In the FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY) and in the COUNTY COURT AT Edmonton sitting at 10 Alfred Place, WC1E 7LR

Tribunal Case reference	**:**	**LON/00BJ/LSC/2021/0168**
County Court Claim Number	**:**	**F69YX307**
Property	**:**	**Flat 3, 155/163 Balham Hill, SW12 9DJ**
Applicant (Claimant)	**:**	**Crescent Trustees Limited**
Representative	**:**	**Mr Richard Davidoff (ABC Estates)**
Respondent (Defendant)	**:**	**Gholam Hossein Behjat**
Representative	**:**	**Mr Matthew Eastman (cILEX Advocate)** Instructed by SCS Law
Type of application	**:**	**Transfer from County Court**
Tribunal	**:**	**Deputy Regional/District Judge N Carr** **Mrs A Flynn MA MRICS**

Date of hearing	**:**	**5 December 2022**
Date of Liability Decision	**:**	**23 December 2023**
Date of Costs Decision	**:**	**29 March 2023**

DECISION AND REASONS: COSTS

The hand down date for this decision and the decision of 23 December 2023 is 29 March 2023

TRIBUNAL DECISION

1. **The Applicant's rule 13(1)(b) Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 application is refused.**

COUNTY COURT DECISION

2. **The Defendant must pay the Claimant's costs, assessed in sum of £910 (small claims track fixed costs).**

BACKGROUND AND ANALYSIS

1. By directions dated 23 December 2022, we provided the following directions to the parties to this case in respect of the costs of the proceedings, after sending to the parties the Tribunal and County Court decision of the same date:

   (A) By no later than **4pm on 20 January 2023**, the Claimant/Applicant must provide to the Tribunal office (administering the County Court claim) by email copied to the Defendant/Respondent:

   (i) Any submissions it relies on regarding the recoverability of costs, whether on the contractual or the small claims track basis (treating each in the alternative), and the reasons why the Claimant/Applicant should not be limited to the solicitors' costs stated on the Claim Form. The submissions should include reference to, and copies of, any caselaw relied on;

   (ii) full details of the costs being sought, including:

   - A schedule of the work undertaken;
   - The time spent;

- The grade of fee earner and his/her hourly rate;
- A copy of the terms of engagement of the Claimant/Applicant's solicitor
- Supporting invoices for the solicitor's fees and disbursements;
- Counsel's fee note(s) with counsel's year of call, details of the work undertaken and time spent by them, and his/her hourly rate.

(B) By no later than **4pm on 10 February 2023**, the Defendant/Respondent must provide to the Tribunal office (administering the County Court claim) by email copied to the Claimant/Applicant:

(i) any submissions on recoverability in response, including reference to, and copies of, any caselaw relied on;

(ii) any argument on which it relies in respect of the quantum of costs, in particular any sum that it says is not reasonably incurred or reasonable in amount, and any counter-offer it makes;

(C) By no later than **4pm on 17 February 2023**, the Claimant/Applicant may provide a short reply on the question of the quantum only of the costs, taking into account the Defendant/Respondent's arguments provided pursuant to (B)(ii) above.

2. By email of 20 January 2023, Mr Davidoff, Managing Agent with (and Director of) ABC Estates acting on behalf of the Claimant, sent the following email submissions on costs (reproduced in their entirety):

Submissions in respect of the recovery of costs

With reference to the bill of costs, you will note that all the charges including the grade of fee earner, time spent along with disbursements and incurred costs of counsel fees have been included.

With reference to the claim, PDC Law would seek to recover its costs on a contractual basis. To clarify, PDC Law on behalf of the client when preparing the claim, would have relied on section 146 notice in the lease. The fixed costs in CPR 45.37 to 45.38 should not apply to assessment of the Applicant recovering its legal costs in the Tribunal. This is in light of the Applicant's contractual right to recover costs in small claims track, and the authority for this is Chaplair Ltd v. Kumari [2015], a case concerned with a contractual right to costs on small claims track, but the principles of which should be equally applicable. Please see a copy of the relevant case authority and also, I would refer

you to paragraph 27.14.8 and 44.5.1 of The White Book, please see attached.

