

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

**AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL
(PROPERTY CHAMBER)**

*LANDLORD AND TENANT – SERVICE CHARGES – orders under section 20C of the
Landlord and Tenant Act 1985 and under paragraph 5A of Schedule 11 to the Commonhold
and Leasehold Reform Act 2002*

BETWEEN:

BRUNSWICK MANSIONS MANAGEMENT COMPANY LIMITED

Appellant

-and-

TRIPLEROSE LIMITED

Respondent

**Re: Flats 2 and 3,
Brunswick Mansions,
Handel Street,
London, WC1N 1PE**

**Upper Tribunal Judge Elizabeth Cooke
Determination on written representations
Decision Date: 1 February 2023**

Dale and Dale Solicitors Limited for the appellant
Scott Cohen Solicitors Limited for the respondent

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Introduction

1. This is an appeal from orders made by the First-tier Tribunal (“the FTT”) in favour of a leaseholder under section 20C of the Landlord and Tenant Act 1985 and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, following a determination of the reasonableness and payability of service charges. The effect of those orders is that costs incurred by the appellant management company in the proceedings in the FTT will not be recoverable from the tenant as a service or administration charge.
2. The appeal has been determined under the Tribunal’s written representations procedure. The appellants were represented by Dale and Dale Solicitors Limited and the respondent by Scott Cohen Solicitors Limited and I am grateful for their written submissions.

The law

3. Section 20C of the Landlord and Tenant Act 1985 reads as follows

“(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal [or the First-tier Tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.”

4. Section 30 of the 1985 Act provides: ““*landlord*” includes any person who has a right to enforce payment of a service charge;”

5. Paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 says this:

“(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—

(a) “*litigation costs*” means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, ...

6. The table referred to includes proceedings in the FTT. Paragraph 6 of the Schedule provides that “landlord” has the same meaning as in the 1985 Act.

The parties, the leases, and the decision in the FTT

7. The appellant is a management company. The respondent is better known in this Tribunal as a landlord but is the leaseholder in the present appeal, holding long leases of two flats in Brunswick Mansions, Handel Street, London WC1N. The leases are in tripartite form between the freeholder, the lessee and the management company.
8. The leases of the two flats are identical in all material respects. The management company covenants to provide services and the lessee covenants to pay a service charge to cover the management company's costs, in the usual way. The "service charge percentage" for each flat specifies how much of the management company's total costs the leaseholder is to pay. However, the covenant to insure the building is given not by the management company but by the freeholder. The provisions about insurance are as follows:
 - a. At clause 4(4) the freeholder covenants to insure the building.
 - b. At clause 5(5) the management company covenants to reimburse the freeholder for the costs of complying with its covenant to insure.
 - c. At clause 3(1)(b) the lessee covenants to pay to the management company its service charge percentage of the sums paid by the management company to the lessor under clause 5(5).
 - d. The Third Schedule to the lease sets out the expenses and outgoings of the management company that together make up the service charge; item 13 is "the cost of insurance in accordance with clause 5(5) hereof to the extent that it is not recovered by the management company under clause 3(1)(b) hereof."
9. Accordingly the lessor is responsible, according to the lease, for arranging insurance; the management company is to reimburse it for the cost of insurance; and the management company recoups that expenditure from the leaseholder, whether under clause 3(1)(b) or as part and parcel of the service charge.
10. The respondent in November 2020 made two applications to the FTT for a determination of the reasonableness and payability of service charges for the years 2015 to 2020 in its jurisdiction under section 27A of the Landlord and Tenant Act 1985. One application was made against the management company in respect of the management fees, professional fees and the charges for an entry system in the building. The other was made against the freeholder in respect of insurance.
11. The two applications were consolidated and heard together by the FTT at a hearing in June 2021. At that hearing the FTT recorded that Mr Comport of Dale and Dale represented the management company and that the other two respondents (Mr Gupta, the freeholder until August 2017, and Girish Gupta Limited to which the freehold had then been transferred) did not appear and were not represented. By the date of the hearing professional fees were not in dispute, and the FTT heard argument from counsel for the leaseholder and from Mr

Comport for the management company about the entry system, the management fees and the insurance. Mr Comport addressed the FTT and cross-examined the leaseholder's witness on all three issues.

12. Evidence was given for the management company by Mr Unsdorfer, a director both of the management company and of Parkgate Aspen Limited the respondent's managing agent; evidence was also given for the respondent by Ms Berlin, the property manager responsible for Brunswick Mansions at Parkgate. Ms Berlin in her evidence dealt with the insurance of the property and said that Parkgate arranges the insurance for the property through brokers "on behalf of the management company".
13. The FTT decided that the costs were reasonably incurred for the entry system; it made a small reduction in the management charges payable to the management company; and it reduced considerably the charges payable for insurance in two of the six years in dispute.
14. The leaseholder had applied for orders under section 20C of the 1985 Act and under paragraph 5A of Schedule 11 to the 2002 Act with the aim of ensuring that it would not have to pay the landlord's or management company's costs of the proceedings through the service or administration charges under the lease. The FTT discussed that application at its paragraph 63 to 73.
15. The FTT expressly made no finding as to whether the legal costs of the proceedings could be recovered as service or administration charges under the leases and said (paragraph 65) that that issue "remains open for decision should it be litigated." It noted that the freeholders had taken no part in the proceedings and might not have incurred any legal costs, but said that the orders it made in response to the application applied equally to the freeholders. The FTT went on to say that the leaseholder had been largely successful in the proceedings and so it allowed the application and made the orders sought at its paragraph 73. Although that paragraph refers to the management company and not to the freeholders it is to be understood from what the FTT said at its paragraph 65 that the orders were made against both the freeholders (in case they had incurred any costs) and the management company (which certainly had).

