FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AY/LSC/2019/0330 & 0338** **LON/00BJ/LSC/019/0330**
Property	**:**	**Various Properties at St George Wharf and Battersea Reach London SW18**
Applicants	**:**	**Alan Fairleigh (1)** **Mr D and Mrs E Kerin (2)** **Various Lessees of Battersea Reach and St George Wharf (3)**
Representative	**:**	**Mr Alan Farleigh** **Dr Kenneth Soo**
Respondents	**:**	**St George South London Ltd (1)** **St George Battersea Reach Ltd (2)** **Berkeley Sixty Ltd (3)** **Berkeley Sixty-One Ltd (4)** **Berkeley Seventy-Six Ltd (5)** **Berkeley Seventy- Seven Ltd (6)** **Battersea Reach Estate Company Ltd (7)** **Fairhold Athena Ltd (8)** **Fairhold Holdings (2005) Ltd (9)** **Pennine Trustees Ltd (10)** **Notting Hill Home Ownership Ltd (11)** **Notting Hill Genesis (12)** **Wandle Housing Association (13)** **The Peabody Trust (14)**
Representatives	**:**	**Philip Rainey KC (1-7)** **Carl Fain (1-7) (counsel)** **Simon Allison (counsel) (8)** **Justin Bates (counsel) (9)** **Forsters LLP (1 – 7)** **Womble Bond Dickinson (8)** **Winckworth Sherwood LLP (9)**
Type of Application	**:**	**Landlord and Tenant Act 1985 s.20C**
Tribunal Members	**:**	**Judge Siobhan McGrath** **Judge Chris McNall** **Ian Holdsworth FRICS MCIArb**

Date of Decision : 24th June 2024

DECISION

---

1. This is an application under section 20C of the Landlord and Tenant Act 1985 for an order limiting the power of the Landlords to recover costs as part of future service charges. The Tribunal determined the substantive claims in these matters in 2023 and the Applicants and Respondents are the same original parties. This decision has been made on consideration of documents alone and without a hearing.

2. Prior to issuing Directions for the determination of the section 20C issue, the Tribunal observed as follows:

> "8. The Respondents' costs in the litigation are very substantial. It is useful to have an indication from R1-R7 that the level of those costs may well exceed £2,000,000. I do not consider that this is wholly irrelevant to the Tribunal's consideration of the exercise of its wide discretion under section 20C. However, I also do not consider that the Respondents or any of them should be required to provide a schedule of costs at this stage in the proceedings, nor that the costs must have been demanded and the amount broken down before the Tribunal can consider the matter.
>
> 9. I also consider that any assessment of costs should be delayed until after the section 20C determination has been reached. Dealing with section 20C and assessment at the same time is more likely to increase than to limit costs.
>
> 10. The Applicants ask that their requests under both section 20C and paragraph 5A be considered at the same time. They concede that the costs would be recoverable as administration charges, but R1-R7 say that the costs "are not sought by the Respondents as an administration charge; they are

> ‘Maintenance Expenses’ under the provisions of the leases.” The Applicant have not conceded the contractual entitlement to claim the legal costs as service charges. Whilst I understand the Applicants’ desire to have all matters relating to costs decided at the same time, administration charges are not currently in issue and at present submissions will be confined to section 20C.”

11. Strictly speaking the determination of the liability of lessees to pay legal costs under the terms of the lease is not required before a section 20C discretion can be exercised. However, in this case, having regard to the level of the costs and the complexity of the lease structure I will direct that the issue be included in the parties’ submissions as it will form part of the matrix of background facts that the Tribunal will wish to consider when deciding whether or not to make an order or indeed the terms of that order.”

3. On that basis it was directed that the Respondents should lodge their submissions first, explaining how it is contended that the legal costs concerned are recoverable as service charges under the occupational leases and summarising their reasons for contending that a section 20C order should not be made. Thereafter the Applicants were directed to respond and the Respondents given permission to reply if so advised. Submissions were received on behalf of the 1st to 7th, the 8th and the 9th Respondents, from Dr Soo on behalf of the St George Wharf Applicants, and from Mr Fairleigh on behalf the Battersea Reach Applicants.

