FIRST-TIER TRIBUNAL

PROPERTY CHAMBER

(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AG/LAC/2020/0021**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**Flat 2, Burgess Park Mansions, London NW6 1DP**
Applicants	**:**	**Mr M Drabu**
Representative	**:**	
Respondent	**:**	**Burgess Park Mansions & Burgess Parade Mansions Management Company Ltd**
Representative	**:**	**Mr W Beetson of counsel**
Type of application	**:**	**For the determination of the liability to pay administration charges under paragraph 5 of schedule 11 to the Commonhold and Leasehold Reform Act 2002**
Tribunal members	**:**	**Judge S Brilliant** **Mr T Sennett FRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of hearing	**:**	**21 January 2021**
Date of decision	**:**	**03 March 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was by video V: CVPREMOTE. 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 the main in a bundle totalling 134 pages, and a few further documents subsequently sent to us.

Decision of the tribunal

The Tribunal determines that the sum of £2,160.00 including VAT claimed by the Respondent in connection with an application for the grant of approval for structural alterations to the Applicant's flat is not recoverable as an administration charge.

The Tribunal also determines that it is just and equitable that the Respondent shall not recover any costs in respect of these proceedings directly from the Applicant.

The application

1. The Applicant seeks a determination pursuant to paragraph 5 of schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to whether he is liable to pay the invoice of Set Square dated 30 June 2020 in the sum of £2,100 plus VAT ("the Set Square invoice"). He also seeks a determination pursuant to paragraph 5A as to whether he is liable to pay the cost of these proceedings.

2. The Applicant contends that the Set Square invoice is a variable administration charge. We did not understand Mr Beetson by the end of the hearing to be contradicting that. In any event, we are satisfied that it is a variable administration charge.

The directions

3. Directions were given on 4 November 2020. 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.

The hearing

4. Mr Drabu appeared in person. The Respondent was represented by Mr Beetson of counsel. We are grateful to both of them for their written and oral submissions, and the civility with which the proceedings were conducted. Mr Beetson called Mr Rennie, a chartered surveyor and director of Rennie and Partners ("Rennie"), the Respondent's current managing agents. He also called Mr Dunn, a director of the Respondent.

The background

5. Burgess Park Mansions is a traditional mansion block at the apex of Fortune Green Road and the Finchley Road at the edge of West Hampstead ("the block"). On the Finchley Road side the ground floor consist of commercial properties, but there are no commercial premises on the Fortune Green Road side.

6. The Applicant decided to purchase the long lease ("the lease") of Flat 2 ("the flat") in late 2017. He reached an agreement to buy the flat, subject to contract, on 30 November 2017.

7. It was apparent to him that he would want to do a considerable amount of structural work to the flat before moving in. He exchanged contracts in January 2018 and completed on Friday 02 May 2018. He then commenced the structural works on Thursday 08 May 2018, and moved in in July 2018 after the works had been completed.

8. The Respondent freeholder is a company in which all the long lessees in the block the own a share.

9. At the time that the Applicant purchased the flat, the managing agent appointed by the Respondent was Parkgate Aspen Ltd ("Parkgate Aspen"). The solicitors used by Parkgate Aspen were Lee Pomeranc. The surveyors used by Parkgate Aspen were Salouen Ltd ("Salouen").

10. 1 February 2019 Parkgate Aspen was replaced as a managing agent by Rennie.

The relevant parts of the lease

11. Pursuant to Clause 3(5):

"*Not at anytime during the said term to make any structural alterations in or additions to the demised premises or any part thereof or alter the internal arrangement thereof or to cut maim alter or injure any of the walls or timbers thereof or to alter the landlord's fixtures without the prior written consent of the Lessor such consent not to be unreasonably withheld or delayed*"

12. Pursuant to Clause 5(2) f(ii):

"*To employ all such surveyors builders architects engineers tradesmen accountants or other such professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building…*"

13. Pursuant to Clause 5(2)(g):

"*Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as the lessor may consider reasonably necessary or advisable for the proper maintenance safety amenity and administration of the Building*".

The Applicant's application to the Respondent for a licence to carry out structural alterations

14. The Applicant appreciated that the works he proposed to undertake in the flat were major works of a structural nature which required the permission of the Respondent. He decided to take all necessary steps to comply with the obligations under the lease towards the end of 2017, so that he would be ready to start work as soon as possible after he had completed the purchase of a the flat.

15. He was given the name of Parkgate Aspen either by his vendors or by the estate agents, by now he could not remember which of them it was. So, he duly got in touch with Parkgate Aspen to request permission to carry out the works.

