FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &

IN THE COUNTY COURT MONEY CLAIMS CENTRE, sitting at 10 Alfred Place, London WC1E 7LR

Tribunal reference	**:**	**LON/00BK/LSC/2020/0330**
Court claim number	**:**	**G52YJ280**
HMCTS code	**:**	**PAPER**
Property	**:**	**Flat 2, 131-132 Park Lane, London W1K 7AD**
Applicant/Claimant	**:**	**131 Park Lane Real Estate Limited**
Respondent/Defendant	**:**	**Mr Vladimir Demjanenko**
Tribunal members	**:**	**Judge P Korn and Mr R Waterhouse FRICS**
In the county court	**:**	**Judge P Korn, with Mr R Waterhouse FRICS as assessor**
Date of decision	**:**	**6th September 2021**

SUPPLEMENTAL DECISION

This decision takes effect and is 'handed down' from the date it is sent to the parties by the Tribunal office:

Summary of the further decision made by the Tribunal

1. The Main Decision is hereby corrected in part, in that the amount payable by the Respondent to the Applicant by way of service charges is £40,062.17 (not £39,486.17).

Summary of the further decisions made by the Court

The following are payable by the Respondent/Defendant to the Applicant/Claimant:

(a) wasted costs in the sum of £3,405.00;

(b) other County Court costs in the sum of £9,760.25; and

(c) interest in the sum of £5,051.60.

The background

2. This decision is supplemental to the main decision (the "**Main Decision**") dated 12th July 2021 relating to a claim for unpaid service charges and administration charges plus interest and costs.

3. In the Main Decision the parties were invited to make written submissions on the following issues:-

   (i) the quantum of the Applicant's wasted costs, these having already been determined to be payable in principle;

   (ii) any other cost applications that either party wished to make; and

   (iii) the calculation of the amount of interest payable on the principal sums already determined as being payable.

4. The parties agreed to the above issues being determined on the papers without an oral hearing. The documents to which we have been referred are in an electronic bundle, the contents of which we have noted.

Quantum of wasted costs

5. Judge Mohabir ordered that the Respondent pay the costs of the hearing on 5th March 2021. The Applicant seeks wasted costs in the sum of £7,269.00 on an indemnity basis.

6. The Respondent states that the hearing on 5th March 2021 was adjourned to allow it to make an application to strike out the claim because the Applicant failed to provide a fully signed deed evidencing the alleged variation of the lease. The costs claimed include a Counsel's brief fee of £5,000.00 + VAT for the hearing, the Applicant's agent's costs of £720.00 and the solicitors' time for preparation of the cost schedule in the sum of £337.50.

7. As regards Counsel's brief fee, the Respondent submits that for a one day hearing it is grossly excessive and that at best a market rate would be £3,000.00 + VAT. In addition, the order is for 'wasted' costs and the Respondent argues that is inevitable that a reduced brief fee would have been negotiated for the adjourned trial as Counsel had already carried out the preparation work for the hearing. The reduced fee

would be based on a re-reading fee. The Respondent therefore submits that no more than £1,500.00 + VAT should be payable.

8. As regards the agent's costs, the Respondent states that there is no explanation or justification given for this cost and that therefore it should be disallowed in its entirety.

9. As regards the preparation of the cost schedule, the Respondent states that the cost schedule amounts to less than a page and consists of two items, merely recording what Counsel's fee is and what the agent's costs were and that therefore nothing should be allowed for that aspect of the claim.

10. The Applicant submits that a Counsel's brief fee of £5,000.00 + VAT is not excessive. It is based on two days' work at £250 per hour. The sum does accurately reflect the costs that were wasted by the adjournment. The adjourned hearing was itself adjourned following the Respondent's illness meaning that the true wasted cost was the cost of two further hearings totalling £5,500.00.

11. As regards the costs schedule, the Applicant states that this is work that needed to be done and the cost is therefore recoverable.

