FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BK/LSC/2019/0378**
Property	**:**	**Flat 10, 54-55 Kensington Gardens Square, London W2 4BH**
Applicant	**:**	**Kensington Gardens Square Limited**
Representative	**:**	**Mr D Peachey of counsel**
Respondent	**:**	**Ms M A Boakye**
Representative	**:**	**Mr E Blakeney of counsel**
Type of Application	**:**	**Application under Commonhold and Leasehold Reform Act 2002, sch 11, paragraph 5A**
Tribunal Members	**:**	**Judge Prof R Percival** **Ms Alison Flynn MA, MRICS**
Date of Decision	**:**	**29 November 2022**

DECISION

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Background

1. On 11 November 2021, the Court of Appeal remitted to the Tribunal an application in respect of the reasonableness of administration charges arising from the cost to the Applicant of proceedings before the Tribunal in 2017. Our decision on this substantive application was dated 23 June 2022.

2. At the close of our decision, we made provision for written submissions as to an application by the Respondent for an order under Commonhold and Leasehold Reform Act 2002 (the 2002 Act), schedule 11, paragraph 5A extinguishing liability in respect of litigation costs "in relation to these proceedings" (paragraph [75]).

3. In August 2022, we approved agreed directions submitted by the parties making provision for further written submissions by way of replies.

4. In the result, we have before us the original submissions of both counsel dated 21 July 2022 (Mr Peachey's is erroneously dated 21 June, we assume July was intended); and the parties' final submissions by way of replies of 21 September 2022 (Mr Blakeney) and 5 October 2022 (Mr Peachey), together with various attachments. Where necessary, we refer to these submissions by counsel's name and date.

5. We have had regard to all of these documents in making this paper determination.

Determination

6. Given the nature of this application, we do not consider it necessary to outline the parties' written submissions in any detail.

Preliminary issue: what "proceedings"?

7. The first issue is to what proceedings the application applies. The Respondent notes that "these proceedings" in our invitation for written submissions is "not entirely clear". Mr Blakeney goes on to argue that we should make an order covering costs incurred at each stage of the case, that is, in turn before the 2020 First-tier Tribunal (FTT), the Upper Tribunal, the Court of Appeal and the FTT to which the final matter was remitted (that is, this constitution of the FTT).

8. We reject that submission.

9. First, we consider that the terms of paragraph 5A itself preclude an FTT making orders in relation to proceedings before the Upper Tribunal and Court of Appeal.

10. Sub-paragraph (1) bestows a jurisdiction to make an order on "the relevant court or tribunal". By virtue of the table in sub-paragraph (3)(b), the FTT is the relevant court or tribunal if the costs relate to "First-tier Tribunal proceedings".

11. Were the "proceedings" before the 2020 FTT, the Upper Tribunal, the Court of Appeal and us a single set of proceedings, or should we distinguish proceedings before the FTT and those before the other fora, which sit in different boxes in the sub-paragraph (3)(b) table? It seems to us that Mr Blakeney's submissions rely on the former approach to the meaning of "proceedings".

12. But, we conclude, for the purposes of paragraph 5A, at least, the latter must be correct. In the first place, that is the natural reading of the way in which the column in sub-paragraph (3)(b) is drafted. In each case, "proceedings" are characterised as that which happens before a court or specified tribunal (the FTT or the Upper Tribunal). While most proceedings will only be before a single FTT or court, many are appealed, and very few cases will be first instance cases before the Upper Tribunal (or the Court of Appeal). If the full appellate course of a case counted as a single "proceedings", some provision would have had to have been made to describe who made the order in the first instance in such circumstances (ie, that – if Mr Blakeney were right –an order for the single course of proceedings could be made in the FTT if the case started in the FTT), and there is none.