The bill does not include the client's administration charges of £340.00, PDC's administration fee of £250 and PDC Law's fixed costs in the claim form of £840.00. The Applicant can and do elect to recover these costs including administration costs pursuant to section 81(1)(a) of the Housing Act 1996 when seeking a determination, in their submissions to the Tribunal.

3. Accompanying that email were the following documents:

(a) Three invoices purportedly rendered by ABC Estates to the Claimant on 2 June 2022, 26 November 2022 and 30 November 2022, for 26 hours of Mr Davidoff's time at £250 plus VAT and 25 hours of a "Service Charge Accountant's" time at £150 plus VAT, allegedly for "court preparation and attendance", totalling **£12,900**;

(b) an Invoice for solicitors' fees, counsel's fees and court fee/disbursements from PDC Law in the sum of **£17,650**, said to be for 'all work carried out incidental to claim number F69YX307 up to 21 December 2022', breaking into £7850 plus VAT for solicitors' costs, £5,950 plus VAT for Counsel's fees, and £1,090 for court fees;

(c) a document labelled 'breakdown of bill of costs', in which can be identified 118 line items during the period 30 November 2019 to 5 December 2022 ('the line items';

(d) counsel's fee notes for e.g. drafting reply (6 February 2020), drafting witness statement (30 March 2020), which items also seem to appear on the line items in (b) (on 6 February 2020 and 14 May 2020 respectively), and in respect of which the fee notes do not add up to the sum on the invoice in (b) above said to be for counsel's fees (£5,950 plus VAT) as some of those sums are stated on the fee notes themselves as being zero rated for VAT. The totals also do not add up with the Client Disbursement Ledger provided;

(e) A copy of *Chaplair v Kumari* [2015] EWCA Civ 798 and extracts from the White Book at paragraphs 27.14.8 and 44.5.1.

4. It appears, then, that the Claimant purports to seek **£30,550** for costs in this small claim for service and administration charges in the sum of £7,566.22.

5. Mr Davidoff did not provide with his email the two statements of costs filed by PDC Law on 2 December 2022, one being for a hearing scheduled to take place in the County Court dated 7 August 2020 and the second being for the hearing before us on 5 December 2022, but I note that they had already been provided to the Defendant and the Tribunal/Court before the hearing on 5 December 2022.

6. There are no explanatory documents in the bundle or provided by Mr Davidoff showing what the hearing in the County Court on 7 August 2020 or what happened at it. The 7 August 2020 N260 shows that the matter was prepared all the way to small claims hearing in Edmonton on that date. None of the previous County Court orders was included in the bundle before us.

7. Those N260s, too, include what appears to be duplicate time spent on e.g. bundles and witness statements, both as against each other and internally. The grand total on the 2020 N260 is **£4,921.20** including VAT and disbursements, and on the 2022 N260 (including counsel's fees, disbursements and VAT) is **£8,877.20**. Plainly, they do not add up to the £17,650 asserted in the PDC Law the invoice provided. The sum of these costs schedules is **£13,798.40**.

8. As can be seen, Mr Davidoff made no submissions on the Claimant's contractual right of recovery of costs beyond PDC "*would have relied on section 146 notice in the lease*" on behalf of the Claimant/Applicant. His submissions do no more than merely assert that the costs can therefore be recovered by reference to *Chaplair v Kumari* and duplicate pages from the White Book. He took no opportunity to address the alternative bases on which a costs order might be made, despite the specific directions to do so. No references are made to the bundle of documents, which we have already observed is far longer than is necessary because it is so repetitive.

9. It appears that Mr Davidoff dis-instructed solicitors two days after the hearing in this case, and seeks (in his reply to the Respondent's submissions) the 'protection' of being a litigant in person, disavowing (in his reply) his failure to make the arguments. This is not the first, (or even the second) hearing in which I have heard Mr Davidoff make this submission. As observed in the hearing, Mr Davidoff is not unfamiliar in or with the Tribunal, and frequently conducts litigation before us without legal assistance on his own account or as the appointed representative of a party. We would not accept that he is as inexperienced as he purports, though of course we are mindful he is not a lawyer. We are satisfied that he is aware that he has to set out his whole argument when directed to do so.