4. To be clear, in this determination we are deciding only whether orders under section 20C of the 1985 Act ought to be made. We are not deciding issues of payability or reasonableness. This is not a determination under section 19 of the Act. Furthermore we are not making any determination about legal costs that may or may not be recoverable as administration charges nor are we considering arguments under paragraph 5A of the Commonhold and Leasehold Reform Act 2002.

5. In addition to lodging submissions each of Rs 8 and 9 have made their own applications under section 20C which they say are protective applications to be considered in the event that the Tribunal decides that an order (including a partial order) under section 20C should be made in favour of the Applicants.

Are Legal Costs Recoverable from the Occupational Lessees?

Respondents' Submissions

6. We deal first with the recoverability of legal costs under the terms of the leases. One of the reasons that we considered it necessary to receive submissions on this point is the complexity of the lease structures at both St George Wharf and Battersea Reach. This is described at paragraph 68 and 69 of the main decision as follows:

> "68. At SGW, there are 10 blocks, A – K.
>
> (i) In respect of 6 blocks, B-G, there is a single concurrent headlease of the whole block, 6 headleases (Blocks B-G) are owned by R9;
>
> (ii) A single concurrent headlease was granted for Blocks H and J which is owned by R8.
>
> (iii) The only exceptions to this tripartite structure are blocks A, H and K, which include some affordable/shared ownership units. For Blocks A and K there is a single concurrent headlease of the whole of the block granted by R1 to a group company, R5.
>
> (iv) R11 has a headlease of affordable housing units (and associated common parts)
>
> a. Admiral and Armada House (Block A);
>
> b. Hanover and Hobart House (Block H) and Kingfisher House.
>
> R11 then sub-lets its units on shared ownership occupational leases.
>
> 69. At BR, there are 17 blocks, A – T (but no O or R blocks):
>
> (i) 5 blocks (K,L,M,N,P) do not have any concurrent headlease;
>
> (ii) Block G contains only AHUs and is demised to R11;
>
> (iii) Blocks F, K, L, M, N, Q + T each contain shared ownership units which are sub demised to R11, R13 or R14 and then in turn demised to occupational shared ownership lessees.

(iv) There are concurrent headleases of the remaining blocks. R8 holds the (single) headlease of blocks B, C and D. The remaining concurrent headleases are owned by either R5 (blocks A, E, F, H, J and S) or R3 (Q and T), both companies in the Berkeley Group.

(v) Additionally for BR, the Battersea Reach Estates Company Limited (BRCL) provides the Estates services."

7. In this decision we adopt the terminology suggested by Mr Rainey KC on behalf of Rs1-7 as follows: The Apartment Leases are referred to as the "Occupational Leases" and the apartment leaseholders as "Occupational Tenant"; "Block Headlease" refers to the concurrent headleases; "Block Landlord" refers to the grantee of the Block Headleases i.e. R3, R5, R8 and R9. Finally, a number of blocks include a further concurrent sub-headlease to R10 and a "collection underlease".

8. The Occupational Leases in both Developments are materially the same (subject to a particular point relating to some of the Battersea Reach leases which we deal with below). Generally speaking, the structure of the Occupational leases is unremarkable.

9. For St GeorgeWharf, Rs 1-7 referred to a sample lease for Flat 274, Drake House (Block D) where the Occupational Tenant covenants to observe and perform the obligations in Parts 1 and 2 of Schedule 8 to the Occupational lease. By paragraph 2 of Schedule 8, the Occupational Tenant covenants to pay the Lessee's Proportion in accordance with the provisions of Schedule 7. The Lessee's Proportion is defined as the specified percentage in respect of the Maintenance Expenses. The Maintenance Expenses are defined as the cost incurred in discharge of the Landlord's obligations in Schedule 6.

