



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case Reference : **CAM/22UJ/LSC/2015/0091/0099/0100**

Properties : **96 Joyners Field, Harlow
242 Pennymead Tower, Harlow
30 Mark Hall Moors, Harlow**

Applicant : **Harlow District Council**

Representatives : **Ms Sarah Bradford Legal Services
Ms Lynn Potter Home Ownership**

Respondent : **Camelot Property Limited**

Representative : **Mr Robert C W Kurz Director**

Type of Application : **Court referrals – section 27A Landlord
and Tenant Act 1985 – determination
of service charges payable**

Tribunal Members : **Judge John Hewitt
Mr Neil Maloney FRICS
Mr John Francis QPM**

**Date and venue of
Hearing** : **8 March 2016
Harlow Magistrates Court**

Date of Decision : **7 April 2016**

DECISION

Decisions of the tribunal

1. The tribunal determines that:

1.1 The balance of service charges now payable by the respondent to the applicant is as follows:

96 Joyners Field (see paragraph 48 below)	Claim No. B6QZ34M9	£564.45
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242 Pennymead Tower (see paragraph 54 below)	Claim No. B6QZ244M0	£180.90
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30 Mark Hall Moors (see paragraph 67 below)	Claim No. B5QZ12P7	£656.06
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1.2 By consent an order shall be made pursuant to section 20C Landlord and Tenant Act 1985 (the Act) that none of the costs incurred or to be incurred by the applicant in connection with these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the respondent in respect of any of the properties mentioned above;

1.3 The respondent shall by **5pm 29 April 2016** reimburse to the applicant the sum of £195.00 being 75% of the fees paid by the applicant to the tribunal in connection with these proceedings; and

1.4 The court files shall now be returned to the County Court at Chelmsford so that the court can determine the outstanding sums claimed in the court proceedings, namely:

The claims to statutory interest made pursuant to section 69 County Courts Act 1984;

Court fees

Costs in the court proceedings

2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Procedural and general background

3. The applicant (the council) is a local housing authority. The council's secure tenants have the statutory right to buy set out in the Housing Act 1985. Where a secure tenant exercises that right the council is obliged to grant the tenant of lease of the property for a term of 125 years at a ground rent of £10 pa.

4. The council has granted such leases in respect of all three properties and they were granted as follows:

96 Joyners Field	13 February 1989
242 Pennymead Tower	22 September 2003
30 Mark Hall Moors	13 June 2005

Those leases are not in identical form but are broadly in a common form adopted by the council from time to time. The material provisions with which we are concerned are much the same in each case and we shall summarise these shortly.

5. All three leases have been assigned to the respondent and were vested in the respondent at the time when the court proceedings were commenced.

The respondent is a property investment company and the properties were sub-let to provide a rental income stream

It appears that one of the leases may have been assigned to a third party recently but that does not affect what we have to decide.

Service charge regime

6. All three leases impose a service charge regime and the tenant covenants to pay the service charge without deduction or set-off at the times and in the manner provided.

As regards major works that is to pay on demand a reasonable proportion of the cost of any major works carried out by the council. 'Major Works' is a defined term but it was not in dispute that the three sets of major works with which we are concerned fell into that definition.

The reasonable proportions of the costs claimed by the council were also not in dispute.

The service charges claimed

96 Joyners Field

7. The demand is dated 11 December 2013 for £1,556.57 [72] which is made up as to:

Major Works: Landlord's Lighting works	£1,415.06
Contract Administration Fee (10%)	<u>£ 141.51</u>
	£1,556.57

8. The respondent has disputed several aspects of the sum claimed and sought from the council supporting documentation. This was not

provided to the satisfaction of Mr Kurz and so the demand was not paid.

9. On or about 10 June 2015 the council commenced court proceedings against the respondent [8] claiming the sum of £1,556.57 plus interest. By order made and dated 23 October 2015 [32] District Judge Shanks ordered (amongst other things) that: *"The question as to whether the service charges claimed are reasonable and are payable is hereby transferred to the First-tier Tribunal (Property Chamber) ..."*
10. Subsequent to the issue of the proceedings the respondent has paid £921.36 on account of the claim, being an amount the respondent considered to be reasonable, so that as at the date of the hearing before us the balance in dispute was £635.21.