10. We must inevitably turn to the pleaded case provided in the Particulars Claim. It relies on clause 3(13) of the lease.

11. As can be seen from the figures above, and the conflicting information provided, the paperwork provided for summary assessment of the quantum of any costs is woeful. As we had cause to observe in our decision on liability, that has been the case in preparation of the Claimant/Applicant's case as a whole.

12. On the other extreme, on behalf of the Defendant Mr Eastman (who insists on calling himself an attorney, though as the panel observed previously, Mr Eastman is a CILEX authorised advocate, and he does not

conduct this litigation, which is the job of his instructing solicitors) filed 13 pages of Respondent's Costs Submissions, which was prolix and unfocussed on the issues. For example, in it Mr Eastman took issue for the first time with whether the Claimant in fact has any legal or beneficial interest in the property. Plainly, it was far too late to do so, and frankly such a submission demonstrated again Mr Eastman's basic lack of familiarity with the area of leasehold law. To this was attached to a document entitled "*Attorney's (Litigator and Advocate) Certificate for Book of Authorities*". The document is a further six pages, presented in something akin to a scott schedule, in which the second column pastes in the legal provision relied on, and the final column is used for 'comments' that are, in reality, further submissions. The authorities identified in column two were then provided in a 'Respondent's Book of Authorities', running to a further 129 pages.

13. Amongst those authorities were included 2 articles from Nearly Legal, which Mr Eastman names as "persuasive academic authority" in his Certificate. With no disrespect to Mr Peaker, to whose blog I confess to being a subscriber, and who I strongly suspect would agree with me in this assessment, Nearly Legal blog posts are not academic authority. They are the thoughts and case analysis of a housing practitioner (unquestionably an experienced one), with no peer review or QA process. Moreover, those provided by Mr Eastman had no place in an 'authorities' bundle in which the Respondent was supposed to be making its submissions on costs recoverability – they were articles in which Nrearly Legal blogged about cases in which the Tribunal was found to have got double-hatting wrong, but were not relied on for any point of principle, save perhaps for a 'warning' not to get it wrong. I'm sure the Tribunals in question had no intention of getting it wrong, and neither do we.

14. It appears Mr Eastman thought all this was digestible in "55 minutes".

15. Of the matters raised, we have ascertained that the relevant ones are:

(a) there is no evidence of the landlord's intention to forfeit (assuming clause 3(12) is engaged – I reject Mr Eastman's argument that the Claimant is not capable of taking the benefit of the clause, which is, frankly, inchoate);

(b) Of Mr Davidoff's purported 'election' in respect of the sums of £340, £840 and £250 respectively: the Tribunal has already found the £340 reasonable and payable and the Judge already indicated that judgment will be given for it; the Applicant/Claimant cannot simply 'elect' to recover costs, expressed to be legal costs on a claim form, as administration charges and seek judgment for them in the way Mr Davidoff purports; there is no additional £250 for PDC's administration charges pleaded;

(c) Mr Davidoff's 'costs' are not costs caught by the clause, and in any event a wholesale duplication of the solicitors' work; and

(d) the costs recovered must be limited to small claim costs, there being no rule 13 application.

16. Amongst other things, Mr Eastman provided copies of *London Borough of Tower Hamlets v Khan* [2022] EWCA Civ 831 and *Kensquare Limited v Boakye* [2021] EWCA Civ 1725.

17. In Mr Davidoff's response dated 17 February 2023, he purported to introduce further evidence; first was a copy of an agreement between PDC and the Claimant, and second an email dated 29 March 2017 supported by a paragraph of evidence in the email response (para 6) that had not been in Mr Davidoff's witness statement or in the bundle.

18. The first should have been provided by Mr Davidoff as part of the costs directions prior to the Respondent's reply, and was not. The second was new evidence that was not in the bundle and that the Respondent had had no opportunity to cross examine him on. No permission was sought to rely on new evidence, and, as can be seen, as specifically fore the Claimant was not entitled to give any evidence in reply. Evidence was given live at the hearing on 5 December 2023, and I refused to permit the Claimant to rely on the additional evidence, both in the attachment and in his related submission at paragraph 6 of his email, by separate decision dated 21 February 2023. That decision has not been appealed.