10. The Maintenance Expenses are listed in Part 2 of Schedule 6 and include:

(i) Paragraph 3.1: "Providing for the employment of such persons as may be necessary in connection with the upkeep and management of the Maintained Property and performance of the covenants on the part of the Lessor in this Lease including fees charges expenses salaries wages and

commissions paid to any auditor accountant surveyor or valuer architect solicitor managing agent or other agent…"

(ii) Paragraph 14: "All other expenses (if any) properly incurred by the Lessor in and about the maintenance and proper and convenient management and running of the Development including in particular but without prejudice to the generality of the foregoing … any legal or other costs bona fide incurred by the Lessor and otherwise not recovered in taking or defending proceedings (including any arbitration) arising out of any lease of any part of the Development or any claim by or against any lessee or tenant thereof or by any third party against the Lessor as owner lessee or occupier of any part of the Development"

11. On behalf of R1-7 it is said that the legal costs of defending the applications fall within paragraph 3.1 and/or paragraph 14 and that therefore the Occupational Tenants are obligated to pay their relevant proportion as a service charge. They submit that the clauses are widely drawn and that a materially identical clause was held in OM Property Management Ltd v LVT [2012] UKUT 102 (LC) not only to include external solicitors' costs but also in-house solicitors' costs. Furthermore in Bretby Hall Management Co Ltd v Pratt [2017] UKUT 70 (LC) they say that a materially identical clause was held to also cover the costs of threatened proceedings not actually issued.

12. For Battersea Reach Rs 1-7 referred to a sample lease for Flat 65, Discovery House where the Occupational Tenants are obliged to pay Maintenance Expenses contained in specified parts of the Sixth Schedule to the Lease which include in Part VII:

(i) At paragraph 3: "Providing and paying for the employment of such persons as may be necessary in connection with the upkeep and management of the Maintained Property and performance of the covenants on the part of the Landlord and the Manager in this Lease including fees charges expenses salaries wages and commissions paid to any auditor accountant surveyor or valuer architect solicitor managing agent or other agent…"

(ii) At paragraph 17: "All other expenses (if any) properly incurred by the Landlord and/or Manager in and about the maintenance and proper and convenient management and running of the Development including in particular but without prejudice to the generality of the foregoing … any legal or other costs bona fide incurred by the Lessor and otherwise not recovered in taking or defending proceedings (including any arbitration) arising out of any lease of any part of the Development or any claim by or against any tenant or tenant thereof or by any third party against the Landlord as owner tenant or occupier of any part of the Development"

13. Again, R1-7 say that the legal costs of defending the applications fall within paragraph 3 and/or paragraph 17 and therefore the Occupational Tenants are obliged to pay their relevant proportion as a service charge.

14. In respect of both St George Wharf and Battersea Reach, R1-7 maintain that because R1 is the freehold owner and the original landlord of the Occupational Leases, it is entitled, notwithstanding the grant of the concurrent headleases, to enforce the tenant covenants in the Occupational Leases pursuant to section 15 of the Landlord and Tenant (Covenants) Act 1995 ("the 1995 Act").

15. They explain that under the 1995 Act, the concurrent lease takes effect as a lease of the reversion because s.15(1) provides that where any tenant covenant of a tenancy, or any right of re-entry contained in a tenancy, is enforceable by "the reversioner", then it is also enforceable by any other person (other than the reversioner) who, as holder of the immediate reversion, is for the time being entitled to the rents and profits under the tenancy.

16. In respect of St George Wharf it is additionally said that in any event R1 retains control over those parts that have not been let on concurrent leases (the wider estate), and hence as a matter of contract is entitled to recover the costs as a service charge. Finally, it is said that the service charges simply head up the chain between the Block Landlords and the Freeholder.

17. The Applicants do not take issue with any part of this analysis, and we consider that it is correct.

18. In respect of Battersea Reach similar points are made as in respect of St George Wharf but, additionally, it is contended that in any event since R7 continues in its role as Manager under the Occupational Leases, it is entitled to recover service charges directly from the Occupational Tenants.

19. R8 also contends that legal costs are payable under the terms of the Occupational Leases at Battersea Reach. In respect of St George Wharf they too rely on paragraphs 3 and 14 of Schedule 6. As to paragraph 3, it is contended that the costs incurred in these proceedings are costs in connection with the management of St George Wharf and include fees payable to solicitors and surveyors and accountants and other agents. Additionally, they say that even if were said that clause 3 is not apt to cover the entire costs of responding to the substantive Applications, the cost of taking professional advice from tax and property management experts on the issues in this case would be since that is the very action that the Applicants ought to have taken so as to properly investigate whether savings of VAT could be made by changing the way in which staff are employed. Those submissions are repeated also in respect of Battersea Reach.