16. On 6 December 2017, Parkgate Aspen informed the Applicant by email, that they had contacted:

our client [the Respondent], <u>their</u> solicitors (emphasis added) [Lee Pomeranc] and surveyors [Salouen] regarding your request for a license for alterations.

17. The Applicant was told that the fees for proceeding were as follows:

(a) Lee Pomeranc: £1,200 - £1,750 plus VAT.

(b) Salouen: £950 plus VAT.

(c) Parkgate Aspen: £400 plus VAT.

18. The Applicant received the various parties' contact details on 10 January 2018. He started engaging with them immediately and, according to his evidence, he paid their fees as directed. The individuals concerned were Mr Natt at Salouen and Mr Lee at Lee Pomeranc.

19. At the hearing the Applicant was challenged endlessly as to whether he in fact had made the payment to Salouen. On the balance of probabilities, we accept the Applicant's evidence that he had made this payment. However, in our judgment it is not relevant to the issue we have to decide whether or not this payment has already been paid or is still outstanding.

20. On 19 March 2018, the Applicant received a letter from Salouen stating that they considered permission for the works and licence for alterations ("the licence") should be granted, provided certain conditions were satisfied.

21. Prior to the works commencing, the Applicant's solicitors (Owen & Co) engaged with Mr Lee to draft and negotiate the licence. The licence was finalised and agreed. The Applicant was sent the engrossed version and he promptly signed and returned the counterpart to Mr Lee. The Applicant expected the prompt return of the signed counterpart, as Mr Lee was aware that the works were about to commence.

22. It is not in dispute that the Applicant is under an obligation to make payments to the Respondent under the licence.

23. Clause 12.1 of the licence provides:

On completion of this licence the Tenant must pay the reasonable costs and disbursements of the Landlord, it solicitors, surveyors and managing agents in connection with this licence.

24. Clause 12.2 of the licence provides:

The Tenant must pay on demand any further reasonable costs and disbursements of the Landlord, it solicitors, surveyors managing agents and insurers incurred in connection with the Works or any removal of them and reinstatement of the Property and making good any damage to any land or building, plant and machinery (other than the Property) which is caused by the carrying out of the Works or by the removal of them or the reinstatement of the Property.

25. The Applicant said in his evidence that both Parkgate Aspen and Salouen were well aware that he had started the works in May 2018.

The position of the Respondent

26. Parkgate Aspen never reported any of this back to the Respondent. The Respondent was unaware that the Applicant wished to carry out structural

alterations, that he had made an application directly to Parkgate Aspen, or that Parkgate Aspen had instructed Salouen to undertake this work.

27. The Respondent did not learn about this until May 2018, when it received the counterpart licence to execute. At first the Respondent understood that Salouen was the Applicant's surveyor, not its surveyor.

28. Understandably, the directors of the Respondent were extremely upset that all of this had been done behind their backs. As result of this, as we have said, the Respondent terminated Parkgate Aspen's retainer on 01 February 2019 and appointed Rennie as managing agent in its place.

29. The Respondent then in June 2018 instructed its existing block surveyors, Set Square Surveyors Ltd ("Set Square"), to inspect the flat in order to produce a report whether the work which had been undertaken at that time had been completed to a satisfactory standard. It is the evidence of the Applicant that by this time about 30% of the work had been completed.

30. The Set Square inspection of the flat was carried out by Mr T Nixon MRICS on 7 June 2018. His report, reviewed by Mr P French MRICS, is dated 6 July 2018. Between the inspection and report, the Applicant had provided builders' photographs to Mr Nixon who did not require a further visit after receiving them. Set Square's report might be referred to as a mid-term one. Salouen had not budgeted for such a report, but that does not affect the issue we have to decide.

31. It is a very short report. The executive summary is as follows;

2.1. We can confirm that the works have been undertaken in line with the drawings and specifications calculated by Form London Ltd. Set Square Surveyor's structural engineer has reviewed the calculation and agrees with their approach and design.

2.2. Having considered the engineering opinions discussed above, in conclusion there is no evidence to suggest that these works have affected the structural integrity of the flat and the remainder of the building.

The Set Square invoice

32. Once this inspection had been completed, the Respondent informed the Applicant that it would be withholding its executed counterpart of the licence until such time as the Applicant paid Set Square's fee of £2,160 including VAT.