19. In respect of the relevant matters raised by the Respondent's representative, Mr Davidoff's submissions are that:

(a) [Mr Davidoff did not identify any document in the bundle evincing the landlord's intention to forfeit. Mr Davidoff's fresh evidence on this was not permitted.]

(b) [No response]

(c) "*In respect of the challenge at Para 13 & Para 14 we contend that there is no duplication. Every time a matter arose / progressed our Director had to read the papers, and collate the data and draft a response. This was sent to the solicitors who in turn had to read it, seek clarification / raise queries, adjust as necessary and formulate a formal response to the other side or the FTT / Court. Both parties had to spend many man hours on this exercise. Our T's & C's with the client very clearly stipulate that we may charge an hourly rate on a "time spent" basis for any work carried out in connection with FTT or Court work as this is not included in the standard Management Fee for standard day to day management work. As such both ABC & PDC Law carried out work, both elements of which were required in order to achieve the win at the final hearing. Without ABC's input PDC Law would not have had the raw data to prepare and present a case, and without PDC Law's input ABC would have had to spend even more time dealing with the matter and given its serious nature the client correctly opted to instruct a solicitor to deal with the case on their behalf. The dates in question 02/06/22 & 26/11/22 are not the dates that ABC instructed PDC initially. They are the dates that we raised our invoices in respect of the*

work that is broken down within the respective invoices. No earlier invoices had been submitted for this work….
In respect of the "surveyor's" fees, there is no requirement for the "surveyor" to be a Chartered Surveyor. In the context of the lease the "surveyor" and "managing agent" is interchangeable as the person or party that provides the landlord with advice and deals with the day to day management of the building on their behalf and as such the ABC fees are clearly covered both in the signed T's & C's as well as the Lease."

The said agreement was not attached and was not in the bundle.

(d) *It is our contention that in any event the Defendant acted unreasonably. It became clear at the hearing that in fact the defendant was happy with the costs and knew they were payable, and was happy to pay them. Rather, he wanted to withhold payment and use that as a bargaining chip to secure a more favourable premium for his lease extension. As per the evidence, the Defendant asked both Jamie Hobbs & ABC and in each instance was advised that neither Jamie Hobbs nor ABC could deal with the request for a Lease extension and that he should formally apply to Crescent Trustees Ltd with a s42 application. It is unreasonable to hold a gun to the landlords head in this manner, and the claim should never have been dragged out, all the way to the substantive hearing, as the defence had no chance of success. It was only ever a bargaining point. There was never a genuine defence or even a misguided thought of a defence that was legitimately run at trial.*

EVIDENCE

20. In the hearing on 5 December 2022, the bundle contained letters from Property Debt Collection Limited (a related company to PDC Solicitors) at **[637 – 648]**. It will be recalled that these proceedings were commenced in June 2019. On 9 January 2019, Property Debt Collection Limited wrote to Mr Behjat with a letter of claim pursuant to the Pre Action Protocol for Debt Claims. It included the following words:

    "This debt is a priority debt and must be considered alongside you other priority debts such as council tax and mortgage repayments. You can risk losing your home by failing to make payment and our client is considering its options such as seeking possession of the premises. It is therefore vital you keep up to date with your Reserve Fund & Service Charge and remedy the breach of contract immediately."

21. A letter of 30 April 2019 (included in the bundle three times at **[640 – 648]** included the same sentence verbatim.

22. Mr Eastman cross examined Mr Davidoff about the intention to forfeit and these letters in particular. Our note of the evidence shows that Mr Davidoff responded thus:

"*We send PDC a template instruction letter to make sure they include the 146 notice so that we can ensure to recover costs on a contractual basis in all cases. Those are our instructions to them as the agent.*"

23. No evidence was provided, either written or oral, setting out either the Claimant/Applicant's instructions to ABC or to PDC Law, or its own intentions.

LAW

24. The County Court general rule is that costs follow the event. There is no reason to depart from the general rule in this case.