13. Secondly, our preferred approach of breaking up the whole course of the case into separate sets of "proceedings" that relate to the forum before which the case was at that time mirrors the position in relation to the very similar question relating to cost regimes. Sitting as a County Court judge, the Deputy President, Martin Roger KC, so found in *John Roman Park Homes Ltd v Hancock*, 17 October 2019. Construing the meaning of "proceedings in the County Court" in section 51 of the Senior Courts Act 1981, he found that, where an application was transferred from the County Court to the FTT, the County Court costs regime applied only before the transfer. Up to that point, there were "proceedings in the County Court". Thereafter, the "proceedings" where in the FTT, and the costs regime in Tribunal Procedure (First-tier Tribunal)(England) Rules 2013 ("the FTT Rules") applied. In *London Borough of Lambeth v Khan* [2022] EWCA Civ 831, the Court of Appeal approved that conclusion and the Deputy President's reasoning (which the Court quoted extensively), and overruled the contrary conclusion in *Avon Ground Rents Ltd v Child* [2018] UKUT 204 (LC), [2018] HLR 44, a decision of Holgate J and HHJ Hodge KC (who were also sitting as County Court judges for that decision).

14. It follows that we have no jurisdiction to make an order in respect of proceedings before the Upper Tribunal or the Court of Appeal.

15. This conclusion, however, does not relieve us of the duty to consider paragraph 5A in relation to the initial proceedings before the FTT in 2020. While we are a separate constitution, there is a single FTT.

16. But, as we stated in our substantive decision, our jurisdiction to decide the substantive issue rested on the Court of Appeal's order remitting it to us. To the extent (see below) that success before the FTT is a matter to be taken into account by the Tribunal in making a decision on an application for a paragraph 5A order, the outcome will be different depending on the relative success of the parties before the differently constituted FTTs, where those were deciding different issues.

17. At this point, it is appropriate to consider Mr Peachey's argument as to res judicata in relation to the 2020 FTT. Our approach so far presents a different starting point to that adopted by the parties in their submissions, so we are not properly speaking directly addressing an argument made by Mr Peachey (or, indeed, Mr Blakeney's counter-arguments). Nonetheless, Mr Peachey does assert that the fact that the Court of Appeal made no order under paragraph 5A, despite an application being made, amounts (a) to a positive decision not to make an order; and (b) that that is res judicata, so we cannot reopen it.

18. The parties' dispute whether the Court of Appeal making no order is a decision, or a non-decision. We do not think it necessary to consider this argument (and decline Mr Blakeney's invitation to do so (Blakeney, 21 September, paragraph 11.1)). The point, as we see it, is that, just as the FTT has no jurisdiction to entertain a paragraph 5A application in respect of proceedings before the Court of Appeal, the Court of Appeal cannot make a paragraph 5A order, as an original order, in respect of FTT proceedings. The Court of Appeal is not a "relevant court or tribunal" in respect of "First-tier Tribunal proceedings" (paragraph 5A(3)(b)). (Accordingly, any argument based on whether the Court of Appeal could have "remitted" a decision in respect of the 2020 FTT proceedings to the 2022 FTT is also misconceived – it has no jurisdiction to remit. Whether the Court has the power to remit a paragraph 5A decision in respect of its own proceedings is not something we have to consider). The Court of Appeal can, of course, substitute its order for an original order made by an FTT on appeal, but here there was no appeal against the FTT order/lack of order.

19. In the circumstances, nor do we consider that we are prevented from making an order (or, perhaps more properly, relieved of the obligation to make an order) by the decision made by the 2020 FTT. A matter is not res judicata until appeals processes have been exhausted. As a result of the substantive decisions of the Court of Appeal, the decision of the 2020 FTT was made on a false legal basis, and we remain seised

of the issue as a result of the course of the appellate process. It is therefore open to us to reconsider the FTT's original jurisdiction to make an order.

Should we make an order or orders within our jurisdiction?

20. We consider first the nature of the jurisdiction conferred by paragraph 5A.

21. Paragraph 5A was added to the 2002 Act by section 131 of the Housing and Planning Act 2016. The note on that section published with the Act includes the following, at paragraph 359:

> "Prior to the passing of this Act, the courts and tribunals had power only to restrict a landlord from recovering their legal costs through the service charge. This section strengthens the powers of the courts and tribunals so that on the application of a leaseholder they may restrict recovery of a landlord's costs through the service charge or as an administration charge."

