FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AF/LSC/2020/0357**
HMCTS code (paper, video, audio)	**:**	**P: PAPERREMOTE**
Property	**:**	**49D Crystal Palace Park Road, London SE26 6UR**
Applicant	**:**	**Cecilia Clarke**
Representative	**:**	**In person**
Respondent	**:**	**Limahs and Remo Limited**
Representative	**:**	**Thackery Williams LLP**
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 Carr**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**23rd November 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was P:PAPERREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined on paper. The order made is described at the end of these reasons. The documents that I was referred to are as follows:

- A bundle from the applicant with embedded PDF documents submitted 21st April 2021 which was subsequently resubmitted with the documents disembedded.
- A 7 page statement from the respondent dated 10th March 2021
- A bundle from the respondent comprising 179 pages dated 7th April 2021
- Various documents from the respondent including the service charge demand for the legal costs and the legal bills which comprise the demand. It is not clear when these were submitted.
- An unindexed additional bundle from the applicant dated 29th July 2021 comprising a 2-page statement with an additional 28 pages of attachments.

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Decisions of the tribunal

(1) The tribunal determines that the sum of £ 5,253.00 for legal costs is not payable by the Applicant.

(2) The tribunal makes the determination as set out under the various headings in this Decision

(3) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

(4) The tribunal determines that the Respondent shall pay the Applicant £100 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of service charges/administration charges payable by the Applicant in respect of legal costs charged to the Applicant in 2020.

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The documentation

2. Directions were originally issued on 13th January 2021 when the matter was set down for a paper hearing. The matter was listed for a paper hearing for the week commencing 21st April 2021. A procedural judge listed the matter for determination but noted that the bundle provided had several PDF documents embedded into it. She pointed out that the Tribunal dealing with this case would not be able to deal with the bundle in the manner presented. In addition, she noted that there were several other documents that had been provided and that the Directions required that the bundle is a single PDF document. She therefore required the Applicant to re-submit the bundle with all materials that was to be relied upon to be included as a full document rather than embedded documents.

3. On the day of the paper determination, the 30th April 2021, the judge declined to make a decision because there was inadequate documentation and she was unable to determine the issue at hand. She made the following further directions:

    (i) By 21 May 2021 the respondent landlord shall send to the applicant tenant by post and email copies of all relevant invoices in respect of the legal costs with details as to how, why, when and by whom these legal costs were incurred together with all demands for payment of these disputed costs.

    (ii) The respondent may provide an itemised Schedule of these legal costs (which provides a column for the applicant's comments) and in addition must provide a statement as to why each of these legal costs are now payable by the applicant and through the service charge account and specifying whether these legal costs have been apportioned only to the applicant's service charges or to other lessees at the subject property at 49 Crystal Palace Park Road, London SE26. The respondent must also send to the applicant any witness statement of fact on which it seeks to rely and this must contain a Statement of Truth and be signed and dated.

    (iii) the applicant and the respondent are each required to resubmit by 25 June 2021 a revised bundle of documents, that is both indexed and paginated and must contain a readable copy of every document on which the party relies and must include the additional documents and statements referred to in paragraphs 1 and 2 above in addition to the documents already submitted. There should be no document that is

embedded into another document or is in an unreadable format. If the parties continue to rely on such documents, which cannot be opened/read, then the tribunal is unlikely to be able to consider them or take them into account when making its determination.

4. The matter was then listed for a decision on the papers on 19th July 2020 by Judge Carr who on that date was unable to locate the documentation which had been ordered by the previous judge. She therefore asked the clerk to ask the parties what they had provided, if anything.

5. On 30th July 2020 a response was provided by the Applicant who provided a bundle which comprised the original bundle but with the documents having been made readable and an additional bundle which comprised a response to the Respondent's witness statement and various attachments. There was no index provided. The response was provided too late for the date allocated for the paper determination. Unfortunately, due to administrative oversight, the paper case has only been reallocated for determination in November 2021.

