LON/00BG/LRA/2013/0008

IN THE FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

IN THE MATTER OF No. 1 West India Quay, 26 Hertsmere Road, London E14
AND IN THE MATTER OF an application for recognition of a tenants' association pursuant to Section 29 of the Landlord and Tenant Act 1985
BETWEEN:-

ONE WEST INDIA QUAY RESIDENTS ASSOCIATION

Applicant

and

(1) WEST INDIA QUAY DEVELOPMENT COMPANY (EASTERN) LIMITED
(2) No. 1 WEST INDIA QUAY (RESIDENTIAL) LIMITED

Respondents

RESPONDENTS' REPLY TO THE APPLICANT'S SUBMISSION ON COSTS DATED 3RD APRIL 2014

Introduction

1. The Respondents have received the submission of the Applicant on costs ("the Costs Submission"), prepared by Mr. Boyd.

1.1 This document ("the Reply") replies, so far as necessary, to the Costs Submission. Expressions defined in the Respondents' Skeleton Argument for the hearing have the same meaning in this reply. Italics have again been added to quotations. References to page numbers in the hearing bundle are given in square brackets and bold print.

1.2 The Reply is not intended to constitute a line by line reply to the Costs Submission. Where a particular allegation in the Costs Submission is not dealt with in the Reply, no assumption should be made that the allegation is accepted. The correct assumption is that the allegation is disputed.

Non-provision of the Costs Submission to the Respondents

2. The Costs Submission was not copied to the Respondents' solicitors, as it should have been, either by the Applicant or Mr. Boyd. In the result, the Costs Submission did not reach the Respondents until 24th April 2014, when it was sent by the Tribunal.

2.1 Mr. Boyd introduces the Costs Submission with the following preamble.

> *"Can I make the following submission on behalf of the applicants. I am not aware of the obligations to forward copies to the other parties now that the hearing is complete. Can I ask you to forward if required."*

2.2 Mr. Boyd plainly has experience of appearing in Tribunals. The idea that the obligation to copy the Respondents in on the Applicant's written submissions had somehow come to an end, at the conclusion of the oral hearing, is quite absurd.

2.3 This point does not simply rest on the fact that all written submissions lodged by a party in proceedings before the Tribunal should be copied to the other party. As a matter of common courtesy, at the very least, both the Applicant and Mr. Boyd should have taken the trouble to copy the Applicant in on the Costs Submission.

2.4 The situation gets even worse when it is borne in mind that paragraph 9 of the Costs Submission introduces an application for the Applicant's costs of the Recognition Application pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The Tribunal will recall that Mr. Boyd was given permission, at the conclusion of the oral hearing, to put in a written submission in support of the Section 20C application. The recollection of the writer (confirmed by his instructing solicitor) is that Mr. Boyd made no mention of the fact that there would also be an application for costs pursuant to Rule 13. There was also no such application in the section of

the Applicant's joint witness statement which dealt with the Section 20C application **[177-178]**.

2.5 The Tribunal will also note that, in his introduction to the Costs Submission, Mr. Boyd did not alert the Tribunal to the fact that the Rule 13 application had been introduced into what the Tribunal would, presumably, have assumed to be a written submission on the Section 20C application.

2.6 The Respondents are not impressed by the conduct of Mr. Boyd and the Applicant. The Tribunal should be similarly unimpressed.

2.7 The Respondents are obliged to the Tribunal for allowing them until 2nd May 2014 to made representations in answer to the Costs Submission.

Paragraph 1 of the Costs Submission

3. There seems to be some confusion here. The Tribunal issued directions on 20th February 2014 ("the Directions"). Paragraphs 9 and 10 of the Directions directed as follows.

> *"9. The Applicants have made an application under S.20C of the Landlord & Tenant Act 1985 and the parties should be prepared to make oral submissions on this matter at the end of the hearing.*
>
> *10. Similarly, the Tribunal will wish to hear oral submissions at the end of the hearing on the issue of costs."*

3.1 Paragraph 11 of the Directions directed that the Respondents were to provide a bundle for the hearing on 27th March 2014. The Respondents did provide the bundle for the hearing. Both the Applicant and the Tribunal have the bundle.

3.2 The Costs Submission is not lodged pursuant to paragraph 9 or 10 of the Directions, but pursuant to the direction of the Tribunal given at the conclusion of the hearing.

