FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)
and in the COUNTY COURT AT KINGSTON-UPON-THAMES sitting at 10 Alfred Place, WC1E 7LR

Case reference	**:**	**LON/00AY/LSC/2020/0042** **LON/00AY/LSC/2020/0044**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**Flat 2, 42 Montrell Road, London SW2 4QB**
Applicant	**:**	**Goldpoint Investments Ltd**
Representative	**:**	**Mr M Paget of counsel**
Respondent	**:**	**Mrs H Kanani**
Representative	**:**	**Mr B Kanani**
Type of application	**:**	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	**:**	**Judge Brilliant** **Mr A Harris LLM FRICS FCIArb**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of Hearing	**:**	**24 March 2021**
Date of decision	**:**	**07 April 2021**

DECISION

Covid-19 pandemic: description of hearing

Those parts of this decision that relate to County Court matters will take effect from the "Hand Down Date" which will be:

(a) if an application is made for permission to appeal within the 28 day time limit set out below - 2 days after the decision on that application since this decision was sent to the parties; or

(b) if no application is made for permission to appeal, 30 days from the date that this decision was sent to the parties

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was V: SKYPEREMOTE. A face-to-face hearing was not held because it was not practicable and no-one requested the same. The documents that we were referred to are in bundles of 62 and 8 pages respectively, the contents of which have been noted.

Summary of the decision made by the Tribunal

1. The case having been withdrawn by the Applicant/Claimant ("the Landlord"), no sums are payable to it by the Respondent/Defendant ("the Tenant").

2. The Landlord is to pay the Tenant's costs between 15 January 2020 (the date of the transfer) and 25 February 2021 (the day permission was given to the Landlord to withdraw its claim for service charges), such costs to be payable on the standard basis subject to a summary assessment on the papers if not agreed.

3. Within 14 days of this decision the Tenant is to provide to the Landlord and the Tribunal a schedule of her costs between 15 January 2020 and 25 February 2021.

4. Within 14 days thereafter the Landlord is to provide to the Tenant and the Tribunal any objections to or representations with regard to the Tenant's schedule.

Summary of the decisions made by the County Court

5. The proceedings are allocated to the small claims track.

6. Permission is given to the Landlord to dispense with the need to file and serve a notice of discontinuance as required by CPR 38.3.

7. Those parts of the Claim not transferred to the Tribunal, namely (a) the costs incidental to the preparation of a s.146 notice (b) contractual interest, alternatively (c) statutory interest, are discontinued.

8. Permission is given to the Landlord to dispense with the need to file and serve a Defence to the Counterclaim as required by CPR 15.4.

9. The Counterclaim is struck out.

10. There be no order as to costs.

Introduction

10. This is a deployment case concerning proceedings in the County Court ("the Court") and in the FTT ("the Tribunal"). In the Court proceedings Judge Brilliant is sitting alone. In the Tribunal proceedings Judge Brilliant and Mr Harris are sitting together.

12. The Landlord is the Claimant in the Court proceedings and the Applicant in the Tribunal proceedings. The Tenant is the Defendant in the Court proceedings and the Respondent in the Tribunal proceedings.

13. The Tenant holds under a long lease dated 15 March 2006. The lease provides for the Landlord to provide services, the cost of which can be recouped from the Tenant by way of a service charge.

The First Claim

14. In 2018, the Landlord commenced proceedings in the Court against the Tenant for (a) arrears of service charges falling due between 31 March 2011 and 31 March 2016, (b) contractual interest thereon, alternatively (c) statutory interest thereon ("the First Claim)".

15. The Tenant served a Defence. Importantly, she took a point under s.20B of the Landlord and Tenant Act 1985 that the demands for all of the six service charges years which were the subject of the claim had been sent to her for the first time on 6 September 2018. This was between two and seven years later than the due date. Accordingly, there had been a failure to comply with the statutory time limit set out in that section, and nothing was due and owing to the Landlord.

16. On 08 August 2019, the First Claim was struck out. This was for "want of prosecution". No order for costs was made. At no time has the Tenant made an application for an order for costs in the First Claim.

The Second Claim

17. In October 2019, the Landlord again commenced proceedings in the Court against the Tenant. This claim was in precisely the same terms as the First Claim, save that there was an additional claim for the costs incidental to the preparation of a s.146 notice in the sum of £2,352.19.

18. It was open to the Tenant to have made an application to stay the Second Claim until the Landlord paid the Tenant her costs of the First Claim. But no such application was made.

19. It was correctly stated in the Second Claim that the striking out of the First Claim for want of prosecution was not a determination of the subject matter of the litigation, and the Landlord was not barred from bringing the Second Claim just because it very closely mirrored the First Claim.

20. The Tenant served a Defence in the Second Claim. It mirrored the Defence in the First Claim and placed reliance upon s.20B.