242 Pennymead Tower

11. The demand is dated 18 October 2013 for £645.62 [76] which is made up as to:

Major Works: Landlord's Lighting works	£586.93
Contract Administration Fee (10%)	<u>£ 58.69</u>
	£645.62

12. The respondent has disputed several aspects of the sum claimed and sought from the council supporting documentation. This was not provided to the satisfaction of Mr Kurz and so the demand was not paid.
13. On or about 10 June 2015 the council commenced court proceedings against the respondent [9] claiming the sum of £645.632 plus interest.

By order made 27 October 2015 and drawn 9 November 2015 [28] District Judge Shanks ordered (amongst other things) that: *"The question as to settle of the service charge and or administration fees claimed are reasonable and or payable hereby transferred to the first-tier tribunal (property chamber)"*
14. Subsequent to the issue of the proceedings the respondent has paid £356.76 on account of the claim, being an amount the respondent considered to be reasonable, so that as at the date of the hearing before us the balance in dispute was £288.86.

30 Mark Hall Moors

15. The demand is dated 11 September 2013 for £2,410.01 [71] which is made up as to:

Major Works: Refurbishment Works NOE	£2,190.92
Contract Administration Fee (10%)	<u>£ 219.09</u>
	£2,410.01

16. The respondent has disputed several aspects of the sum claimed and sought from the council supporting documentation. This was not provided to the satisfaction of Mr Kurz and so the demand was not paid.
17. The respondent paid £1,561.67 on account of the demand, being an amount the respondent considered to be reasonable. The respondent's account was credited with £39.04 so that the balance in dispute was reduced to £809.30.
18. On or about 22 June 2015 the council commenced court proceedings against the respondent claiming the sum of £809.30 plus interest [8].

By order made and dated 27 October 2015 [27] District Judge Shanks ordered (amongst other things) that: *"The question as to whether the service charges claimed are reasonable and are payable is hereby transferred to the First-tier Tribunal (Property Chamber) ..."*

19. The tribunal consolidated the three references and directions were given on 7 December 2015 [33 on Joyners Field bundle].

The hearing

20. The hearing was listed for 8 March 2016. The tribunal did not consider they would derive any assistance from an inspection of the subject developments.
21. The council was represented by Ms Bradford and Ms Potter both of whom are employed by the council. Mr Bob Purton of Kier Harlow Limited was called to give evidence. Kier Harlow is a joint venture company owned by Kier and the council and it manages a large number of building and related projects on behalf of the council. Mr Purton has been with Kier Harlow for the past nine years. Before that Mr Purton had been employed by the council for some 17 years.
22. The respondent was represented by Mr Robert Kurz, one of its directors. Mr Kurz did not call any witnesses as such but he cross-examined Mr Purton and put forward his views where he disagreed with or disapproved of what Mr Purton had to say and he also had a number of things to say about the council's bona fides and accounting and administration systems and record keeping.

96 Joyners Field Forged documents

23. Mr Kurz' opening position was that the council had falsified, forged or doctored a number of the documents it relied upon. By way of an example Mr Kurz referred to the letter at [77] which is dated 11/12/2013. Mr Kurz handed in a copy of the original letter which he had received which we have numbered [77a-c]. This was the covering letter sending out the major works invoice. The gist of it is that it offers the tenant a number of payment plans/loan arrangements. There are two differences in the letters.

The first is that in section 2 '**Interest free loan over 5 years**' of the version at [77] the arrangement fee in respect of that loan is put at £303.60 whereas in the original version at [77a] that fee is put at £300.

The second is that in section 3 '**Council Loan – Mandatory**' there are slight differences in the minimum and maximum amounts of the loan on offer.

Both versions also had slightly different lay out and some paragraphs were at the foot of a page in one version and at the top of the subsequent page in the other version.