22. Notes on legislation published with Acts by the Government Department responsible for the legislation can assist tribunals as to the purpose of a provision, which in turn can be an aid to its construction.

23. The power referred to in the first sentence of the note is that contained in the Landlord and Tenant Act 1985, section 20C. As the note indicates, the purpose of paragraph 5A is to replicate, for administration charges, the existing law as it relates to service charges in section 20C. Our view is that, as a result, the considerations that apply to the making of an order under section 20C apply mutatis mutandis to making an order under paragraph 5A.

24. Paragraph 5A(2) states that "the court or tribunal may make whatever order on the application it considers to be just and equitable", and a similar formula appears in section 20C(3) (and see *Tenants of Langford Court v Doren Ltd* (LRX/37/2000). The orders are discretionary. They constitute an interference with the landlord's contractual rights, and should not be made as a matter of course, so the success or failure of a party is not wholly determinative. Comparative success is, however, a significant matter in weighing up what is just and equitable in the circumstances, and it would be unusual to make an order in favour of an unsuccessful tenant (see generally *Langford Court*; *Schilling v Canary Riverside Development PTE Limited* LRX/26/2005).

25. The Upper Tribunal gave guidance as to how a Tribunal should assess success or failure in *Church Commissioners v Derdabi* [2011] UKUT 380(LC). At paragraph [19] the judgment says:

> "Where the tenant is successful in whole or in part in respect of all or some of the matters in issue, it will usually follow that an order should be made under 20C preventing the landlord from recovering his costs of dealing with the matters on which the tenant has succeeded because it will follow that the landlord's claim will have been found to have been unreasonable to that extent, and it would be unjust if the tenant had to pay those costs *via* the service charge. By parity of reasoning, the landlord should not be prevented from recovering *via* the service charge his costs of dealing with the unsuccessful parts of the tenant's claim as that would usually (but not always) be unjust and an unwarranted infringement of his contractual rights."

26. It is clear, however, that the allocation between the parties where success is mixed does not require detailed consideration of bills for legal services: Paragraphs [22] and [23]:

> "Where the landlord is to be prevented from recovering part only of his costs via the service charge, it should be expressed as a percentage of the costs recoverable. ... In determining the percentage, it is not intended that the tribunal conduct some sort of "mini taxation" exercise. Rather, a robust, broad-brush approach should be adopted based upon the material before the tribunal and taking into account all relevant factors and circumstances ...".

27. We turn first to whether we should make an order in respect of proceedings in the 2020 FTT.

28. This is an unusual situation. In the first place, we are dealing with an application remitted from the Court of Appeal in which, at each level, different findings were made. The findings of the 2020 FTT were largely, but not wholly, in favour of the Respondent. Those of the Upper Tribunal were wholly in favour of the Applicant, but the Court of Appeal found preponderantly in favour of the Respondent, but less so than the 2020 FTT. As to the matter remitted to this FTT, our conclusions were largely, but not wholly, favourable to the Applicant. Mr Peachy makes points as to the *monetary value* of the elements found each way, such that he argues that the Applicant was, really, the major victor in value terms at the Court of Appeal. But at this stage, we are concerned with findings on the principle legal issues at stake. We will return to make some observations on that argument in due course.

29. Secondly, the subject matter of the dispute was (in part) the payability of legal costs under the lease, leading to another layer of complexity. In some cases, conclusions as to section 20C and paragraph 5A were affected by the substantive decisions as to whether legal costs were chargeable to the service charge and/or the administration charge under the lease.

30. Finally, the particular decisions taken by the 2020 FTT meant that its decisions on section 20C and (somewhat less obviously) paragraph 5A were not the subject of the subsequent appeals.

31. The starting point in considering an order in relation to the 2020 FTT proceedings must be that, if that FTT came to clear conclusions, as a matter of comity we should respect those so far as is possible. Even if technically we enjoy a jurisdiction to make orders, we would not do so in the face of decisions already made unless there was good reason to do so.

32. In this case, the 2020 FTT made no order. We think it likely that, if they had made an order, given the position we are in, we would have had jurisdiction to vary or discharge that order, but that is not a matter we have to decide in this case, and we do not do so.