Other cost applications

12. The Applicant seeks an order that the Respondent pay the costs that it has incurred in the County Court only. Although, in the case of "double hatting", the Applicant notes that it can sometimes be difficult to identify with bright lines which costs have been incurred in the Tribunal and which have been incurred in the County Court, in this case the Applicant seeks (i) the costs it incurred prior to the claim's transfer to the Tribunal on 22nd October 2020 as set out in its submissions filed on 29th September 2020 and (ii) the cost of these submissions.

13. The Applicant states that it is entitled to an order that the Respondent pay its costs because it has been the successful party and there is no other reason, considering the factors in CPR 44.2(4), as to why such an order should not be made.

14. In *Chaplair Ltd v Kumari (2015) EWCA Civ 798*, it was held that where a party has a contractual right to recover its costs on an indemnity basis, the court will generally exercise its discretion when making an order for costs so as to give effect to that right unless there is a good reason to the contrary. In this case, the Respondent's lease contains the relevant clauses. Clause 9.1 relates to costs incurred in contemplation of forfeiture proceedings, and clause 11 allows the landlord to claim a full indemnity in respect of costs and expenses arising from the tenant's breach of covenant. Clause 9.1 is engaged because the pre-action letter made clear that the claim was in contemplation of forfeiture. In

Barrett v Robinson (2014) UKUT 322 (LC) it was held that correspondence which indicated that forfeiture was contemplated was an indication that it was in the mind of the landlord.

15. The Applicant goes on to submit that costs that are payable under a contract are presumed to be reasonable in amount: see CPR 44.5. In *Church Commissioners for England v Ibrahim (1997) 1 EGLR 13* it was held that *"the successful litigant's contractual rights to recover the costs of any proceedings to enforce his primary contractual rights is a highly relevant factor when it comes to making a costs order. He is not … to be deprived of his contractual rights to costs where he has claimed them unless there is good reason to do so and that applies both to the making of a costs order in his favour and to the extent that costs are to be paid to him".*

16. It is therefore for the paying party to demonstrate that certain costs have been unreasonably incurred or are unreasonable in amount. Otherwise, the full sum is payable. It is not good enough for the paying party to just assert that the costs are unreasonable. The court must therefore identify a particular cost that is unreasonable and explain why that is the case. Also, the issue of proportionality does not arise as the costs are assessed on the indemnity basis: see *Ibrahim* and CPR 44.3(2) and (3). It is the Applicant's case that the costs it has incurred are reasonable in amount.

17. The costs incurred by the Applicant before the matter was transferred to the Tribunal are shown in its submissions prepared on 29th September 2020. The total claimed is £2,988 .25 exclusive of VAT for disbursements (this includes the court fee which the court has already ordered is payable). An additional £130.00 including VAT is payable on one disbursement. There is also £4,885.00 exclusive of VAT for time costs (and so an additional sum of £977 in VAT is payable). The total claimed is therefore £8,980.25. The cost of the Applicant's written costs submissions is £780.00 inclusive of VAT.

18. The Respondent objects to any order being made against him in relation to costs on two grounds: (i) the Applicant failed to engaged in any pre-action correspondence with the Respondent at all; and (ii) it would be unjust to make an award of costs given the facts of his case.

19. The Respondent states that his then solicitors, CLP Solicitors, wrote to the Applicant's solicitors on 20th May 2020 stating that their client had not seen any effective variation to the lease or the level of service charges and asking for the service charge invoice to be amended. Only the unsigned deed of variation was ever filed with the Land Registry. Instead of reverting with the fully deed of variation or indeed reverting at all, the Applicant merely issued proceedings. The Respondent's solicitors then wrote again on 22nd July 2020 demanding to know why proceedings had been issued without important matters have not been responded to. No response to the questions raised was ever received.

20. The Respondent adds that the Applicant failed to respond to a reasonable request for information and did not even produce a signed

and witnessed version of the deed of variation until after the hearing on 5th March 2021.