24. There were no differences in the invoices or demands for payment of the service charge enclosed with the letters.
25. Ms Potter explained that this type of documentation is raised by a team of two persons. They are not necessarily both in the office all of the time. Documents and letters are prepared on master templates and are created and filed digitally. The council does not retain on file hard copies of every letter or demand sent out. Subsequent copies are printed out as and when required.
26. Evidently differences in the format of printed copies can arise depending on the computer/printer that is being used. Also changes or updates are sometimes made to the master templates and this will affect content and layout.
27. Ms Potter was not able to give a precise explanation of the modest differences in the numbers in the two versions put before us but speculated it might be due to changes made to the master template between the time when the original version was prepared and printed off in December 2013 and February/March 2016 when copies were printed off to include in the hearing file.
28. We accept and prefer the evidence and submissions made by the council in respect of the documents. Other than that the two versions were slightly different Mr Kurz did not have any evidence to support his allegation of forgery or falsification.
29. We find the explanation put forward on behalf of the council to be plausible and on the balance of probabilities correct.
30. In arriving at this conclusion we observe that the differences relate solely to loan arrangements on offer, none of which were taken up by Mr Kurz, and have nothing whatsoever to do with the costs of the works undertaken and the amount of the tenant's contribution to those costs. Thus whatever the exact reason for the differences in the versions they have no bearing on the reasonableness of the amount of service charges payable.

The procurement process

31. Mr Kurz was highly critical of the procurement process. It was not in dispute that the council invited five contractors to submit tenders for the project and that only two tenders were submitted. These are summarised at [96]. The estimate submitted by Lovelock & Taylor resulted in a block cost of £58,192.67 and that of Mid Essex Heating resulted in a block cost of £38,455.
32. The council rejected the Mid Essex Heating tender as being inadequate when evaluated against its quality statement and placed a contract with Lovelock & Taylor. Mr Kurz did not appear to challenge the rejection of the Mid Essex Heating tender and complained that the council was effectively left with one adequate tender with the result that there was no real competitive tender. Mr Kurz suggested that in those circumstances the council ought to have conducted a second tender exercise to obtain truly competitive prices.
33. The second stage consultation notice (notice of estimates) is dated 6 April 2011 and invited observations by 6 May 2011 [94]. The notice indicated that the respondent's estimated contribution to the cost of works could be £2,078.31 based on the most economically advantageous tender. Whilst not naming Lovelock & Taylor as a preferred contractor, that estimated contribution is plainly based on the amount of the Lovelock & Taylor bid.
34. In a letter of reply dated 19 April 2011 [102] dealing with a number of issues raised by Mr Kurz the council explained how the evaluation exercise had been carried out and indicated that the council had recommended a contractor. Again Lovelock & Taylor was not named but the council accepted that by this stage the preferred bidder was Lovelock & Taylor. Mr Kurz submitted that this preference at an early stage of the second stage consultation and prior to the closing date for observations voided the consultation process.
36. Mr Purton of Kier Harlow gave oral evidence and confirmed that his witness statement [287] was true.
37. Mr Purton explained the tender process, the tender evaluation and method by which the contract was placed and supervised as set out in his witness statement. Mr Purton answered a number of questions put to him by Mr Kurz and members of the tribunal.
38. We accept the evidence of Mr Purton and in the light of that we accept it was reasonable for the council to reject the tender by Mid Essex Heating and to place the contract with Lovelock & Taylor.
39. Inevitably and as with many, if not most, major works projects there were a number of variations by way additions and/or omissions. Mr Kurz was critical that the council had not produced written variations or Contract Administrator's Instructions from which he could track each variation and the cost implications of it. Mr Purton explained that

whilst some written variations were issued by way of a Contract Administrator's Instructions, not all additions/omissions were the subject of individual such documents. Mr Purton took us carefully through the contract administration process and explained the importance of the monthly valuation spreadsheets submitted by the contractor, considered by the contract administrator and approved or not as the case may be. The approval of a cost claim was deemed by Kier Harlow and the council to be adequate written evidence of the variation.