6. The judge was not provided with a response from the respondent. It is unclear to the judge whether the additional documents provided by the Respondent were in response to the directions issued in April 2021. The additional documents provided by the Respondent were not contained in that bundle. Nor was the judge able to locate a bundle provided by the Respondent subsequent to that provided on 7th April 2021.

7. The judge has therefore made this decision on the basis of the documents listed above.

The background

8. The property which is the subject of this application is a first floor 2-bedroom flat in a Victorian property converted into five flats. The respondent is the freeholder and also owns three of the five flats.

9. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

10. The Applicant holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

The issues

11. This application concerns the sole issue of the payability of legal costs of £5,253.00 incurred in 2020. The applicant also seeks to make a s20C Landlord and Tenant Act 1985 in addition to an application under para 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

12. The issue of the payablity of the legal costs arises as a consequence of a long standing dispute between the parties about water ingress from the Applicant's ensuite shower.

The Respondent's argument

13. The Respondent argues that the lease for the property contains a clause allowing for the recovery of legal expenses in the event that forfeiture of the lease is being considered or pursued. That clause is a 4(d) of the lease.

14. It also argues that the lease permits the recovery of legal costs under the service charge. It says that legal costs can be charged to the defaulting leaseholder and claimed within court proceedings as an administration charge.

15. The Respondent submits that it is reasonable for the Applicant to pay the legal costs incurred by the Respondent in view of the fact that the costs were incurred purely to assist the Respondent in remedying breaches of the lease on the part of the Applicant.

16. The Respondent further argues in support of the claim that there has been

    (i) A history of delinquent service charge payments

    (ii) Irresponsible behaviour by not permanently resolving a water lead leading to problems to the occupants of the flat below 49C and the freeholder.

    (iii) There has been an impact upon the insurance premium on the property so legal action was reasonable and necessary to try and recover such a cost to avoid insurance being withdrawn or increased further.

    (iv) The behaviour of the Applicant put the Respondent at risk of being in breach of their obligations under the lease

    (v) There have been repeated cases of extra noise from the flat disturbing the neighbours

(vi) There has been repeated parking of a commercial vehicle disturbing neighbours in a share car park

17. The Respondent relies on a report from an independent structural surveyer in 2015 to demonstrate the causes and effects of the water ingress.

18. In conclusion the Respondent argues that

(i) the Applicant has failed to take action on stopping water leaks for well over a decade. Occupants in the below flat have been disturbed and have luckily not been injured with the fall of the ceiling.

(ii) the insurance premiums have increased due to claims following negligent lack of action leading to deterioration in scope of damage, as well as a high number of claims.

(iii) the Applicant has minimised the financial impact upon herself hiring contractors (or friends) who unsuccessfully tried to fix the problems, and in some instances appear to have made the matters worse with low quality parts and workmanship.

(iv) The structure of the property has been compromised and the Applicant must take responsibility. o The Applicant has been negligent, unreasonable and improper therefore it is reasonable for the legal costs to be recovered

The Applicant's argument

19. The Applicant argues that the legal costs are the responsibility of the Respondent who instructed solicitors to act on its behalf. She argues that there is no section of the lease that states that *ad hoc* legal costs incurred by owner occupier disputes are recoverable through service charges for the property.

20. The Applicant argues that she has maintained a channel of continuous communication with the respondent, affording the possibility to resolve the issues of the water ingress without the need for a solicitor's involvement.

21. The Applicant received no warning or indication that the respondent had intentions to instruct a solicitor. This meant the Applicant had no opportunity to challenge the need for this. The Applicant says she is not

willing to pay for any of the Respondent's legal costs, as the Respondent decided to take the course of action and incur legal costs.

