FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BJ/LAC/2020/0026**
Property	**:**	**Ground Floor Flat, 47 Marmion Road, SW11 5PN**
Applicant	**:**	**Mr Radan Covic**
Respondent	**:**	**Eldersan Limited**
Type of application	**:**	**Administration Charges, s.20C Landlord and Tenant Act 1985**
Type of decision	**:**	**Paper**
Tribunal Judge	**:**	**Martyński**
Date of decision	**:**	**2 July 2021**

DECISION

Decision summary

1. The costs claimed from the Applicant by the Respondent in the sum of £131,547.02 are reduced to £91,695.10.

The application

2. In this application, the Applicant leaseholder;

   (a) Challenges the legal fees claimed by the Respondent as Administration Charges in respect of previous tribunal proceedings between the parties

   (b) Seeks an order preventing the Respondent freeholder from including the costs of this application in the Service Charge payable by the Applicant

The factual background

3. The subject building is a two-storey house converted into two flats. The Applicant's wife owned the leasehold interest of the flat on the ground floor and that interest passed to the Applicant upon the death of his wife.

4. In 2008, the Applicant's wife obtained planning permission to carry out extensive building works to the subject flat. In 2010, the Respondent granted a licence for the carrying out of the works. The works were completed in 2011 but those works exceeded what had been permitted by the Licence.

5. The Respondent alleged that damage had been caused to the upper flat by the works carried out in the ground floor flat. There then followed various inspections and correspondence between the parties.

6. In December 2017, the Respondent made an application to this tribunal for a declaration under s.168(4) Commonhold and Leasehold Reform Act 2002 that the Applicant was in breach of the lease resulting from the building works.

7. The application came before the tribunal on 18 June 2018. On 30 August 2018, the tribunal published its decision which was as follows;

> The Applicant had breached clauses 2.3 (not to injure or maim any of the walls ceilings floors or partitions of the premises), and 2.4 (not to make any structural alterations or additional) of the lease.
>
> The tribunal found no breach of clause 3(1) (to keep the premises in good substantial and tenantable repair).

8. The reason given by the tribunal for the finding that there had been no breach of clause 3(1) was;

> 29. The tribunal heard evidence from two experts. The evidence conflicted and therefore the tribunal was unable to determine that the movement on the upper level of the property was due to the works on the spine wall and therefore no breach of Clause 3(1) of the lease in connection with the removal of the spine wall.

9. The Respondent appealed the tribunal's decision in respect of Clause 3(1). In giving permission to appeal, the Upper Tribunal ('UT') indicated that if it allowed the appeal, it would continue to re-hear the original application on the question of Clause 3(1).

10. The matter came before the UT for final hearing in November 2019 and its decision was published on 9 January 2020.

11. The UT took the view that the tribunal hearing the case in 2018 had based its decision on Clause 3(1) entirely on the basis of the burden of proof following the conflict of evidence between the parties' experts. The UT considered the authorities on the question of cases being decided on the burden of proof and concluded that, whilst there were cases in which

a tribunal could resort to the burden of proof in deciding an issue, that was not necessary in this case. The UT commented as follows;

> Faced ……. with the divergence of view between the experts, it was essential for the FTT to ask itself what the evidence as a whole contributed to the picture [para 47]
>
> There is therefore no doubt in our minds that the FTT did not show it had undertaken the examination and evaluation of the evidence which is essential before a fact-finding tribunal may fall back on the burden of proof to make the decision for it [para 48]

12. The UT therefore decided that the FTT's decision could not stand and accordingly went on to re-hear the case on the question of clause 3(1). This included hearing further from the experts (some new evidence on the building was available by this time) and inspecting the building.

13. The UT concluded that there had been a breach of clause 3(1) and made the necessary declaration.

14. Following these proceedings, the Respondent demanded the costs of the proceedings from the Applicant.

The procedural history

15. The Applicant's application is dated 8 December 2020 and refers to a demand in the total sum of £125,102.10. Directions on the application were given on 18 January 2021. The directions stated that the application would be decided on the papers without a hearing and neither party has requested a hearing. I have concluded that the matter is suitable for a determination without a hearing and I have been supplied with all the necessary documents and submissions.