40. Mr Kurz accepted that he did not have any evidence to challenge the additions claimed by the contractor and approved by the council. Mr Kurz accepted that some works to the communal lighting were carried out. He did not know precisely what works and at what cost.
41. We reject Mr Kurz' submission that the council, had not conducted a proper competitive tender process and that once it was left with only one acceptable bidder, it should have started over again. We find that the council had already conducted a fair and reasonable exercise. They had invited five tender bids but only two were submitted. The evaluation of those bids was carefully undertaken and the outcome was properly reasoned. It would be arguably unfair on the one remaining successful bidder to have to start again or re-bid at a time when his own (first) bid was in the public domain.
42. Mr Kurz did not adduce any evidence to show that the bid of Lovelock & Taylor was unreasonable in amount when tested against the criteria adopted by the council.
43. We reject Mr Kurz' submission that having a preferred contractor in mind at the time of sending out the second consultation notices somehow invalidates that consultation exercise. Where a landlord (or its advisers) receives tender bids and evaluates them properly it is inevitable, or almost inevitable, that by that time one of the bidders will have emerged as a preferred bidder. Sometimes it will be blindingly obvious who is a preferred bidder and at sometimes it may well be a close run race. We consider that to be immaterial. The council has a duty to consult, to invite observations and to consider those observations. Mr Kurz did not adduce any evidence to suggest or show that the council had not properly considered such observations as it may have received. Mr Kurz did not suggest that he had submitted any observations which had not been properly considered.
44. We reject Mr Kurz' submission that the absence of contract variations should result in the council not being able to recoup its costs of carrying out the works. We accept Mr Purton's evidence and paper trail on this issue. Mr Kurz did not adduce any evidence that some or all of the costs incurred by the council were unreasonable in amount. It is not sufficient for him to simply say 'the council has not adduced proof to my satisfaction about the costs incurred'.

The amount of the contribution

45. We were taken carefully through the council's documents so that we could be clear as to the actual cost of the works and the amount of the contribution payable by the respondent.
46. It was not a straightforward exercise. Figures are prepared by Kier Harlow and submitted to the council on spreadsheets. These figures are then transferred to other spreadsheets and (eventually) trickle down to the block cost which is then divided by 28 to arrive at the amount of the contribution payable in respect of each flat. Of course the council can only pass on the costs in respect of those flats which have been sold off on long leases and must itself bear the contributions payable in respect of its flats let to its secure tenants. Inevitably in this process some discrepancies have occurred. We infer that as staff transfer data from one spreadsheet to another errors are made, perhaps by numbers being transposed or a wrong key being hit. As it happens, in this case such errors as we have seen have, in the final event, favoured the long lessee tenant.
47. In summary the original estimated block cost (incl contingency) was put at £57,617.68 [251].

On the spreadsheet for the subject block the original estimated block cost was entered as being £58,192.67 [252]. Adjustments for the additions/omissions reduced the actual block cost to £47,139.78 [252].

Divided by 28 that gave a unit contribution of £1,683.56 (excluding Keir Harlow's contract administration fee of 10%).

The final account for the subject property relied upon by the council is at [82] which shows an adjusted unit contribution of £1,415.06. The 10% contract administration fee is added to that to produce £1,556.57 which was the amount of the demand dated 11 December 2013 [72].

The representatives of the council present at the hearing were unable to fully explain how the discrepancies occurred but we were well satisfied that the amount actually demanded of the respondent by the council a little less than it might have been but was in any event reasonable in amount in respect of major works undertaken was thus payable by the respondent.

In his final submissions Mr Kurz said that he had demonstrated inaccuracies in the council's accounts and documents and that the council offers no assistance to lessees to enable them to check the accuracy of all the figures. Mr Kurz suggested an adjustment should be made to his account to reflect these matters. We reject that submission as a matter of general principle. But, as explained below we do find it appropriate to make an adjustment to the contract administration charge claimed.

In the light of the discrepancies in the documentation produced to us we find that a contract administration charge of 10% was unreasonably high and we reduce it to 5% to reflect this lack of quality.