33. In this case, there is a good reason to consider making an order that was not made in the FTT in 2020.

34. As to what costs were recoverable as an administration charge under a form of Law of Property Act 1925, section 146 notice clause in the lease, the 2020 FTT concluded that only the very limited costs of actually drafting and serving a section 146 notice were recoverable. That amounted to £192.50. The FTT considered a paragraph 5A application in respect of that sum (ie, the notice served after the 2017 proceedings, and as a result of them), but made no order on the basis that it was "concerned with the reasonableness of the Applicant's conduct in relation to the s. 146 Notice" (paragraph [94]). This is in the context of the FTT's finding that it was *only* the minimal costs of drafting etc the notice that were recoverable, not the whole of the legal costs of the proceedings to that date before the FTT. On this issue, the Court of Appeal disagreed, and concluded that all of the legal costs before the FTT (ie in 2017) were recoverable, a result that means that, in respect of the costs of the 2020 FTT, the 2020 FTT made its decision on paragraph 5A only in respect of the drafting of the section 146 notice after the 2017 proceedings, not on the basis that the costs of the FTT to date in 2020 were recoverable.

35. Thus, in the light of the Court of Appeal's judgment, the 2020 FTT considered its decision in respect of the paragraph 5A application on an erroneous basis.

36. As to the service charge, the FTT found that legal costs could not be recovered under the lease, a decision upheld by the Court of Appeal, and accordingly made no section 20C order. However, the FTT very helpfully added this, at paragraph [103]:

> "If [the FTT] had reached a different conclusion on this point of interpretation, the tribunal would have concluded, taking

> into account its determinations and the submissions made by the parties, that (a) it was not just and equitable to make an order under section 20C of the 1985 Act in relation to the costs of the 2017 proceedings; but (b) it was just and equitable to make such an order in relation to the costs of the present proceedings."

37. This leaves us with the responsibility to reconsider a paragraph 5A order in respect of the costs of the 2020 FTT proceedings; but with the assistance that the 2020 FTT would have considered a section 20C order appropriate if it had been necessary. As we have indicated, we see the considerations relevant to paragraph 5A orders as mirroring those in respect of section 20C orders, so paragraph [103] does properely inform our consideration of whether it is just and equitable to make a paragraph 5A order.

38. The big difference between a hypothetical section 20C order in 2020 and an actual paragraph 5A application today, in respect of the costs of the 2020 FTT, is that we now know that the balance of success at the 2020 FTT should have been different, in that the Applicant should have won its point on the administration charge, as a matter of construction. (It could be argued that the hypothetical situation presupposed by paragraph [103] necessarily included a further hypothetical, to wit that the Applicant had won on the recoverability of legal costs through the service charge, and that that would offset the different result in respect of the administration charge – but we think it is going too far to assume that the paragraph [103] statement relied on that difference. It is safer to ignore this further double counter-factual hypothesis).

39. The 2020 FTT would have found it just and equitable to prevent the Applicant from recovering any of the costs of the proceedings before it, had it thought it necessary to do so (save for the minimal cost of the notice allowed as an administration charge). We should adjust that on the basis that the Applicant won its (greater) point on the administration charge.

40. Mr Peachey, in the context of assessing the significance of the administration charge win against the service charge loss for the Applicant in a broader context, submitted that it should be measured in monetary turns; and if so measured, the eventual preponderance of success lies overall with the Applicant (Peachey 21 July, paragraphs 27 and 28). We do not accept that that is necessarily the case, even on Mr Peachey's own approach. First, as we explain below, his characterisation of the Applicant's success before us, the 2022 FTT, is overstated, for the reasons we indicate. We also see merit in Mr Blakeney's argument that the value of the points won by the Respondent in respect of the service charge mechanism may not have been determined, and that they have value in terms of the continuing relationship between the parties. Further, while the fact that the

Respondent won on the question of collection under the service charge may not advance the pecuniary interests of the Respondent, it was nonetheless a win, and is important in terms of the future conduct of the parties to the lease. From our perspective, while it is wrong to say we should discount monetary value, it is not the only measure of success between parties to a lease. We further note that the parties have told us that the Court of Appeal awarded 50% of costs to the Respondent, an indication of preponderance of success in the Court of Appeal's view.