16. The directions given by the tribunal specified that the Respondent produce a schedule of costs sufficient for a summary assessment and for the Applicant to respond to that schedule.

17. The schedule of costs provided amounts to a total of £131,547.02. The Applicant's detailed response, set out in a schedule, contains submissions in respect of that schedule. I take it therefore that, as both parties appear to be working off the Applicant's schedule of costs, it is the total of that schedule that is the sum in question in this application.

The lease

18. The lease for the subject property contains the following relevant clause:-

> 2.(5) To pay all costs charges and expenses (including Solicitors' costs and Surveyors' fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a Notice under Sections 146 and 147 of the Law of Property Act 1925 (including any such fees payable in respect of the preparation and service of any schedule of dilapidations) notwithstanding that forfeiture may be avoided otherwise than by relief granted by the Court

The Applicant has not contested the Respondent's assertion that this clause allowed the Applicant to claim the costs in question as Administration Charges.

The law – Administration Charges

19. The Applicant's application seeks a determination of the Administration charges pursuant to paragraph 5, Schedule 11, Commonhold and Leasehold Reform Act 2002 but there is also an application pursuant to paragraph 5A of Schedule 11. The relevant statutory provisions in Schedule 11 are as follows;

> *Reasonableness of administration charges*
>
> 2 A variable administration charge is payable only to the extent that the amount of the charge is reasonable.
>
> *Liability to pay administration charges*
>
> 5 (1) An application may be made to **[**the appropriate tribunal**]** for a determination whether an administration charge is payable and, if it is, as to—
>
> (a) the person by whom it is payable,
>
> (b) the person to whom it is payable,
>
> (c) the amount which is payable,
>
> (d) the date at or by which it is payable, and
>
> (e) the manner in which it is payable.
>
> (2) Sub-paragraph (1) applies whether or not any payment has been made.
>
> (3) The jurisdiction conferred on **[**the appropriate tribunal**]** in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
>
> (4) No application under sub-paragraph (1) may be made in respect of a matter which—
>
> (a) has been agreed or admitted by the tenant,
>
> (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
>
> (c) has been the subject of determination by a court, or
>
> (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
>
> (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.
>
> (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
>
> (a) in a particular manner, or
>
> (b) on particular evidence,
>
> of any question which may be the subject matter of an application under sub-paragraph (1).

Limitation of administration charges: costs of proceedings

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.

(3) In this paragraph—

(a) "litigation costs" means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and

(b) "the relevant court or tribunal" means the court or tribunal mentioned in the table in relation to those proceedings

The approach to assessment

20. *Paragraph 5, Schedule 11 of the 2002 Act*: If these proceedings were in the County Court and the question of costs was being dealt with there, the court, noting the fact that these are contractual costs, would assess the costs on an Indemnity basis. In the court assessment, proportionality would not be in question given the indemnity basis of the assessment.

21. Paragraph 2 of Schedule 11 states that Administration Charges are only payable to the extent that the amount of the charge is reasonable.

22. I have approached the consideration of the costs under paragraph 5 on the basis of paragraph 2 but bearing in mind, as useful guidance, the approach that the court would take as described above.

23. As to the application made pursuant to paragraph 5A of Schedule 11, that paragraph gives a much wider discretion as to litigation costs, the tribunal being able to make; "*whatever order on the application it considers to be just and equitable*". In approaching the decision under paragraph 5A, I have considered that proportionality and the principles of proportionality (as applied in costs assessed by a court) is a useful reference point from which to assess the application. I have not taken proportionality to be the sole basis of assessment, but, as stated, I have borne it in mind.

The parties' respective positions

24. The parties have usefully set out their general comments on the costs and additionally have set out line-by-line comments in a table.