22. The Applicant has already paid for more than £2,800.00 toward repairs caused by the water leak from the applicant's property into the respondents. She has taken extensive action to repair the leaks. The applicant has gutted and repaired the shower room on three occasions. On the third refurbishment the removal of the floorboards revealed the waste pipes were laid incorrectly. This was repaired by the Respondent's preferred contractor in January 2020. The shower room was refurbished to the specifications detailed in the Applicant's bundle. The Applicant believes she has acted responsibly throughout.

23. The Applicant also argues that she has not received notice of legal costs and that it has never been clearly defined whether the solicitor was acting on behalf of the landlord or the residents. She says that it is the residents who have experienced the water damage and she has paid damages and compensation to them.

24. The Applicant agrees that in the past she has been sporadic with service payments in the past but this is historical and has been resolved. Nor is it relevant to the legal costs which are being demanded. The same points are made about the parking of the commercial vehicle and allegations of noise.

25. She points out that she has paid the penalty for her breaches in 2019 including an administration fee to the landlord and the cost of repairs. She also paid for the independent surveyor's report. That report indicated that the applicant had no way of knowing that she was in breach as the poor plumbing was beneath the floorboards.

The Tribunal's decision

26. The Tribunal determines that the amount payable in respect of legal costs is nil.

Reasons for the tribunal's decision

27. The Tribunal notes that the arguments of the parties have covered a lot of issues, many of which are irrelevant to the matter in hand which is the payability and reasonableness of the legal costs.

28. The Tribunal notes that there is a demand for the legal costs which was accompanied by a statement of rights and obligations. Although the Applicant states that she received no notice of the legal costs, she has provided no comment on that demand. The Tribunal therefore determines that the demand was served and it was compliant with the statutory requirements.

29. The Tribunal has reached its decision primarily on the basis of the terms of the lease.

30. The Respondent drew the attention of the Tribunal to the following clauses to demonstrate that the money was payable:

Clause 4d which provides that the lessee is 'to pay all costs charges and expenses (including solicitor's costs and surveyor's fees) incurred by the Council for the purpose of or incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court.

Paragraph e of the Sixth Schedule of the lease which provides that the service charge includes, 'the administrative and labour costs of managing the estate including the costs of employing and paying profession men agents contractors or employees in and about the performance of any of the said covenants.

31. It also argues that at **paragraph 1(b) of the Sixth Schedule** it is made clear that the service charge covers the costs of complying with the covenants in clause 6(b). Clause 6(b) states that 'the Council will keep in repair the structure and exterior of the Flat and the Building including the drains gutters and external pipes thereof and will make good any defects affecting the structure and this obligation includes an obligation to rebuild or reinstate the Flat or the Building if either of them is destroyed or damaged by any of the risks against which the Council hereinafter covenants to insure.) of the lease.

32. The Tribunal considers that the only clause that is relevant to the dispute is the clause entitling the Respondent to its legal costs for the purpose of or incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925. The case law is clear that in order for costs to be payable under this clause there must be evidence that the costs were incurred in contemplation of proceedings under section 146 of the LPA 1925. This position was recently reaffirmed by the Court of Appeal in No. 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd [2021] EWCA Civ 1119.

33. There is some correspondence relating to the possibility of legal action which the Tribunal has located. The Tribunal is surprised that the Respondent did not direct it to this correspondence in its statement.

34. The first correspondence the tribunal has located which indicates the Respondent's intentions is in an email sent on 22nd November 2018 which stated that the landlord was 'fully prepared to follow legal action in order to resolve this issue that has been ongoing for over a decade'. The Tribunal does not consider that this sentence is specific enough to

fulfil the requirements of the cases and establish the liability of the Applicant under the clause.

35. The second is a letter from the solicitors to the Applicant dated 3rd September 2019 stating that they had been instructed by Prime Property Management, in relation to the water ingress. It made no reference to forfeiture proceedings or breach of the lease, simply stating that 'We are taking our client's instructions and will provide substantive correspondence in due course.' The Tribunal does not consider that this letter is sufficient to establish liability under the s.146 clause. It also notes how the Applicant responds, in a letter dated 26th September 2019, in which she sets out her concern that she is not under an obligation to use the contractors recommended by the freeholder and sets out how she intends to progress the repairs to the shower.