3.3 So far as Directions 9 and 10 are concerned, the Respondents were ready to make oral submissions at the hearing on the Section 20C application, but were not required to do so. Mr. Boyd asked for, and was given permission to put in a further written submission on the Section 20C application within 7 days. The writer indicated that the Respondents were content to rest on what had been said in their Skeleton Argument in relation to the Section 20C application.

3.4 The above matters for two reasons.

(1) The Respondents have seen a separate e mail from Mr. Boyd to the Tribunal, again not copied to the Respondents by Mr. Boyd, which appears to have been sent on 28th March 2014. In that e mail Mr. Boyd suggests that the Respondents have not complied with Paragraph 10 of the Directions. This is nonsense. Paragraphs 9 and 10 of the Directions are now spent. So far as the Costs Submission deals with the Section 20C Application, it has been served pursuant to the separate direction of the Tribunal given at the conclusion of the hearing.

(2) The Respondents were content to rest upon their Skeleton Argument, so far as the Section 20C application was concerned. The only reasons why the Reply is being lodged (and served on the Applicant) are (i) the Costs Submission contains an application for costs pursuant to Rule 13, and (ii) much of what is said in the Costs Submission is simply too outrageous and/or too misconceived to go unchallenged.

Paragraph 2 of the Costs Submission

4. The Tribunal is reminded that it also has the benefit of the two decisions of the Upper Tribunal on the Section 20C jurisdiction, which are attached to the Respondents' Skeleton Argument. The attention of the Tribunal is drawn, in particular, to what was said by Judge Rich QC in The Tenants of Langford Court (Sherbani) v Doren Limited LRX/37/2000, which is cited in paragraph 16 of the decision in Church Commissioners v Derdabi [2010] UKUT 380 (LC).

4.1 One further point to make in respect to these authorities is that Section 20C applications are normally made in relation to challenges by tenants to the reasonableness of service charges. The two cases referred to in the Respondents' Skeleton Argument are examples of this. In the present case an entirely different application comes before the Tribunal, namely the Recognition Application. Whatever the outcome of the Recognition Application, it is respectfully submitted that the Tribunal should, at least, accept that the Respondents had serious and principled objections to the Recognition Application, which they were entitled to pursue. If this point is accepted, as it should be, it follows that it would not be just and equitable to deprive the Respondents of their contractual right to recover the costs of their opposition to the Recognition Application, regardless of the outcome of the Recognition Application.

4.2 The Tribunal will bear in mind that if, contrary to the Respondents' case, the Recognition Application is allowed, it does not follow that there has been any mismanagement of the Building by the Respondents or indeed any conduct justifying the exercise of the Section 20C jurisdiction. This is in stark contrast to cases involving the reasonableness of service charges, where any measure of success on the part of the tenants challenging the relevant service charges necessarily entails a finding that the landlord has been guilty of some unreasonable conduct in relation to the level of the service charges.

Paragraph 3 of the Costs Submission

5. This is agreed. The jurisdiction is to do what is just and equitable. This is why the Respondents say that the Section 20C application should be refused, regardless of the outcome of the Recognition Application. Success or failure of the Respondents' opposition to the Recognition Application is not the correct criterion.

Paragraph 4 of the Costs Submission

6. The writer's understanding of the Section 20C jurisdiction is that the Tribunal is not concerned to decide whether the Respondents (strictly speaking the Second Respondent as immediate landlord of the tenants of the Upper

Apartments) have the contractual right to recover the costs of the Recognition Application as part of the service charge.

6.1 Quite apart from this, if it had been the intention of the Applicant to argue that this contractual right did not exist, this should have been raised prior to the hearing, so that the question could be considered and argued at the hearing if, contrary to the Respondents' primary argument, this question was considered to be engaged in a Section 20C application.

6.2 It is of course the Respondents' case that the Respondents do have the contractual right to recover their costs of the Recognition Application through the service charge provisions in the Underleases. It is not however open to Mr. Boyd to ambush the Respondents with this point in the Costs Submissions. If the Applicant considers that this contractual right does not exist, it should start the appropriate proceedings, on behalf of its members, to try to establish this.