25. I will first summarise and consider the parties' general comments and then make specific comments and decisions on the parties' table which I have incorporated within this decision.

Applicant

26. The Applicant made the following general points;

    (a) The Respondent incurred least four times more costs in the litigation than was incurred by the Applicant

(b) The Applicant largely co-operated with the Respondent in the litigation

(c) The Respondent's charges are; "*disproportionately high given the modest nature of the property combined with the straightforward legal analysis and modest factual complexity of the dispute…..the charges now sought……..amount to an appreciable fraction of the entire value of the subject property itself.*"

Respondent

27. In response, the Respondent alleged;

(a) This was a heavily contested matter where the Applicant took every point available.

(b) There were effectively two fully contested trials

Decision

28. Attached to this decision is the Respondent's bill of costs which I have assessed on a line-by-line basis. The main reasons behind my reductions are as follows;

(a) There was very heavy reliance on senior Counsel, accordingly, claiming Grade A fee-earner rates is not justified. I have allowed a composite rate of £192 for the work (apart from trainee work which carries a rate of £110).

(b) There is evidence of considerable amounts of time being claimed unreasonably. For example, 17 hours have been claimed to produce a witness statement that runs to 10 or 11 pages. 11.5 hours have been claimed to put together the trial bundle for the appeal. There is also a large claim for lengthy telephone conferences with counsel on top of the face-to-face conferences with counsel.

(c) Some work, for example, the putting together of the trial bundle, has been claimed for by a full fee-earner; this is essentially trainee work.

(d) A claim has been made for the attendance of both the full fee-earner and Counsel at some hearings, I have allowed only the trainee rate for attendance at such hearings.

(e) Some of the work claimed for (both Solicitor and Counsel) appears to relate to proceedings after the appeal in the Upper Tribunal and relating to forfeiture proceedings following the service of a s.146 notice. The charging for such work is not covered by the lease.

(f) I have reduced Counsel's fee for the appeal as being excessive and also on the basis that, according to the UT, Counsel did not properly address the central question in the appeal (see paragraph 39 of the UT decision).

(g) I have disallowed two fees from the expert given that there is no description of the work carried out.

29. The total costs figure arrived at on the line-by-line approach is £91,695.10.

Paragraph 5A, Schedule 11

30. As I have stated above, paragraph 5 limits my jurisdiction to finding what was reasonably incurred. Paragraph 5A appears to give me a much wider discretion.

31. As required by that paragraph, I have considered what is 'just and equitable' in coming to my conclusion, I have taken the following matters into account.

32. I note that the Respondent was almost entirely successful in the case. The case proceeded for a little over two years before both tribunals. The case involved a valuable asset (a property in London) and involved a great deal of expert evidence with relevant documents spanning a large number of years.

33. I accept that the Respondent was pushed and opposed all the way by the Applicant and there was no doubt that the Respondent had to pursue the matter to the end in order to protect its asset.

34. There were effectively two trials as well as the appeal.

35. I consider that, in order to assess what is just and equitable, I have to take into account proportionality. I am satisfied that the costs that I have arrived at a line-by-line assessment are proportionate bearing in mind the above matters. Looking at the matter as a whole, I consider that, in the circumstances of this case, the sum that I have arrived at is just and equitable.

S.20 Landlord and Tenant Act 1985

36. The Respondent has been challenged as to its costs and those costs have been reduced. However, the amount offered by the Applicant falls short of the amount assessed by me. Therefore, if the terms of the lease allowed the costs of these proceedings to be placed on a Service Charge payable by the Applicant, I do not see any reason why I should make an order preventing those costs being claimed in that way.

Mathematical errors

37. It is possible, given the length and complexity of the costs schedule, that there are some small mathematical errors in my calculations. If this is the case, and if the result of these errors is within £1,000, I still consider that, overall, the sum that I have arrived at is the correct sum for the decision.

Deputy Regional Tribunal Judge Martyński
2 July 2021

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).