21. The Respondent states that the other significant issue in this case was the question of estoppel. The Applicant's misled the Respondent about the effective rate of service charges. The Court/Tribunal held in the Main Decision that the Respondent had good reason to believe that when summarising the percentage payable in respect of a particular service charge item Mr Lambertucci was doing so on behalf of and with the full authority of the Applicant and therefore that the position set out by him was the Applicant's own position. Given the facts of this case, albeit that the Court/Tribunal has decided that there was insufficient evidence of detriment on the part of the Respondent, the Respondent submits that it would be wholly unjust to award any costs in favour of the Applicant given that this issue arising in relation to the level of service charges was in fact a mess of the Applicant's own making. In the circumstances, it is submitted that no award of costs should be against the Respondent.

22. In response, the Applicant states that it has been wholly successful on a money claim for over £40,000 and that it would be extraordinary in these circumstances for the court not to make a cost order against the Respondent. It adds that the Respondent did not make an offer to settle and that it is not a requirement of the pre-action protocol for a landlord to point out to a tenant the existence of a deed of variation which is registered against the title. In any event, even on becoming aware of the deed of variation the Respondent still decided to fight the claim and only raised a question about the validity of the deed of variation in March 2021 despite having been made aware of its existence in November 2020.

Amount of interest

23. The Applicant states that clause 6 of the Respondent's lease provides that interest is payable at 4% above NatWest Bank's base rate for the time being on unpaid sums that have become due. On 24th June 2021, the Applicant prepared a schedule which calculated that on that date £4,727.60 in interest was due (the schedule setting out the basis of the calculation is appended to these submissions). Since that schedule was prepared interest has continued to accrue at £4.50 per day. This is lower than that claimed for in the claim form because the interest rate has decreased since then. The Applicant therefore seeks an order for £4,727.60 plus the sum of £4.50 multiplied by the number of days that have passed from 24th June 2021 when the order is finally made.

24. The Respondent has not disputed the Applicant's interest calculation.

Objection to decision as to amount of service charge payable

25. The Applicant states that in the Main Decision the Tribunal stated that the claim for arrears of service charge was for £39, 486.17 but that the amount claimed in the claim form is actually £40,062.17. The Respondent has not disputed this point in written submissions.

Court's analysis and decisions on County Court issues

Quantum of wasted costs

26. The Respondent argues that the brief fee of £5,000.00 + VAT is grossly excessive for a one-day hearing and that only the element of wasted costs is recoverable, i.e. based on the amount of extra work needed. The Respondent proposes £1,500.00 + VAT.

27. I have some sympathy with the Respondent's arguments in relation to the brief fee. The Applicant states that it is based on two days' work at £250 per hour and that the adjourned hearing was itself adjourned following the Respondent's illness, but I do not accept that two whole days' work would have been needed to re-consider the case and advise. In my view £2,500.00 + VAT would be a more proportionate and reasonable amount for the wasted costs element of the brief fee.

28. As regards the Applicant's agent's costs of £720.00 + VAT, the Respondent has challenged these and has commented that there is no explanation or justification given for this cost. The Applicant has not provided any explanation or justification having been given an opportunity to do so and therefore this sum is disallowed in its entirety.

29. As regards the cost of preparing the costs schedule, the Respondent has not explained why this cost should not be recoverable in principle. The amount (which is inclusive of VAT), whilst perhaps slightly on the high side of reasonable is not manifestly excessive and therefore is payable in full.

30. Accordingly, the claim for wasted costs needs to be reduced from £7,269.00 to £3,405.00 to reflect the disallowing of the agent's costs and half of the brief fee.