6.3 So far as the Tribunal's decision on the Section 20C application is concerned the Respondents confirm that they do not regard this decision as being concerned with or deciding whether the Respondents have the contractual right to recover these costs. That is a separate argument for another day. In making its decision on the Section 20C application it is respectfully submitted that the Tribunal should assume, without deciding, that the contractual right does exist, leaving it to the parties to argue this contractual point ("the Contractual Point") in the appropriate proceedings, should the Applicant choose to commence such proceedings.

6.4 If the Tribunal disagrees with the above analysis of the Section 20C jurisdiction there will, most regrettably, have to be another round of written and/or oral submissions to deal with the Contractual Point, so that it can properly be addressed by the parties and the Tribunal. It is very much to be regretted that the Applicant, if it was intending to raise the Contractual Point, did not raise the point at the appropriate time, namely in advance of the hearing. The Applicant had ample time and opportunity to raise the

Contractual Point. If the Applicant had raised the Contractual Point, and if the Tribunal had considered that it should deal with the Contractual Point, the Respondents could have prepared appropriate submissions, and arranged for the inclusion of a sample Underlease or Underleases in the hearing bundle.

6.5 The point is also worth making that it was at least implicit in the making of the Section 20C application that the Applicant accepted that the Respondents had the contractual right to recover their costs by the service charge, in the absence of a successful Section 20C application; see in particular the letter from Ms Hewland to the Tribunal dated 7th January 2014 **[86]** and the relevant section of the joint witness statement **[177]**.

Paragraph 5 of the Costs Submission

7. There appears to be a line missing from this paragraph in the version of the e mail which has reached the Respondents' solicitors. This probably does not matter because the procedural position was addressed in section 5 of the Respondents' Skeleton Argument. While this was not and is not a criticism of the Tribunal, the timetable for preparation for the hearing was a tight one, and the Respondents had to do a great deal of work in a very short time in order to be ready for the hearing. The Applicant was caused not the slightest prejudice by the Respondents being two days late with their evidence, and there was no prejudice or disruption to the hearing. At the hearing the Tribunal, very sensibly, accepted that both parties were well able to say all they wanted to say in relation to the Recognition Application, and that all the evidence should be heard. This is all now water under the bridge.

7.1 What is not water under the bridge is the fact that the Costs Submission contains an application for costs pursuant to Rule 13, and an attempt to bring the Contractual Point into the Section 20C application. The abuse of procedure is very clearly on the Applicant's side.

Paragraph 6 of the Costs Submission

8. This has all been dealt with. The suggestion that the Respondents have behaved abusively towards the Applicant and its members were not

established at the hearing, and should be seen, and dismissed by the Tribunal for what they are, namely crude attempts at mud slinging which reflect no credit on the Applicant and its members.

8.1 The bundle contains the correspondence which records the Respondents' attempts, by their own solicitors and then by BVI lawyers, to find out who is in control of East Tower. The suggestion that this correspondence amounted to any kind of abuse or harassment remains as ridiculous as it was at the time of the hearing. The Tribunal is referred to section 11 of the Respondents' Skeleton Argument.

8.2 The Tribunal will have noted that no one from East Tower chose to give evidence at the hearing. The Tribunal will also have noted the stonewalling from Ms. Hewland on this topic in cross examination. Even more remarkably, the Tribunal will have noted that no one from East Tower's agents, Premview Properties, was called to give evidence. The writer's recollection is that a representative of Premview was present at the hearing, but he chose to remain silent. One might have thought, if the Respondents' concerns about East Tower were groundless, that the representative of Premview would have taken the opportunity to say so, and to explain why Premview has referred to a conflict of interest in its correspondence with Ms. Hewland; see the penultimate paragraph of the letter from Darrel Samson to Ms. Hewland dated 10th October 2013 **[31]**.

Paragraph 7 of the Costs Submission

9. The argument in this paragraph is understood to be that the Respondents had no grounds for the arguments which they advanced, and no justification for calling the evidence which they did call, including the expert evidence, quite properly and professionally delivered, by Mr. Maunder Taylor.

9.1 The Tribunal has heard the Respondents' case. The suggestion that it could not reasonably be advanced is self-evidently absurd.

9.2 The point is emphasized to the Tribunal that the Recognition Application should be dismissed, for all the reasons advanced by the Respondents at the hearing. Paragraph 7 is no more than a pointless and futile diversion from the Tribunal's consideration of the Respondents' case.

