltd* [2013] UKUT 592 (LC)). In *Conway*, it was said that the effect of the section 20C order was 'fundamentally unfair' because it led to the majority of leaseholders in a building being required to contribute to their landlord's costs of defeating an application in which they had not participated, whereas the lessees who had unsuccessfully brought the application had obtained the benefit of the section 20C order.

The tenants' submissions

8. The tenants assert four broad grounds as to why a section 20C order should be made:

    (1) Historical service charge disputes between the Parties
    (2) Tenants' case having merit
    (3) The nature of the breach
    (4) Applicability of the Service Charge provision

9. These are addressed in turn.

Historical disputes

10. The tenants submit that the past litigation history is a relevant factor to the present application. Reference is made to a section 20C order being made in previous proceedings between the parties, which the tenants suggest was not properly adhered to by the landlord. Ultimately, it is said that the "previous failures by the landlord impacted the need for litigation between the Parties in this breach case as they were not in a realistic position to simply accept the landlord's case regarding consent where the landlord had no record of the licence even existing".

11. The landlord disputed that what happened in previous proceedings should have any impact on whether to make a section 20C order in these proceedings. Indeed, it was submitted that to do so would in effect be to punish the landlord for conduct that had already been reflected in previous section 20C orders.

12. It is clear that there has been a breakdown of trust between the parties. It is also accepted that in determining whether it is just and equitable to make an order under section 20C it is appropriate to have regard to the wider circumstances, which can include the background of the wider dispute between the parties. However, in our determination, this does not of itself justify the making of a section 20C order in these proceedings. The tribunal must determine whether it is just and equitable to make a section 20C order in respect of the costs in respect of these proceedings. While we have regard to the background and the clear lack of trust between the parties, we must consider principally what has happened in these proceedings where the landlord has ultimately been successful.

Merit of the Respondents' case

13. While the landlord was successful in the main application, the tenants maintain that their case had merit. In particular, reliance is placed upon the tribunal's finding that that the parties did enter into a licence for alterations in or around March 2005 as the tenants had argued.

14. Further, the tenants do not agree that they could or should have accepted the landlord's position as, in their submission, to do so would have been to deny matters known to be true by them. As the landlord had no evidence of any licence – for which the tenants are critical of the landlord's record keeping – the only evidence put forward to the tribunal was from the tenants and in this regard, it is said that the tenants were partially successful.

15. The difficulty with this argument, however, is that the tenants were ultimately unsuccessful in the main application. While the tribunal found that a licence for alterations was entered into, this did not change the

overall result of the case: we went on to hold that there was not sufficient evidence to establish on the balance of probabilities that the Respondents obtained consent to the floor works as they now appear. Accordingly, insofar as it was the tenants' case that they had authorisation for the floor to be as it was found, they did not establish this at the hearing.

16. We have sympathy with tenants' submission that they could not simply give up and accept the landlord's case, given the belief that a licence had been granted and the fact that no objection had been raised to the flooring for many years. Moreover, the present application is not a rule 13 costs application where the tribunal is required to consider whether the tenants have acted unreasonably. Had it been, we would not have found that the tenants acted unreasonably in not conceding the application. Rather, the legal test which we must apply is whether it is just and equitable to make an order that the costs are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge. Applying this test, we do not accept that the fact the tribunal found there was a licence entered into when overall we concluded that the breach of covenant claim succeeded, means that it would be just and equitable to make such an order.

Nature of the breach

17. Thirdly, the tenants claim that the landlord has been seeking opportunities to take draconian action against the tenants, in part due to a strained relationship between Mr Lamberti and Mr Adler (who gave evidence on behalf of the landlord at the hearing), as opposed to taking reasonable action to ensure even-handed property management.

18. The section 20C application asserted that the breach in question was relatively minor and not a breach that would typically be expected to be forced to a tribunal by a landlord. The tenants assert that the flooring not being carpeted has had little to no impact on the landlord or neighbouring tenants over the previous 17 years. It was also contended that the right to forfeiture had been lost. Further, the tenants submit that it is relevant to the exercise of the tribunal's discretion that this was an

application brought by the landlord, not one in which a landlord was forced into defending an action brought by a tenant.

19. Again, in our determination, these submissions cannot succeed. The landlord was entitled to bring a claim for breach of a covenant in the lease and the tribunal found the allegation of breach to be made out. It would not be appropriate to impose a hierarchy of breaches or to suggest that it is somehow improper for the landlord to takes steps to enforce the covenants in the lease. We also agree with the landlord's submission that it is not for the tribunal to determine whether the tenants might have a defence to a potential claim for forfeiture.

Applicability of the service charge provision

20. The application notice raises the issue of whether the landlord's legal costs could properly be recharged as a service charge under the terms of the lease. However, the tenants' reply suggests that this is no longer an issue as the point was decided in separate proceedings between the parties.

21. In the circumstances, the tribunal makes no further comment, save to emphasise that in determining the question of whether or not to make a section 20C order, the tribunal need not make a finding as to whether costs would be recoverable under the terms of the lease in any event. Similarly, and for the avoidance of doubt, the refusal to make an order under section 20C does not preclude a future challenge to the reasonableness of any such costs under section 27A of the Landlord and Tenant Act 1985.

Determination and conclusion

22. For the reasons set out above, we do not find that the grounds relied on by the tenants either individually or collectively are sufficient to make it just and equitable to make a section 20C order.

23. In the circumstances the tenants' application for an order under section 20C of the 1985 Act is dismissed.

Name: Judge Sheftel **Date:** 22 March 2023

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).