33. The Respondent stated that it had instructed Set Square because the applicant had *planned and instructed major works to this property without consultation with [the Respondent] … We were only made aware of the extent of the works (ie structural changes to the flat requiring new supporting beams) once they were already mid-way through we had to instruct our surveyor at short-notice.*

34. Although this may well have been written in good faith, it is simply not true that the Applicant had not been consulting with the Respondent. The Applicant had been conscientiously liaising with and working with managing agents, solicitors and surveyors whom he was led to believe and did genuinely believe were duly authorised on behalf of the Respondent.

35. In cross examination Mr Rennie said that two surveyors had been instructed when only one should have been. He accepted that the managing agent will normally be the body to instruct a surveyor in these sorts of cases.

Discussion

36. The only issue before us is whether the Set Square invoice is liable to be paid by the Applicant. He says that he had already entered into an agreement with Salouen as to the fee which was payable as part of the approval process, and he does not see why he should have to pay again.

37. We would add for the sake of completeness that the Respondent's statement of case refers to other fees being incurred in this matter, namely those of Salouen (which the Applicant says he has already paid), those of Rennie (which the Applicant has not paid but disputes) and the fees of Lee Pomeranc (which the Applicant says he has already paid). These are not matters which are before us.

38. In our view, the purpose of instructing Set Square was not to determine whether or not the work had been undertaken without a licence having been formally executed: that was already known to the Respondent which had not executed its part or returned it to the Applicant. It would be a misuse of language to say that Set Square's report was commissioned in order to enforce a provision of the lease. It was not the basis for a s.168 application. You are a

39. The reason that Set Square was instructed was because the Respondent was interested in knowing whether the work which had already been undertaken had been completed to a satisfactory standard and/or whether as a result of this work there was any outstanding risk of damage to the block itself. If not, the work required to achieve a satisfactory conclusion would have been specified. This was part of the work that would normally be undertaken by a surveyor acting for a landlord in connection with a licence to a lessee to carry out structural alterations.

40. In other words, the disputed charge falls within paragraph 1(1)(a) (grant of approval), but not within paragraph 1(1)(d) (breach or alleged breach of covenant), of Schedule 11 to the 2002 Act.

41. The approach of the Respondent seems to be as follows. We never actually authorised Salouen to do anything; we reject what he did especially as it was not thorough enough; we are therefore entitled to wash our hands of what Salouen did; we are fully entitled to appoint Set Square and charge the Applicant a second time.

42. In our judgment, the flaw in the Respondent's argument is a failure to grasp the law of agency.

43. Lee Pomeranc had the actual authority of the Respondent to act as its managing agent and it had the ostensible authority, as managing agent, to instruct Salouen in the ordinary exercise of its powers as a managing agent. At no time did the Applicant have any reason to believe that Salouen was not duly authorised to act on behalf the Respondent.

44. In maybe that the Applicant got a good deal in that Salouen was not charging as much as it might have, or, more importantly, was requiring less

hands-on involvement as it might have. Set Square was clearly doing more work than Salouen proposed.

45. But this is nothing to the point. The Applicant was led to believe that he was paying a certain fee, which fee he was contractually bound to discharge. As we have said, we accept the Applicant's evidence that this is been paid, but even if it has not, he has incurred an outstanding debt upon which he could be sued.

46. When the issue came to light, the Board of Directors of the Respondent indicated that it was the fault of Parkgate Aspen, and that the Applicant should make a claim against it to recover the Set Square's fee. But there is no reason why the Applicant should be expected to embark upon speculative litigation when he was entitled to assume that those with whom he was dealing had authority to do so. The Applicant believes, perhaps with some justification, that the Respondent chose to come after him as an easy target, rather than to commence proceedings against Parkgate Aspen.

47. On 01 August 2018, Mr Stannard, a director of the Respondent, sent the following email to Parkgate Aspen:

After reading through [recent emails] I see that [the Applicant] tried to do everything to properly comply with the process to get his plans reviewed and checked for the [licence] - so it seems to me having found this all out now that we really can't expect him to pay for [Set Square's] invoice.

48. It is perhaps unfortunate that this advice was not followed. In an email dated 22 September 2018 Mr Stannard said to the Applicant *We totally sympathise that you had acted in good faith*. We do not consider it a reasonable to expect the Applicant to pay Set Square's invoice when he has already paid Salouen's invoice.

49. In his notice of application, the Applicant elected not to make a s.20C application, but did elect to make a paragraph 5A application. In all the circumstances of this case we consider it just and reasonable that the Applicant should not be liable for any contractual costs under the lease relating to these proceedings.

Name: Simon Brilliant Date: 03 March 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).