20. In conclusion, R8 contend that the recovery of costs in respect of both St George Wharf and Battersea Reach is supported by the clear terms of the Occupational Leases.

21. R9 also rely on paragraphs 3 and 14 in Schedule 6 to the Lease. The following additional points are made about clause 3: that the case was, at its core, a challenge to the method of management adopted by R9; that litigation to resolve disputes around appropriate management decisions is itself and aspect of management (Retson v Hudson [1990] 2 E.G.L.R. 51) and that the inclusion of solicitors in the list indicates that this is intended to go beyond “on the ground” management roles.

22. In addition to paragraphs 3 and 14, R9 also relies on paragraph 9 which relates to the costs of “Enforcing or attempting to enforce the observance of the

covenants on the part of the lessee or owner of any of the Properties". This supports, it is said, legal costs incurred in establishing that it can enforce the obligation to pay VAT on the management costs.

23. As to paragraph 14, R9 submits that the breadth of the provision is striking and that, in short, the costs of defending such a challenge clearly fall within the clause.

Applicants' submissions

24. Submissions were made by Dr Soo on behalf of the St George Wharf Applicants and by Mr Alan Fairleigh on behalf of the Battersea Reach Applicants. The submissions relating to the recoverability of legal costs are made in section 3 of Mr Fairleigh's written arguments, which were adopted by Dr Soo.

25. One of the first matters dealt with by Mr Fairleigh is that there is a difference in the drafting of his and a number of other Battersea Reach leases (i) from the remaining leases and (ii) from the St George Wharf leases. Put simply, although there are 17 clauses in the Sixth Schedule of the lease, clause 1 sets out the costs to which a contribution must be made as being "All sums spent in and incidental to the observance and performance by or on behalf of the Lessor of the covenants in Part I,II,III, IV and V of this Sixth Schedule and any of the matters referred to in clauses 2-15 of this Part VI of the Sixth Schedule which are relevant or attributable thereto." He therefore submits that the Occupational Leases, in that form, do not impose the obligation to pay for the matters in clauses 16 and 17.

26. In support of this contention he submits that, unlike clauses 2-15, clauses 16 and 17 describe expenditure for which the lessor retains liability. In other words, the phraseology was structured to accommodate specific exclusions.

27. Mr Fairleigh also refers to the advice given to him by his conveyancing solicitors when he purchased his lease. This advice seems to relate to legal costs for breach of covenant, which is not relevant here, and costs for the enforcement of

covenants against other defaulting tenants, which is also not relevant to this determination.

28. In response, the Respondents say, in effect that the "non-inclusion" of clauses 16 and 17 is clearly a typographical error; an obvious mistake that falls to be corrected as part of the process of construction and interpretation of the leases and referred the Tribunal to the principles summarised in Chapter 9, Section 1 of The Interpretation of Contracts (8th edition, 2023, Sir Kim Lewison).

29. They ask, hypothetically, why would clauses 16 and 17 have been excluded? They suggest that it makes no sense. Part VI is headed "Maintenance Expenses" and lists all the costs: "Neither the Lessor nor the Manager covenant to carry out the covenants in Part VI of the Sixth Schedule." Therefore clause 16 and clause 17 would be meaningless unless the reference to clauses 2-15 was a mistake and it should have said "clauses 2-17". On behalf of R8 it is said that Mr Fairleigh's lease, when read as a whole, supports the contention that the omission of a reference to clauses 16 and 17 is a mistake.

30. R8 set out the test to be applied in order to correct mistakes in legal documents by construction: "Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as a matter of construction" Brightman LJ in East v Pantiles (Plant Hire) Ltd (1981) 263 EG 61, as cited and endorsed by Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38 at §22.