36. The third piece of relevant correspondence is a letter from the solicitors dated 15th October 2019. This letter concerns legal action in response to the water ingress. Relevant paragraphs of the letter are set out below.

> Please treat this letter as formal notice under Clause 5(f) of the Lease to carry out the works specified forthwith failing which our client will have no option other than to take steps to have the works carried out themselves and to charge you for the same.
>
> You covenant under Clause 9(a) of the Lease to indemnify our client in respect of all costs incurred in respect of enforcing the covenants under the Lease and also to indemnify the landlord against any damage caused to the building or any part thereof by you or your family or visitors. There is a further restriction in the Fourth Schedule paragraph 2 requiring you not to do anything which may be or become a nuisance or annoyance or cause inconvenience to the landlord, lessees and occupiers of other flats. The consistent leaks from your property do cause a nuisance and/or annoyance and/or cause inconvenience to our client and thus, you are in breach of this clause also.

37. The Tribunal notes that there is no reference to forfeiture proceedings in the letter and the attention of the Applicant is not drawn to the costs consequences of the Respondent taking forfeiture proceedings. The letter's focus is ensuring that the substantial repairs it believes are necessary are carried out and making it clear that if this does not happen then it will carry out works in default. It also makes clear that in its opinion there are other potential breaches of the lease. The Tribunal determines that this is insufficient to entitle the Respondent to its legal costs for the purpose of or incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925.

38. The Respondent has argued that the circumstances of the case demonstrated that there were grounds for it bringing a claim for forfeiture. That is not, in the opinion of the Tribunal sufficient, there

must be specific evidence that such a course of action was being contemplated by the Respondent and there is no such evidence. What the correspondence demonstrates is a dispute about the extent of the works being carried out by the Applicant and the Respondent making it clear it will execute works in default. There is also correspondence about the amount of compensation payable by the Applicant, but again this correspondence does not relate to forfeiture proceedings.

39. As regards the other clauses that the Tribunal has had its attention drawn to, the Tribunal does not consider that the legal costs are payable under those clauses. More specifically Paragraph e of the 6th Schedule does not specify legal costs and relates to the administration and labour costs of running the estate and paragraph 1(b) of the Sixth Schedule relates clause 6(b) of the lease which concerns repair works. The Tribunal considers that these clauses are too generic to make the legal costs it is claiming payable under the lease.

40. In the light of the Tribunal's determination that the legal costs are not payable under the lease the second concern of the Tribunal, the reasonableness of the sums claimed is not relevant. Nonetheless the Tribunal notes that whilst it has seen the solicitors' bills the detail provided is insufficient to demonstrate that any or all of the costs claimed are reasonable or relate to the dispute between the parties. The Tribunal has seen no Schedule of legal costs or any adequate explanation of the charges despite the requirements of the additional directions. The first bill provided is dated 13th September 2019 and relates to work to 11th September, the second is dated 22nd January 2020 and relates to work carried out between 12th September 2019 and 22nd January 2020, the third is dated 18th February 2020 and relates to work carried out between 23rd January and 18th February 2020 and the fourth is dated22nd Arpil 2020 and relates to work carried out between 19th February and 20th April 2020. The details provided simply say letters or emails in and out and provide nothing further. The Tribunal would have expected sufficient detail to enable the Applicant to challenge the reasonableness of the charges.

Application under s.20C and refund of fees

41. The Applicant made an application for a refund of the fees that she had paid in respect of the application fee. Taking into account the determinations above, the tribunal orders the Respondent to refund any fees paid by the Applicant.

42. In the application form the Applicant applied for an order under section 20C of the 1985 Act. Taking into account the determinations above, the tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the

Respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

Name: Judge Carr **Date:** 23rd November 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).