Thus we find that the respondent's contribution is:

Unit cost of works	£1,415.06
Contract administration charge (5%)	£ 70.75
Total	£1,485.81

48. Accordingly we find that when the court proceedings were issued by the council on or about 10 June 2015 claiming the sum of £1,556.57, only £1,485.81 was then due and payable by the respondent to the council.

However, since that time the respondent has made a payment on account of £921.36 so that the balance payable as at the date of the hearing was £564.45.

242 Pennymead Tower

49. This also related to a major works project concerning landlord's lighting works carried out under the contract placed with Lovelock & Taylor. Mr Kurz accepted that lighting works were carried out. Initially Mr Kurz challenged the number of new light fittings installed but, at the hearing, accepted the number of 62 was correct as set out on [284/5].
50. Mr Kurz' principal challenges and submissions were again the allegation of forged or falsified documents and the lack of a proper competitive process.
51. For the same reasons as set out above we reject those submissions.
52. Mr Kurz also raised some accounting issues and queried the need for an electrical inspection of the tenant's installation.

The amount of the contribution

53. We were again carefully taken through the spreadsheets and accounting documents [284/5] which showed a block cost of £24,366.01 which divided by 43 should produce a unit contribution of £566.65.

The final block account at [87] shows a unit cost of £586.93 and this is replicated in the final account for the subject property at [89].

The representatives of the council present were unable to explain fully how this discrepancy had occurred.

However, included in both of those accounts is a unit cost of £54.59 which evidently relates to the cost of 'periodic inspection' in connection with the electrical installation within the subject flat. Mr Purton was

unable to give us a full and reasoned explanation as to why this cost was incurred in the first place and that it was reasonable in amount given that we infer a number of inspections of adjacent properties were carried out at the same time. In the experience of the members of the tribunal that cost was unreasonable in amount.

54. For the same reasons as before we have adjusted the contract administration charge to 5%.

Thus we find the respondent's contribution to these works is:

Unit cost of works	£566.65
Less: inspection charge	<u>£ 54.59</u>
	£512.06
Contract administration charge (5%)	<u>£ 25.60</u>
Total	£537.66

55. Accordingly we find that when the court proceedings were issued by the council on or about 10 June 2015 claiming the sum of £645.62, only £537.66 was then due and payable by the respondent to the council.

However, since that time the respondent has made a payment on account of £356.76 so that the balance payable as at the date of the hearing was £180.90.

30 Mark Hall Moors

56. The major works project on this block concerned external redecorations and renewal of windows and guttering.
57. Evidently the project was originally under consideration in 2007 [83] (before the respondent acquired the lease of the flat).
58. A notice of estimates was issued March 2009 but the project did not progress at that time. A fresh (and replacement) notice of estimates was given to the respondent in June 2011 [94]. That notice indicated that the respondent's contribution was estimated to be £3,299.29 based on best quality and the most economically tendered price. That notice made reference to five invitations to tender having been sent out but only two contractors had submitted tender bids; Kier Harlow £269,274 and T&B Contractors £232,827 [96]. The T&B block cost was put at £36,292.18 and as there are 11 flats in the block that would produce a unit cost of £3,299.29 and so we infer that at the time of the notice the council's preferred bidder was T&B. The notice invited observations to be submitted by 21 July 2011.
59. The works were duly carried out by T&B and on 15 February 2012 a certificate of practical completion was issued by the contract administrator.

60. A demand for payment of £2,410.01 issued by the council to the respondent is dated 11 September 2013 [72].
61. A final account for the subject flat is at [79]. It shows deductions of £1,501.07 reflecting that virtually none of the windows and doors were replaced and that the contingency of £298.25 was not utilised. It also shows additions:

£225.00 individual window costs; and
 £167.69 relating to four relatively modest sets of works but included £69.23 for 'Gas safety engineer prior to window installation'.