31. In our view, for the following reasons, both conditions are met in this case and the leases which refer to clauses 2-15 should be read as referring to clauses 2-17:

(a) There is no purpose to clauses 16 and 17 unless they are treated in the same way as clauses 2-15 of Part VI.

(b) We do not accept Mr Fairleigh's contention that the structure of the leases where clauses 16 and 17 are not included was deliberate and intended to

accommodate specific exclusions. This does not make sense either in the context of the schedule itself or in the context of the lease read as a whole.

(c) There would seem to be no rationale for the landlord being able to charge some lessees for all of the maintenance expenses but not those lessees where the reference is to clauses 16 and 17 is missing.

(d) There is no similarity between clauses 16 and 17. Although 17 deals with general expenses, clause 16 relates specifically to the operation and maintenance and review of lighting apparatus.

(e) The correction that needs to be made is clear.

32. In reaching this conclusion, we acknowledge that the Applicants had sought permission to reply to the Respondents' contentions on this point. We refused that permission on the basis of proportionality. However, we said that we would seek submissions if they were required. In fact, the strength of the arguments against the Applicants is such that we are satisfied that there would be no material purpose in receiving further argument.

33. Turning then to Mr Fairleigh's other submissions on the construction of the leases. In his paragraph 3.3 he refers to the determination of disputes about the maintenance expenses being referred to arbitration. That is not relevant here. He also refers to Paragraph 6 of Part I of the Eighth Schedule which, as explained above, is also not relevant as we are not making a determination about administration charges. We also consider that the paragraph does not assist in our construction of the Maintenance Expense clauses.

34. Mr Fairleigh starts with submissions about clause 3. His first contention is that clause 3 is intended to deal with management and maintenance costs and in this respect he referred the Tribunal to 89 Holland Park (Management) Limited v Dell [2023] EWCA Civ 1460, where the Court of Appeal upheld the Upper Tribunal decision on legal costs. He contended that the focus of the provision is on practical management and that there is no suggestion that this would go beyond "on the ground" management roles. He submitted that the imposition of legal costs under this clause would result in an unusual and onerous payment obligation.

35. He also submitted that clause 17 (even if not excluded) would fail to provide entitlement to the legal costs of litigation. He suggested that the parties to the Lease could not seriously be taken to have intended all costs incurred by the lessor in resisting or pursuing proceedings in respect of third parties should be recoverable. This case does not concern third parties.

36. A further contention by Mr Fairleigh is that clause 17 is "surreptitiously sneaked into the tail end of a long but detailed parade of maintenance and management expenses in a tangle of words from which no certainty of meaning can be gleaned." In this and in other contexts Mr Fairleigh referred the Tribunal to Arnold v Britton [2015] UKSC 36. He suggests that it is implausible that a leaseholder would agree to costs through a service charge "at the commercially suicidal level claimed by the Respondents." He also argues that the clauses impose an onerous and unusual obligation on the lessees.

37. Finally, Mr Fairleigh contends that the legal costs claimed are not "bona fide" costs incurred and that this must mean that exceptional or extraordinary expenditure ought to be excluded.

38. For the following reasons, we are satisfied that legal costs are recoverable under the terms of the leases in both St George Wharf and Battersea Reach. Firstly, it is our view that both clauses 3 and 17 clearly articulate the landlord's right to recover costs. This is so if they are read separately but that conclusion is fortified if the clauses are taken together. This is not a case where there is an ambiguity. In Arnold v Britton Lord Neuberger explained at [15]:
"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38; [2009] 1 AC 1101, para 14. And it does so by focusing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the

lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions…"

39. In our view, the ordinary and natural meaning of clauses 3 and 17 is clear and reflect the overall purpose of the clauses and the leases. We do not regard the inclusion of the right to recover legal costs to be onerous or unusual. We reject the suggestion that costs were incurred otherwise than bona fides. As we have already explained, we are not considering issues of payability or reasonableness in this determination. We do not find that the wording of clause 17 is obscure or that the manner in which the leases are drafted mean that it is difficult to understand the impact of the provision.