Paragraph 8 of the Costs Submission

10. This is resisted. There is no basis for the Respondents to be deprived of any of their costs pursuant to a Section 20C order.

Paragraph 9 of the Costs Submission

11. The Rule 13 application is hopeless. The Applicant does not identify what costs it is seeking to recover but, in order to recover any costs under Rule 13 the Applicant would have to demonstrate either that the wasted costs jurisdiction in Section 29(4) of the Tribunals, Courts and Enforcement Act 2007 was engaged, or that the Respondents had acted unreasonably in resisting the Recognition Application.

11.1 The Recognition Application should be dismissed. Whether it is dismissed or allowed, the suggestion that the Respondents' resistance of the Recognition Application has engaged the costs jurisdiction in Rule 13 is self-evidently absurd.

Paragraph 10 of the Costs Submission

12. This has been addressed above and in the Respondents' Skeleton Argument for the hearing.

Paragraph 11 of the Costs Submission

13. This is, in reality, a disguised attack on the Tribunal. There may be applications for recognition which are accepted by the landlord. There may be applications for recognition which can be dealt with on paper.

13.1 In the present case the Recognition Application is, and always has been strongly resisted by the Respondents, for very good reasons. The Tribunal decided, entirely sensibly, that the Recognition Application could not be dealt

with on paper, and required an oral hearing with appropriate directions to ensure that there was proper preparation for the hearing. The result was that the evidence and arguments on the Recognition Application were properly ventilated at the hearing.

13.2 The Recognition Application was subject to sensible and effective case management by the Tribunal. The Applicant's attempt to turn this into a ground for a Rule 13 costs order is perverse.

Paragraph 12 of the Costs Submission

14. This paragraph is absolute nonsense. The suggestion that the Respondents only disclosed their real position at the hearing is a blatant misrepresentation of the position. At the hearing the Respondents pursued the arguments previously set out in their Skeleton Argument, their Reply to the Recognition Application and, it should also be noted, in their earlier application to the Tribunal for directions.

14.1 In this case the Tribunal is required to decide the Recognition Application, not the history of dealings between the Applicant and the Respondents over the last 8 years.

Paragraph 13 of the Costs Submission

15. Given that the Rule 13 application should be dismissed, the request in this paragraph does not arise.

A final point

16. In considering the Recognition Application, one of the matters which the Tribunal has to decide is whether it is appropriate to put into the hands of the Applicant the additional powers and rights which follow from recognition.

16.1 The Tribunal has the Respondents' submissions on this point, and they are not repeated.

16.2 The Tribunal should however bear in mind the terms of the Costs Submission in making its decision on the Recognition Application. If recognition is granted to the Applicant it will have all the rights to make applications to the Tribunal, and to Court, which were considered in the hearing. The Tribunal will recall, in particular, the discussion of the provisions in Schedule 4 to Housing Act 1996, and the possibility of applications to Court in respect of the exercise of the rights granted by those provisions.

16.3 Leaving aside, for present purposes, the other grounds of resistance to the Recognition Application, the Tribunal must be satisfied that the Applicant will use the rights conferred by recognition responsibly, proportionately and sensibly, and that recognition will not leave the Respondents vulnerable to misconceived and costly applications, on the part of the Applicant, to the Tribunal and/or a Court.

16.4 The terms of the Costs Submission should give the Tribunal no confidence that this will happen.

Quantum of costs

17. Mr. Boyd has suggested that, in breach of the Directions, the Respondents have failed to address the question of the quantum of costs.

17.1 If this is a reference to the Respondents' costs of the Recognition Application, the Respondents have not been directed to provide details of the quantum of these costs.

17.2 That said, the Respondents have no objection to providing a summary of their costs of the Recognition Application, in case the Tribunal should find this useful in their consideration of the Section 20C application. The summary is attached to the Reply.

17.3 For the avoidance of doubt, the Respondents make no excuse or apology for the quantum of their costs. The costs figure is a reasonable one, given the amount of work which those representing the Respondents have had to do.

17.4 Quite apart from this, the Recognition Application is strongly resisted. The attached costs summary serves to illustrate to the Tribunal and the Applicant the importance which the Respondents attach to the Recognition Application, and to its dismissal.

EDWIN JOHNSON QC
Counsel for the Respondents
2nd May 2014