25. The basis of County Court costs assessment is section 51 of the Senior Courts Act 1981 and CPR 46.2, which states as follows:

> **Court's discretion as to costs**
> 44.2—(1) The court has discretion as to—
> (a) whether costs are payable by one party to another;
> (b) the amount of those costs; and
> (c) when they are to be paid.
> (2) If the court decides to make an order about costs—
> (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
> (b) the court may make a different order.
> (3) ....
> (4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including—
> (a) the conduct of all the parties;
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
> (5) The conduct of the parties includes—
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction— Pre-Action Conduct or any relevant pre-action protocol;
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.
> (6) The orders which the court may make under this rule include an order that a party must pay—
> (a) a proportion of another party's costs;
> (b) a stated amount in respect of another party's costs;
> (c) costs from or until a certain date only;
> (d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;
(f) costs relating only to a distinct part of the proceedings; and
(g) interest on costs from or until a certain date, including a date before judgment.

26. Assessment of costs on the small claims track in the County Court is usually by reference to a fixed costs regime, unless a Judge decides to exercise their discretion to order otherwise under CPR 46.2 (whether in order to give general effect to a contractual clause or for another reason within the Judge's exercise of discretion). Rule 27.14 of the Civil Procedure Rules sets out the fixed costs recoverable in respect of such a claim on the small claims track:

27.14
(2) The court may not order a party to pay a sum to another party in respect of that other party's costs, fees and expenses, including those relating to an appeal, except –
(a) the fixed costs attributable to issuing the claim which –
(i) are payable under Part 45; or
(ii) would be payable under Part 45 if that Part applied to the claim;
(b) in proceedings which included a claim for an injunction or an order for specific performance a sum not exceeding the amount specified in Practice Direction 27A for legal advice and assistance relating to that claim;
(c) any court fees paid by that other party;
(d) expenses which a party or witness has reasonably incurred in travelling to and from a hearing or in staying away from home for the purposes of attending a hearing;
(e) a sum not exceeding the amount specified in Practice Direction 27A for any loss of earnings or loss of leave by a party or witness due to attending a hearing or to staying away from home for the purposes of attending a hearing;
(f) a sum not exceeding the amount specified in Practice Direction 27A for an expert's fees;
(g) such further costs as the court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably…

27. In *Chaplair v Kumari* [2015] EWCA Civ 798, the Court of Appeal stated that a *"party's contractual right is highly relevant to the exercise by the court of its discretion and the court would in general give effect to his contractual right*".

28. First, the contractual entitlement must be established as a matter of contractual construction and of fact. In *Barrett v Robinson* [2014] UKUT 322, Deputy President Martin Rodger KC held that where a service charge is reserved as rent, a determination of the First Tier Tribunal is a pre-condition to the service of a section 146 Notice. The existence of a costs clause in the lease purporting to allow recovery of litigation costs associated with the service of the Notice is not, however, conclusive. There is a two-stage approach to be taken. The first question is whether the wording of the clause is, as a matter of construction, capable supporting the Landlord's right to recover costs incurred in the specific proceedings in which the right is being asserted. In proceedings in which the clause concerned was to "*pay all reasonable costs charges and expenses (including solicitors' costs and surveyors' fees) incurred by the Lessor in or in contemplation of any proceedings or the preparation of any notice under s.146 Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court*", His Honour Judge Rodger found that the first question is whether the proceedings are a precondition to the service of a section 146 Notice (whether they are will depend on the existence of a breach of covenant and the nature and circumstances of the proceedings). The second is the question, factually, whether the proceedings are brought in contemplation of service of a statutory notice. At paragraph 51:

    "*For costs to be recoverable under [*the clause*] a landlord must show that they were incurred in or in contemplation of proceedings… under section 146.*"

29. In *No1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2021] EWCA Civ 1119 the Court of Appeal approved this approach:

    "57. … *The words 'in contemplation of any proceedings' in [*the clause] *do in my view require an investigation into the landlord's state of mind at the time when the costs were incurred… [A] landlord who does not* in fact *contemplate the service of a statutory notice when expenditure is incurred, will not be able to rely on a clause* [such as that in the case] *as providing a right to recover its contractual costs.*"

30. In *Kensquare Limited v Boakye* [2021] EWCA Civ 1725 the Court of Appeal reiterated that, as was set out in *Arnold v Britton* [2015] UKSC 36, the court "*should not bring within the general words of a service charge clause anything which does not clearly belong there*".