The Merits of Making a Section 20 Order

40. A section 20C order may be made if the Tribunal considers it "just and equitable in the circumstances." The Tribunal's discretion is wide and largely unfettered. However, it is trite law to observe that the outcome of an application will weigh heavily in the exercise of that discretion. Indeed the outcome of a case is the "usual starting point" (see Church Commissioners v Derdabi [2011] UKUT 380 (LC)).

41. In this case, the Applicants failed to succeed in any aspect of their application and indeed the Tribunal decided that in a number of respects the applications were wholly misconceived and did not engage the Tribunal's jurisdiction at all (see paragraphs 46-65 of the main decision). In those circumstances it is our view that the Tribunal would need to be offered very convincing reasons in order to accede to the application. The Applicants' submissions on section 20C are wide-ranging and in this determination we have not addressed each point that is made. We do not consider that the exercise of our discretion requires such a forensic approach.

42. In their submissions, both Dr Soo and Mr Fairleigh rehearse, in some detail, the correspondence that preceded the decision of the Applicants to issue their applications in the Tribunal. We do not regard the Respondents as having been obstructive or as having failed to engage with the Applicants. On the contrary we take

the view that the applications were issued at a time when correspondence was continuing and had not been concluded. We are satisfied that, both before the applications were issued and during the course of the proceedings, the Respondents were at pains to explain their position and the reasons for their approach to VAT and the management arrangements at both St George Wharf and Battersea Reach. The Applicants' complaint seems to be that the Respondents ought to have changed their approach and the fact they did not justified the commencement and continuance of the proceedings. Given the outcome of the proceedings, those contentions are simply not established.

43. Before the proceedings were commenced and even during the proceedings the alternative management proposals made by the Applicants remained obscure. As we observed in paragraphs 61 and 62 of the decision:
“61. In our view, the proposals must have sufficient content for a landlord to have formed a view of the arrangement. It seems to us that there is a continuum between proposals which are entirely hypothetical and those which are completely worked out. Somewhere along this continuum is a dividing-line between proposals which the landlord can reasonably refuse to consider and those which it cannot. We do not need to draw that line in this case because the proposals in this case are, in our clear view, clearly on the wrong side of that line.

62. As they stand, the models do not meet, even on a realistic case basis, the "implementability" part of the test. The Applicant has not shown, even as a realistic case, that either of the 'models', as placed before the Tribunal, and as discussed by competing cohorts of experts, were realistically capable of being implemented. There always were and still are far too many steps remaining to be done, and far too many potential obstacles. That being so, it cannot be said that it was unreasonable for the Respondents to adopt the stance which they did.”

44. Furthermore, our findings in respect of both tax and management risk are very clear (see paragraphs 97=99 and 138-142) and in our view confirm that the Respondents were correct to resist the applications to protect the status quo at both St George Wharf and Battersea Reach. Not to have done so may have resulted in detriment to all lessees.

45. Separately, it would be wrong in principle to make an order in favour of the Applicants in these cases whilst the non-participating lessees would have to bear their share: see Conway v Jam Factory Freehold Ltd [2014] 1 EGLR 111 (UT).

46. The Applicants take issue with the quantum of the costs incurred by the Respondents generally. They contend that the costs are excessive and that it should not have been necessary to have separate representation. This part of the Applicants' submissions conflates the discretion under section 20C with issues of payability and in particular whether costs have been reasonably incurred which will include questions of proportionality. However, we would observe even at this stage, that the lack of clarity in the Applicants' case contributed to the need for the Respondents to provide wide-ranging and comprehensive submissions and evidence.

47. Finally, the Applicants contend that a second 20C order ought to be made because the Respondents' motive in contesting these proceedings included a desire to resolve the Ingram issue for their wider business interests. We do not consider that this was the driving purpose in the conduct of the Respondents' case. We are satisfied that the Respondents were obliged to meet the case made against them in respect of St George Wharf and Battersea Reach specifically. A great deal of the evidence related to the particular management challenges to the specific properties and was not confined simply to a narrow issue of principle. Accordingly, although there may be tangential benefits to the Respondents in that respect, that of itself would not justify making a section 20C or even a partial section 20C in this case.

48. Accordingly, the applications are dismissed.

Siobhan McGrath
24th June 2024