41. Using what we perceive to be the position of the 2020 FTT as a starting point and taking account of the Applicant's success on appeal in respect of the administration charge, we consider that an order extinguishing 75% of the litigation costs relating to the proceedings before the 2020 FTT is appropriate.

42. Finally, we turn to whether we should make a paragraph 5A order in respect of the costs of remitted matter before the presently constituted FTT.

43. The question remitted was the quantification of the administration charge in respect of the costs of the proceedings in 2017. That was the substantive content of our determination. We now consider whether we should make a paragraph 5A order in respect of the costs incurred by the Respondent in establishing that before us, in the period starting with the end of proceedings before the Court of Appeal.

44. On the substantive issue, the Applicant contended for £8,213.70. We concluded that, applying the test of reasonableness in paragraph 5 of schedule 11 to the 2002 Act, the sum of £6,500 was recoverable. The Applicant argued for a quantification of zero (or, as we concluded in our substantive decision, she really argued that nothing was recoverable as a matter of law), aside from one low-value argument on the merits, which we rejected.

45. This was described by Mr Peachey as "an excellent level of costs recovery on any measure". We regard this as a mis-characterisation of the Tribunal's decision.

46. Just as section 5A mirrors section 20C, so the concept of reasonableness in paragraph 2 of schedule 11 mirrors the same concept in section 19 of the 1985 Act. That applies to a determination under section 27A or paragraph 5 regardless of the subject matter of the expenditure under consideration. Whether the FTT is considering expenditure (either in respect of a service charge or an administration charge) on legal costs, the costs of other professionals, an insurance premium, or changing a light bulb in the communal hall, the same concept of reasonableness is in play. That involves determining a reasonable range of costs, and finding whether the costs actually

charged fall within that range. Those decisions are based on the evidence as to prevailing costs in the relevant market, and the experience and expertise of the Tribunal in relation to those markets. It is an assessment of real costs.

47. No doubt it would be true that recovery of 79.1% could properly be described in the terms Mr Peachey used in relation to a costs order made against a losing party in litigation in a court. But that is a wholly different context. The sophisticated costs jurisdiction of the courts is entirely different. The purpose (or one of the purposes) of the jurisdiction is the control, for public policy reasons, of the costs that the court is prepared to order a losing party to pay to a winning party. The costs jurisdiction deliberately *controls* costs in the context of a costs order, the exercise of a coercive state power.

48. So we reject the contention of the Applicant that our determination represented an exceptionally high level of success.

49. Nonetheless, we did reject all of the principal arguments made by the Respondent in respect of the matter remitted, including the only argument truly directed at the reasonableness of the legal costs. And the sum we concluded was reasonable was a significant proportion of that claimed.

50. Accordingly, (and albeit on the basis of the broad balance of advantage, rather than an overwhelming victory), we conclude that we should not make a paragraph 5A order in respect of the costs before the FTT on the remitted matter.

Decision on application for orders under paragraph 5A

51. The Tribunal orders under Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A that 75% of the liability of the Respondent to pay an administration charge in respect of litigation costs as defined in that paragraph be extinguished in respect of the proceedings before the Tribunal resulting in the decision dated 7 February 2020.

52. The Tribunal makes no order under Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A in respect of the Respondent's lability to pay an administration charge in respect of litigation costs incurred in relation to the matter remitted to the Tribunal resulting in the decision dated 23 June 2022 or this decision.

Rights of appeal

53. We stated in our substantive decision dated 23 June 2022 that we would provide a separate decision in respect of the application under paragraph 5A.

54. 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 London regional office.

55. The application for permission to appeal must arrive at the office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

56. If the application is not made within the 28 day time limit, the 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 these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

57. The application for permission to appeal must identify the decision of the Tribunal to which it relates, 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.

Name: Tribunal Judge Professor Richard Percival **Date:** 29 November 2022