31. Sitting as a County Court Judge I therefore determine that wasted costs of £3,405.00 are payable by the Respondent.

The Applicant's other cost application

32. The Applicant seeks an order that the Respondent pay the other costs that it has incurred in the County Court. The total claimed is

£8,980.25 plus the cost of the Applicant's written costs submissions in the sum of £780.00 inclusive of VAT. The Applicant states that it is entitled to an order that the Respondent pay its costs because it has been the successful party and because there is no other reason, considering the factors in CPR 44.2(4), as to why such an order should not be made.

33. The Respondent objects to any order being made against him on the grounds that (i) the Applicant failed to engaged in any pre-action correspondence with the Respondent and (ii) it would be unjust to make an award of costs given the facts of the case. As to what facts of the case are being referred to, these appear to be the initial failure to provide a copy of the deed of variation, a failure to respond to one or two letters and the fact that the Tribunal gave credence to one element of the Respondent's estoppel argument.

34. In my view, the Respondent's objections to the Applicant's cost application are very weak. The Applicant was wholly successful on a substantial money claim, the Tribunal rejected the Respondent's argument that it suffered detriment as a consequence of having been inadvertently misled by the Applicant's agent, the Respondent made no offer to settle and continued to fight the claim on grounds which were rejected by the Tribunal, and there is no evidence before me that the Applicant failed to comply with the pre-action protocol or that any other issues arise which under CPR44.2 should lead me to conclude that a full cost award should not be made against the Respondent.

35. The Respondent has not raised any issues on quantum in relation to these costs and there is no evidence before me to indicate that the costs claimed are in an amount which is higher than can or should be claimed by the Applicant.

36. Sitting as a County Court Judge I therefore determine that the costs of £8,980.25 are payable in full by the Respondent, as is the cost of the Applicant's written costs submissions in the amount of £780.00 inclusive of VAT.

Amount of interest

37. The Applicant has referred the court to clause 6 of the Respondent's lease, and I accept that it provides that interest is payable at 4% above NatWest Bank's base rate for the time being on unpaid sums that have become due. The Applicant has prepared a schedule which calculates that on 24th June 2021 the sum of £4,727.60 was due by way of interest. The Applicant adds that since that schedule was prepared interest has continued to accrue at £4.50 per day.

38. The Respondent has not disputed the Applicant's interest calculation, and having considered the calculation I accept it. The amount of interest payable is therefore £4,727.60 plus the sum of £4.50 multiplied by the number of days that have passed from 24th June 2021 until the date of this decision, namely 72 days. £4.50 multiplied by 72 is £324.00.

39. Sitting as a County Court Judge I therefore determine that the amount of interest payable by the Respondent is £5,051.60.

Tribunal's analysis and decisions on Tribunal issue

Amount of service charge payable

40. The Applicant submits that the Tribunal has wrongly stated the amount of service charge claimed and the Respondent has not disputed this point in written submissions.

41. Sitting as a Tribunal we are satisfied, having reviewed the position, that the Applicant is correct on this point. Therefore, pursuant to paragraph 50 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 we hereby correct this mistake and confirm that the amount claimed and the amount payable by the Respondent way of service charges is £40,062.17.

Name: Judge P Korn **Date:** 6th September 2021

ANNEX - RIGHTS OF APPEAL

Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional tribunal office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.

3. 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.

4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers

5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.

Appealing against the County Court decision

1. A written application for permission must be made to the court at the Regional tribunal office which has been dealing with the case.

2. The date that the judgment is sent to the parties is the hand-down date.

3. From the date when the judgment is sent to the parties (the hand-down date), the consideration of any application for permission to appeal is hereby adjourned for 28 days.

4. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.

5. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers.

6. If an application is made for permission to appeal and that application is refused, and a party wants to pursue an appeal, then the time to do so will be extended and that party must file an Appellant's Notice at the appropriate County Court (not Tribunal) office within 14 days after the date the refusal of permission decision is sent to the parties.

7. Any application to stay the effect of the order must be made at the same time as the application for permission to appeal.

Appealing against the decisions of the tribunal and the County Court

In this case, both the above routes should be followed.