The account thus showed:

Unit cost of works	£2,190.21
Contract administration charge (10%)	<u>£ 219.09</u>
Total	£2,410.01

62. Mr Purton gave evidence and said that his witness statement at [509] was true. Mr Kurz asked Mr Purton a number of questions about the works carried out and appeared broadly satisfied with most of the explanations given by him. Mr Kurz accepted that the works have been carried out reasonably.
63. Mr Purton was cross-examined closely on the need for the gas safety inspections and explained the need for them. The explanation struck a chord with the experience and expertise of the members of the tribunal and we find that the expense was reasonably incurred and was reasonable in amount.
64. During the course of a review of the contract/accounting documents it emerged that a Contract Administrator's Instruction [535] specifying an omission of £450 in respect of patch redecoration of the front elevation had not been carried into the final accounts. The council representatives present conceded this oversight. There are 11 flats within the block so that this equates to a unit credit of £40.90.
65. For the same reasons as set out above we have adjusted the contract administration charge down from 10% to 5% to reflect the level of quality of that service.
66. Thus we find the respondent's contribution to these works is:

Unit cost of works	£2,190.21
Less: Patch decoration omission	<u>£ 40.90</u>
	£2,149.31
Contract administration charge (5%)	<u>£ 107.46</u>

Total

£2,256.77

67. Prior to the issue of court proceedings the respondent's account was credited with £1,600.71 and so on 18 June 2015 the council issued proceedings claiming a balance of £809.30. In the light of our findings set out in paragraph 66 at that time the balance due and payable by the respondent to the council was £656.06. That sum remained due and payable as at the date of the hearing.

Costs and fees

68. The respondent had made an application under section 20 of the Act in respect of any costs which the council incurred or might incur in connection with these proceedings.
69. The council representatives present said that the council did not propose to put any costs of these proceedings through the service charge account and said that they were content an order under section 20 should be made.
70. We have made such an order for the avoidance of doubt.
71. The council has incurred fees of £260 paid to the tribunal in connection with these proceedings and made an application that this sum be reimbursed to the council by the respondent.
72. In support of the application the council submitted that:
- the respondent owns many properties in the area;
 - there has been no dispute over the standard or quality of the works;
 - at the time of the issue of the three sets of court proceedings over £2,000 was owed, plus fees and interest;
 - the respondent was in breach of the leases by not paying the demands in accordance with the lease terms;
 - taken overall the forensic accounting exercise pursued by the respondent has shown a net undercharge; and
 - given the issues raised it should have been the respondent which initiated tribunal or court proceedings and thereby incurred the fees.
73. Mr Kurz opposed the application and submitted that:
- the hearing would not have been necessary had the council provided full supporting information earlier in the process;
 - the council has made some concessions; and
 - the council should have come to an agreement with him and he would, have made payment as he had done in the past.
74. Rule 13(2) provides that the tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by that other party. The rule does not prescribe any

particular test or set of circumstances which should be borne in mind when considering or making such an order. We consider the appropriate test to adopt is that of 'fair and equitable having regard to all of the circumstances'.

75. The main thrusts of the challenges pursued by the respondent turn on the alleged failure to obtain competitive tenders in respect of two projects and the lack of full supporting documentation in respect of all three projects. Over time the respondent has pursued detailed enquiries drilling into the day to day management of the projects. We find that was out of proportion and it may have been that Mr Kurz was looking for some anomaly or imperfection in the paperwork to use for negotiating purposes. It is our experience that with the interaction of human error and the generation of accounts and spreadsheets it is almost inevitable that minor discrepancies will occur from time to time. Sometimes they will benefit one party, sometimes the other party. In the present case they went both ways. In the absence any obvious or major issues parties have to take a balanced and proportionate view as to how much time, effort and resources they impose upon themselves and the opposite party in drilling down into the very fine detail in the hope of finding a discrepancy.
76. The respondent has not succeeded with the major thrust of his case. The forensic accounting exercise undertaken has shown some discrepancies; some in favour of the council and some in favour of the respondent.
77. In broad terms we prefer the submissions made on behalf of the council. The council has won more than it has lost. In these circumstances we find the just and equitable outcome is for the respondent to reimburse the council 75% of the fees it has incurred. That equates to £195 and we thus made a determination and requirement to that effect.

John Hewitt
Judge John Hewitt
7 April 2016

ANNEX - RIGHTS OF APPEAL

1. 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.
2. 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.

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 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.