31. In *London Borough of Tower Hamlets v Khan* [2022] EWCA Civ 831 the Court of Appeal also considered the position in respect of a contractual recovery clause. In that case, the clause provided as follows: "*To pay to the Lessors all costs charges and expenses including Solicitors' Counsels' and Surveyors' costs and fees at any time during the said term incurred by the Lessors in or in contemplation of any proceedings in respect of this Lease under Sections 146 and 147 of the Law of Property Act 1925 or any re-enactment or modification thereof including in particular all such costs charges and expenses of and*

incidental to the preparation and service of a notice under the said Sections… to be payable notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court".

32. Their lordships had cause to determine whether the proceedings before the Tribunal were "*incidental to the preparation and service"* of a section 146 notice. The decision was in the negative; so to hold would be "*a case of the tail wagging the dog*". Lord Justice Newey observed, at paragraph 45, that "*[i]t cannot be taken for granted from the fact that one clause has been held to allow, or not to allow, a landlord to recover a particular category of costs that the same will be true of a differently worded clause*". The earlier part of the clause - "*in contemplation of*"- had not been raised or argued in the Tribunal or the County Court at first instance, and consequently Tower Hamlets was not permitted to pursue the point on appeal – the hearings before the first instance Tribunal and Court, and the points of appeal to the Court of Appeal, were "*not a dress rehearsal but the first and last night of the show*" (para 54, citing *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5).

33. Second, *Chaplair* does not displace the County Court's costs discretion pursuant to section 51 of the Senior Court Act 1981 and rule 44; the contract is not a complete answer to the question. Section 51 and rule 44 are the basis of any County Court costs order, which order might (and will '*usually*', though does not have to) give effect to the contractual right, as is made clear in both *Chaplair* and *Ibrahim*, and in *Forcelux v Binnie* [2009] EWCA Civ 1077: "*the general principle is not a rule of law and it may well be that in a particular case, or even in a class of case, the court's discretion should be used to override the contractual right*" (para 12).

34. In so saying, their lordships expressly cited with approval the earlier case of *Church Commissioners v Ibrahim* [1997] EGLR 13, in which their lordships stated that: "*parties to litigation cannot tie the hands of the court on the question of costs by agreement whether that agreement is one made after the commencement of proceedings or in the contract, breach of the terms of which gives rise to the proceedings. The court's power to decide by whom costs should be paid could probably not be fettered by a prior contract between the parties to the effect that a successful litigant should have to pay costs to an unsuccessful litigant*."

35. Third, in the second part of the decision in *Khan,* the Court of Appeal resolved the tension between *Avon Ground Rents Ltd v Child* [2018] UKUT 204 (LC) and *John Romans Park Homes Ltd v Hancock*, 17 October 2019 (His Honour Judge Martin Rodger KC), unreported. It held that costs in the Tribunal after a County Court case is transferred were not County Court costs in the exercise of section 51, but costs to be considered under section 27 of the Tribunals, Courts and Enforcement Act 2007 as implemented in the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 ('the Rules'). This points to the fact that there are different considerations regarding contractual costs in the Tribunal.

36. Section 29 of the Tribunals, Courts and Enforcement Act 2007 states all costs of and incidental to proceedings before the Tribunal shall be in its discretion, the Tribunal having full power to determine by whom and to what extent the costs are payable.

37. In pursuit of this section, rule 13 of the Rules provides that:

> (1) The Tribunal may make an order in respect of costs only –
>
> (a) under section 29(4) of the 2007 Act (wasted costs)… [*or*]
>
> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –
>
> …
> (iii) a leasehold case.
> …

38. This particular case is a leasehold case for the purposes of rule 13(1)(b), by virtue of the transfer order from the County Court at Edmonton pursuant to section 176A(2) of the Commonhold and Leasehold Reform Act 2002. Were it not so transferred (i.e. it had originated in the Tribunal), it would nonetheless fall under (ii) "a residential property case".