21. But the Tenant also served a Counter Claim. The amount of the counterclaim was £3,000.00. It was said to be a claim for costs incurred by the Defendant in defending the First Claim. No proper breakdown was given of how those costs were quantified. More importantly, such a claim was wholly misconceived. If the Claimant wished to make a claim for her costs in the First Claim (which on the face of it would appear to be a wholly meritorious claim) she should have made such a claim by an application in the First Claim.

22. On 17 January 2020, District Judge Armstrong transferred the Second Claim to the Tribunal[1].

The hearing

23. At the hearing the Landlord was represented by Mr Paget of counsel. The Tenant was not present but was represented by her husband, Mr Kanani. No witness evidence was adduced, and the matter was dealt with by way of oral submissions on the documentary evidence.

The Court proceedings

24. After the service charge matters had been hived off to the Tribunal, all that remained before the Court were the following issues: (a) the costs incidental to the preparation of a s.146 notice, (b) contractual interest, and, alternatively, (c) statutory interest. For the avoidance of doubt, I allocate the Court proceedings to the small claims track.

25. As is explained below, the Landlord has been given permission to withdraw its case before the Tribunal. There is no longer any claim for interest on those sums to be pursued in the Court. There remains the issue of the costs incidental to the preparation of a s.146 notice. Having been given the opportunity to take instructions, Mr Paget said he wished to discontinue all the remaining issues in the Court proceedings.

26. Discontinuance in the Court is regulated by CPR 38[2]. Unlike withdrawal in the Tribunal, a party in Court proceedings has an unfettered right to discontinue. CPR 38.3 requires a Claimant to file and serve a notice of discontinuance. This has not been done in this case. I dispense with the need to do so in accordance with my case management powers.

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[1] The order also purported transfer the First Claim to the Tribunal, but it had already been struck out over two months before.

[2] The equivalent to withdrawal in the Tribunal is discontinuance in the Court.

27. CPR 38.6(1) provides that unless the Court orders otherwise, a Claimant who discontinues is liable for the costs which a Defendant against whom the Claimant discontinues incurred before the date on which notice of discontinuance was served on the Defendant. It might be said accordingly that the Landlord should pay the Claimant's costs of the Court proceedings.

28. But the normal rule as to costs does not apply if a Claimant in a case allocated to the small claims track serves notice of discontinuance (CPR 38.6(3). However, that can in turn be trumped if a party has behaved unreasonably (CPR 27.14(2)(d)).

29. I might have been attracted to this latter approach, had it not been for Counterclaim.

30. As far as the Counterclaim is concerned, it is clearly misconceived and I strike it out pursuant to CPR 3.4(2)(a).

31. In my judgment, the just order in respect of the Court proceedings is that there should be no order as to costs .

The Tribunal proceedings

32. The claim for six years' arrears of service charges was transferred to the Tribunal.

33. This claim could never succeed because of the failure of the Landlord to comply with the provisions of s.20B.

34. This should have been apparent from the Defence in the First Claim.

35. The Second Claim should never have been brought. After the Defence in the Second Claim was served, the Landlord had yet another opportunity to review whether its case would stand up. It failed to do so and the claim for service charges was duly transferred Tribunal.

36. We were told that it was only following service of the Tenant's Statement of Case in the Tribunal proceedings that the Landlord decided to withdraw its case. There is no good reason why it should have taken so long for the penny to have dropped.

37. On 9 February 2021, the Landlord applied to the Tribunal to withdraw its case.

38. Unlike discontinuance in the Court, withdrawal in the Tribunal can only be achieved with permission (r.22(3) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013). The Tribunal has also powers to impose such conditions on withdrawal as it considers appropriate (r.22(4)).

39. We were told that a Tribunal Judge had already given permission for the Landlord to withdraw its case.

40. So what remains for us is decide whether (a) any order for costs should be made against the Landlord in the Tribunal proceedings and (b) whether any order should be made under s.20C of the 1985 Act.

Costs in the Tribunal proceedings

41. Rule 13(1)(b)(iii) of the 2013 Rules provides:

> *The Tribunal may make an order in respect of costs only … if a person has acted unreasonably in bringing, defending or conducting proceedings in … a leasehold case …*

42. The jurisdiction to award costs under rule 13 was examined y by the Upper Tribunal in Willow Court Management (1985) Ltd v Alexander [2016] UKUT 290 (LC), [2016] L&TR 34.

