IN THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

Case ref: LON/00BG/LAM/2015/0012

IN THE MATTER OF S.24 OF THE LANDLORD & TENANT ACT 1987

BETWEEN

VARIOUS LEASEHOLDERS OF CANARY RIVERSIDE Applicants

-and-

(1) OCTAGON OVERSEAS LIMITED
(2) CANARY RIVERSIDE ESTATE MANAGEMENT LIMITED

Respondents

GROUNDS FOR THE APPLICANTS' APPLICATION FOR AN ORDER UNDER SECTION 20C OF THE LANDLORD AND TENANT ACT 1985

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1. In their application for the appointment of a manager [bundle 1, page 6], the Applicants applied for an order under section 20C of the Landlord and Tenant Act 1985 that the costs incurred by the Respondents in relation to the Applicants' application for the appointment of a manager 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.

2. That application has not yet been determined. Now that the Tribunal's decision has been given, these grounds amplify the Applicants' application.

3. The Applicants understand that whilst some service charge funds have been paid to Mr Coates, the Tribunal's appointed manager, the Respondents have retained, amongst other sums, a figure in the region of £400,000 to satisfy the legal costs of their unsuccessful resistance to the application.

4. This application, if granted by the Tribunal, will therefore enable the Respondents to release funds to Mr Coates.

The law

5. The Tribunal will be familiar with the authorities on the exercise of the section 20C discretion.

6. In Tenants of Langford Court v Doren 2007 LRX 37, HHJ Rich QC said:

> "28. In my judgement the only principle upon which the discretion should be exercised is to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the outcome of the proceedings in which they arise…
> "30. Where, as in the case of the LVT, there is no power to award costs, there is no automatic expectation of an Order under s.20C in favour of a successful tenant, although a landlord who has behaved improperly or unreasonably cannot normally expect to recover his costs of defending such conduct…
>
> "31. In my judgement the primary consideration that the LVT should keep in mind is that the power to make an order under s.20C should be used only in order to ensure that the right to claim costs as part of the service charge is not used in circumstances that make its use unjust.

7. In *St John's Wood Leases Ltd v O'Neil* [2012] UKUT 374 (LC), the Upper Tribunal noted:

> "As was made clear in both *Doren* and *Schilling* [*v Canary Riverside Development PTE Limited* LRX/26/2005], whether such an order should be made depends on the facts and circumstances of the case and ultimately what is just and equitable in those circumstances".

8. It is just and equitable for such an order to be made by the Tribunal in relation to the Applicants' application for the reasons set out below.

Success

9. Whilst it is accepted that success does not of itself justify a section 20C order, the Applicants' success is a factor to be taken into account in determining whether it is just and equitable to make an order.

Pre-action conduct

10. Before making their application, the Applicants gave the Respondents ample opportunity to remedy their breaches:

    a) The Tribunal will recall reading the minutes of meetings that had taken place during 2010 – 2013 where issues such as the PPM were repeatedly raised, and

    b) The section 22 notice was served on 14 May 2014. The Applicants waited more than a year for the Respondents to remedy the breaches identified in the notice before applying for Mr Coates's appointment in June 2015.

11. The section 22 notice clearly notified the Respondents of the particulars of the breaches that were alleged.

12. The Applicants were obliged to chase the Respondents for a response however, none being forthcoming on initial service of the notice.

13. The Respondents subsequently provided a small number of documents but substantially failed to address the numerous breaches alleged in the notice. In the circumstances the Applicants were left with no alternative but to apply to the Tribunal.

Disclosure

14. The Applicants were obliged to apply for disclosure of documents in November 2015 because the Respondents had not provided full disclosure in response to the section 22 notice.

15. The application, made at the case management conference in November, clearly identified the documents that were sought from the Respondents.

16. The Tribunal directed that the deadline for compliance with that application was 17 December 2015. In fact, the Respondents continued to disclose documents all the way through 2016, including as exhibits to their witness statements:

    a) On 01 April 2016, they sent a further 260 pages to the Applicants;

    b) On 12 April 2016, they submitted additional witness statements and associated exhibits, and

17. On 16 May 2016, they produced a further bundle of documents and a second witness statement from Mr Paul. The majority of the documents were within the public domain, but they dated back at least twelve years. The Respondents did not inform the Applicants that they intended to rely on them until 1.20pm on the eve of the hearing.

Bundles

18. The Applicants prepared an indexed, paginated hearing bundle of 3,000 pages, ensuring that there was no unnecessary duplication of documents.

19. Within twenty-four hours of the Respondents pointing out that the exhibits to the Respondents' witness statements were no longer in the order originally provided (ie, as annexed to those statements), they produced a cross referenced index to those exhibits.

20. The Respondents subsequently protested that the bundle was unusable and that they would be obliged to prepare their own. They provided the Tribunal with an additional bundle containing their witness statements and exhibits, although they did not copy that bundle to the Applicants.

21. In the event, both they and the Tribunal were able to use the Applicants' original bundle without difficulty at the five-day hearing.

Delays

22. The Respondents attempted to delay the hearing of the application, presumably in order to try to improve the position at Canary Riverside sufficiently to defeat the application for Mr Coates's appointment.

23. The hearing was delayed twice on the Respondents' applications:

    a) The November 2015 hearing was adjourned to 14-18 March 2016 – albeit ultimately by consent – because the Respondents considered that there was insufficient time for the matter to be heard, and

    b) Two weeks after the March 2016 hearing date was agreed between the parties the Respondents requested it be adjourned to enable Mr Paul to attend MIPIM in Cannes. Confirmation of Mr Paul's attendance at MIPIM was provided by way of a flight booking, which had been made the day before it was sent to the Tribunal as evidence of his prior commitment, The booking was made one month after the November 2015 hearing.

Conclusion

24. In the circumstances, the Tribunal is asked to make an order under section 20C in relation to all of the Applicants.

Amanda Gourlay

STATEMENT OF TRUTH

I believe that the facts stated in this application are true.

I am authorised by the Applicants to sign this statement of truth.

Signed: .....

Name: M A C . STEEL

Date: 27 October 2016

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BETWEEN

VARIOUS LEASEHOLDERS OF CANARY RIVERSIDE

Applicants

-and-

(1) OCTAGON OVERSEAS LIMITED

(2) CANARY RIVERSIDE ESTATE MANAGEMENT LIMITED

Respondents

GROUNDS FOR THE APPLICANTS' SECTION 20C APPLICATION
