FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AC/LBC/2019/0004**
Property	**:**	**1462 High Road, London N20 9BS**
Applicant	**:**	**Ferney Auto Engineering Limited ("the Applicant")**
Representative	**:**	**Vanderpump and Sykes LP**
Respondents	**:**	**JDO Property Limited ("the Respondent")**
Representative	**:**	**Gelbergs LLP**
Type of Application	**:**	**Determination of alleged breaches of covenant.**
Tribunal Members	**:**	**Jim Shepherd** **John Barlow FRICS**
Date of Decision	**:**	**4 July 2019**

DECISION ON COSTS

Introduction

1. This decision is made further to the substantive decision dated 29th April 2019. The parties were invited to make submissions on costs in that decision. The Applicant duly made submissions dated 15th May 2019 and the Respondent replied on 12th June 2019. The Applicant seeks costs of £ 24085. The Respondent seeks to limit these costs to £7687.80.

2. A contested hearing did not take place on 29th April 2019 because the Respondent made admissions through their solicitors in relation to all of the allegations save for the allegation that they had not provided access. Previously, James O' Driscoll for the Respondent had challenged a number of the

allegations made in his letter to the Tribunal dated 14th March 2019. Whilst some admissions were made in the letter the Applicant's application was clearly not conceded. The Tribunal duly convened and travelled to inspect the premises where they were informed that the Respondent had made a number of admissions in relation to the alleged breaches of covenant. These are detailed in the decision dated 29th April 2019. Self evidently Mr O' Driscoll had taken legal advice which resulted in the admissions being made.

Scope for a costs award

3. The parties are in agreement that the Respondent is liable under the lease to pay the Applicant's expenses incurred incidental to the preparation and service of a Section 146 Notice (Clause 2 (xvii)) and that the clause applies in the present instance. The Respondent however submits that the costs claimed by the Applicant are excessive, disproportionate and in the case of the fees claimed by the agent in particular, not properly or reasonably incurred for the purpose of preparing and serving a Section 146 notice.

4. As well as the lease itself the Tribunal has limited powers to award penal costs contained in rule 13 of the Procedure Rules. A costs order for unreasonable behaviour (rule 13(1)(b)) may be made where a person has acted "unreasonably in bringing, defending or conducting proceedings"

5. In *Willow Court Management (1985) Ltd v Alexander* [2016] 0290 UKUT (LC) the Upper Tribunal gave guidance on the application of the rule and considered the separate circumstances in a number of cases. It said that a three stage systematic approach should be taken in such applications:

   (1) "Has the person acted unreasonably"? At this stage, there is a high threshold. The UTLC said that "if there is no reasonable explanation for the conduct complained of, the behaviour will be adjudged to be unreasonable, and the threshold for making of an order will have been crossed".

   (2) "Should an Order be made?" If the party has acted unreasonably, the Tribunal has a discretion whether to make an order or not. There would be focus on the nature, seriousness and effect of the unreasonable conduct, which will be an important part of the material to be taken into account. At this stage conduct prior to the proceedings might be relevant

   (3) "What should the order be?" If the above two stages above are satisfied, it does not necessarily follow there will be an order for costs.

Application to the present case

6. The Tribunal considers that the Clause 2 (xvii) of the lease applies in the present instance. The clause is not limited to solicitor's costs and surveyor's fees. Accordingly the Applicant is *prima facie* entitled to seek the costs of its agent,

Gilmartin Ley. The Respondent objects to the agents costs in their entirety. The Tribunal does not consider these objections are well founded. The agents were closely involved in the case and their fees need to be taken into account.

7. In broad terms the Applicant had to incur the costs of preparing an application to the Tribunal because the Respondent had breached his lease in a relatively brazen fashion and only admitted this after he had been challenged with the evidence and eventually received legal advice. He could have taken this legal advice and conceded the application much earlier. He chose instead to challenge the evidence of the Applicant in his letter dated 14th March 2019 such that the Tribunal hearing was still necessary.

8. Whilst the disputed issue of access did play a part in the costs incurred it was a relatively minor issue. The only reason that the Applicant needed to gain access (and eventually did gain access without the assistance of the Respondent) was because the Respondent had knowingly breached his lease. Neither is it reasonable to suggest that the Applicant was somehow remiss in not seeking to resolve the proceedings or narrow the issues. The onus was on the Respondent to do this - he had breached his lease and been found out, he should have made the admissions he eventually made much earlier.

9. Whilst neither party has made a formal application for the Tribunal to determine the reasonableness of the costs incurred by the Applicant both sets of submissions address the issue and therefore it seems appropriate for the Tribunal to deal with it.

10. The Tribunal broadly considers that the Applicant's costs are reasonable in the circumstances save that the cost of emails out and in appear excessive. 50% of these particular costs are allowed (£ 1450.50). In addition it is considered appropriate to reduce the overall costs total by 15% to reflect the fact that the access issue was not decided against the Respondent. Accordingly doing the best it can the Tribunal considers that costs of £18992 are reasonable.

11. In the alternative and for completeness even if the costs were not recoverable under the lease the Tribunal does consider that penal costs would be payable. Applying the criteria in the Willow Court Management case the Tribunal considers that the Respondent <u>did</u> act unreasonably. As indicated already the breach of lease was brazen. On discovery the Respondent sought to challenge the case against it when it plainly should have made the admissions that it made at the 11th hour. In the meantime the Applicant was put to the cost of preparing for a hearing that did not take place.

12. The Tribunal also considers that an order should be made. This was not an unintentional breach. It seems likely that the Respondent had benefitted financially as a result of his actions. The fact he decided to make the admissions he did on legal advice (presumably in order to try and avoid forfeiture proceedings) does not negate the fact that to all intents and purposes he was contesting the case unreasonably before that.

13. In summary the Tribunal considers that costs are payable at the level indicated above.