43. The head note in L&TR reads as follows:

> *(1) The Court of Appeal guidance on what constitutes "unreasonable" conduct in the context of wasted costs applies in FTT proceedings for the purposes of r.13(1)(b), rather than this term having a wider interpretation, Ridehalgh v Horsefield [1994] Ch 205 applied. The test for unreasonable conduct may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or, is there a reasonable explanation for the conduct complained of?*
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> *(2) A systematic or sequential approach to applications under r.13(1)(b) should be adopted. At the first stage the question is whether the person has acted unreasonably. At the second stage it is essential for the tribunal to consider whether, in light of the unreasonable conduct it has found, it ought to make an order for costs or not. If so, the third stage is what the terms of the order should be. At both the second and third stages the tribunal is exercising a judicial discretion in which it is required to have regard to all relevant circumstances. Whether the party whose conduct is criticised has had access to legal advice is relevant at the first stage of the enquiry, as the behaviour of an unrepresented party with no legal knowledge should be judged by the standards of a reasonable person who does not have legal advice; it may also be relevant, though to a lesser degree, at the second and third stages, without allowing it to become an excuse for unreasonable conduct. At the third stage, a causal connection with the costs sought is to be taken into account, but the power is not constrained by the need to establish causation.*
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> *(3) Applications under r.13(1)(b) should not be regarded as routine, should not be abused to discourage access to the tribunal and should not be allowed to become major disputes in their own right. They should be dealt with summarily, preferably without the need for a further hearing, and after the parties have had the opportunity to make submissions. Those submissions are likely to be better framed in light of the tribunal's substantive decision rather than in anticipation of it, and applications at interim stages or before the substantive decision should not be encouraged.*

44. Turning to the actual words used by the Upper Tribunal, the following

paragraphs are germane:

> *24. … "Unreasonable" conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test [in Ridehalgh v Horsefield [1994] Ch 205]: is there a reasonable explanation for the conduct complained of?*
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> *28. At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that second stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.*
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> *29. Once the power to make an order for costs is engaged there is no equivalent of CPR 44.2(2)(a) laying down a general rule that the unsuccessful party will be ordered to pay the costs of the successful party. The only general rules are found in section 29(2)-(3) of the 2007 Act, namely that "the relevant tribunal shall have full power to determine by whom and to what extent the costs are to be paid", subject to the tribunal's procedural rules. Pre-eminent amongst those rules, of course, is the overriding objective in rule 3, which is to enable the tribunal to deal with cases fairly and justly. This includes dealing with the case 'in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal.' It therefore does not follow that an order for the payment of the whole of the other party's costs assessed on the standard basis will be appropriate in every case of unreasonable conduct.*
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> *30. At both the second and the third of those stages the tribunal is exercising a judicial discretion in which it is required to have regard to all relevant circumstances. The nature, seriousness and effect of the unreasonable conduct will be an important part of the material to be taken into account, but other circumstances will clearly also be relevant; we will mention below some which are of direct importance in these appeals, without intending to limit the circumstances which may be taken into account in other cases.*

45. Despite Mr Paget's attractive submissions to the contrary, we are driven to the conclusion that this is a paradigm example of a Landlord acting unreasonably in bringing these proceedings. The Landlord was unreasonable in bringing and pursuing proceedings when it ought to have known as far as back as the service of the Defence in the First Claim that s.20B gave complete protection to the Tenant.

46. The threshold for making the order for costs has been passed. We regard the conduct of the Landlord as having had serious consequences regarding the peace of mind of the Tenant, who was being pressed for far too long for the payment of service charges which were plainly not due.

47. In our judgment, the appropriate order is that the Landlord should pay the Tenant's reasonable costs on the standard basis, subject to a summary assessment on the papers if not agreed.

48. We must make it clear to the Tenant that her costs will be subject to rigorous scrutiny. She must appreciate that plucking a figure out of the air such as £3,000 or £2,000, as she has done in the past, will not work. Mr Kanani must sit down and calculate how many hours he has spent on each aspect of the case, such as communicating with the Landlord, preparing documents and attending the hearing. He is entitled to charge £19 per hour and no more for work he has done on behalf the Tenant.

49. Within 14 days of this decision the Tenant is to provide to the Landlord and the Tribunal a schedule of her costs between 15 January 2020 and 25 February 2021, worked out on this basis.

50. Within 14 days thereafter the Landlord is to provide to the Tenant and the Tribunal its objections to or representations with regard to the Tenant's schedule. We will then make our decision on the papers.

s.20C application

51. In view of the Tenant's success in the Tribunal proceedings, we make an order that none of the costs of the Tribunal proceedings are to be passed through the service charge.

Name: Simon Brilliant **Date:** 07 April 2021

Rights of appeal

Appeals in respect of decisions made by the FTT

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).

Appeals in respect of decisions made by the Tribunal Judge in his/her capacity as a Judge of the County Court

An application for permission to appeal may be made to the Tribunal Judge who dealt with your case or to an appeal judge in the County Court.
Please note: you must in any event lodge your appeal notice within 21 days of the date of the decision against which you wish to appeal.
Further information can be found at the County Court offices (not the tribunal offices) or on-line.

Appeals in respect of decisions made by the Tribunal Judge in his/her capacity as a Judge of the County Court and in respect the decisions made by the FTT

You must follow **both** routes of appeal indicated above raising the FTT issues with the Tribunal Judge and County Court issues with either the Tribunal Judge or proceeding directly to the County Court.