The appeal

16. The management company sought permission to appeal from the FTT on two grounds. The first related to the decision on the reasonableness of the costs incurred on insurance. The FTT refused permission, first because it took the view that the management company had no standing to appeal the FTT's findings about the insurance premiums, which are the responsibility of the freeholder and not of the management company, and second on the merits of the argument about reasonableness. That ground of appeal has not been renewed to the Tribunal.
17. The second ground of appeal, on which the FTT gave permission to appeal, was that the leaseholder had not been successful as against the management company. The charges for the entry system were unamended and there was only a small reduction in the management fee; the leaseholder's success had been against the landlord in respect of the insurance

charges. Accordingly the management company argued that orders under section 20C and paragraph 5A should not have been made against the management company.

18. The FTT in granting permission said this:

“Mr Comport made it clear that he was acting only for the Management Company at the outset of the proceedings. He then went onto argue the issue in relation to insurance, which he now asserts (correctly) was a matter for the Freeholder. We erred in not addressing this issue when Mr Comport addressed us in relation to the insurance. We should have asked him for the basis upon which he purported to represent the Freeholder at that point. Had we done so, and had Mr Comport stood by his assertion that he was only representing the Management Company, we would not have heard him in relation to the insurance. What effect that may have had on the outcome is speculation.”

19. Rather than reviewing its decision, which it said would have necessitated an enquiry into Mr Comport’s position and therefore an increase in costs, the FTT gave permission to appeal its orders under section 20C and paragraph 5A.
20. The appellant in its statement of case on appeal repeats that any success of the leaseholder was against the freeholder, on the question of insurance, and not against the management company as regards the other charges. It argues that “any discussion with the Tribunal on the question of insurance” took place with the “sole purpose” of assisting the FTT. It says that the management company “did have an interest in the question of insurance” and that its representations influenced the FTT’s findings about insurance. It says that it did not act unreasonably, was largely successful as regards the entry system and the management fees, and that the input of the management company and of Mr Comport on the question of insurance should not result in a section 20C order being made against it.
21. In written representations in the appeal the respondent has pointed out that the management company gave evidence that it arranged the insurance, that it corresponded with the leaseholder about the insurance before the hearing in the FTT, that it complied with the FTT’s directions in relation to the insurance by completing the Scott schedules and providing documentation, and that its Statement of Case in the FTT made it clear that it took issue with the leaseholder’s challenge to the insurance costs. It has tried to appeal the substantive decision about the insurance. It is hardly consistent for the management company now to distance itself from the insurance issue in order to avoid having orders under section 20C and paragraph 5A made against it.
22. I agree with the respondent. The appellant management company incurred legal costs before and during the hearing in relation to the insurance costs; it gathered and adduced evidence, and Mr Compton presented argument and cross-examined witnesses. The suggestion that this was just “discussion with the Tribunal” and that the management company was simply “assisting the tribunal” is disingenuous; the management company opposed the leaseholder’s application in relation to insurance costs. The FTT allowed it to do so, and despite the misgivings it expressed in its decision granting permission to appeal the FTT was clearly right to allow it to do so because the management company has an interest in the

level of the insurance costs (as indeed it says itself). Its interest arises not merely because it is the conduit for payment of the landlord's costs; it is clear that - for reasons unexplained - it arranged the insurance itself through the managing agent. Moreover it is likely to have a financial interest in the amount payable; its obligation to reimburse the landlord for what is spent on insurance is not conditional upon the leaseholder in turn reimbursing the management company. That interest is clearly seen in the fact that the appellant also wanted to appeal the substantive decision in relation to the insurance costs. So naturally it took part in the proceedings insofar as the related to the insurance costs and it is unsurprising that the FTT allowed it to do so.

23. Against that background the appropriate response to the leaseholder's application for orders under section 20C and paragraph 5A is obvious. The leaseholder challenged the cost of insurance, the entry system and the management fees. The appellant management company incurred legal costs in arguing against it on all three points. The leaseholder was largely successful and therefore the FTT's order was unsurprising. Most of the legal costs incurred against the leaseholder were on the issue of the insurance costs (which were the subject of most of the evidence and argument), and were properly incurred by the management company because of its interest in those costs; to excuse the management company on the technical ground that it was not itself responsible under the lease for the insurance of the property would be unrealistic and unfair to the leaseholder.
24. The appeal fails.

Upper Tribunal Judge Elizabeth Cooke

1 February 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.