39. In *Willow Court Management Limited v Alexander* [2016] UKUT 0290 (LC) at paragraph 28, the Upper Tribunal set out the threshold test for 'unreasonable conduct':

> "*At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged unreasonable, and the threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that stage it is essential for the tribunal to consider whether, in light of the unreasonable conduct it has found to be demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of the order should be.*"

40. In paragraph 20, the Upper Tribunal set out that the acid test, derived from *Ridehalgh v Horsefield* [1994] Ch 205 (itself dealing with wasted costs), is whether the conduct complained of permits of a reasonable explanation. In particular, *"…conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently*."

DECISION AND REASONS

(1) Tribunal decision on Mr Davidoff's 'election'

41. Mr Davidoff asserts in his email submissions of 20 January 2023 that he 'elects' to recover £340 administration charges of the Applicant, and PDC's administration fees of £250 and contractual costs on the claim form of £840 as *'administration costs pursuant to section 81(1)(a) of the Housing Act 1996'*.

42. Section 81 is not a recovery provision. It concerns the necessity of a formal determination that a service or administration charge is recoverable before action can be taken in forfeiture in respect of it.

43. If what Mr Davidoff is trying to assert is an intention to forfeit for these sums, and so to try to seek to rely on these sums as establishing that these proceedings are brought in contemplation of forfeiture, it is too late for him to give evidence.

44. Moreover, there is no claim on the Particulars for a separate £250 in connection with PDC's 'administration charges', nor has Mr Davidoff set out any basis for recovery of such a sum or a determination of it by the Tribunal. Any such determination is refused.

45. We have already given our decision in respect of the £340 sum, and (as Deputy District Judge) I have already set out I will enter judgment for it. On its own, that sum is not one that the Claimant/Applicant could exercise a right of forfeiture in respect of (section 167 of the Commonhold and Leasehold Reform Act 2002).

46. PDC Law's legal costs of £840 are pleaded in the Particulars in reliance on the contractual costs clause above. They stand or fall with the decision on whether the contractual clause in engaged in this case. Mr Davidoff sets out no legal basis on which he purports to elect for them to be treated differently (as 'administration charges'), and we refuse to do so.

(2) Tribunal decision on costs

47. It is unclear whether Mr Davidoff's paragraph in relation to the Respondent's conduct in his email of 17 February 2023 is intended to be a rule 13 application for costs in the Tribunal. In the context of it being a response to Mr Eastman's point that there is no costs shifting in the Tribunal, lacking a rule 13 application, and in light of *Khan*, we are prepared to treat it as such.

48. For the reasons set out in Deputy District Judge Carr's costs decision in the County Court below at paragraphs 70 - 78, and applying the test in *Willow Court* that aligns wholly with the County Court decision in *Dammermann v Lanyon Bowdler LLP* [2017] EWCA Civ 269 we agree and find that the conduct of the Respondent does not cross the threshold test for unreasonable conduct because the conduct complained of bears of a reasonable explanation, and we refuse to make an order pursuant to

rule 13(1)(b) of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013.

(3) County Court Decision on costs

Contractual recovery

49. As set out above, the Claimant's case relies on clause 3(13) of the lease, which states as follows:

> "*To pay all costs charges and expenses (including legal costs and fees payable to the Lessor's and/or Superior Lessor's surveyor) incurred by the Lessor and/or Superior Lessor in or in contemplation of any proceedings under section 146 and 147 of the Law of Property Act 1925 in respect of the Premises notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court …*"

50. It is presumably the second part of the clause ('*in contemplation* of') that the Claimant relies on, since we are not in forfeiture proceedings.

51. I have no evidence of the Claimant's contemplation. The landlord has taken no part in these proceedings on its own account.

52. I have no evidence of any instruction made by the Claimant to Mr Davidoff (or ABC more generally) that forfeiture proceedings are in contemplation or forfeiture is sought in this particular case.

53. I have no copy of any agreement between ABC and the Claimant that shows that Mr Davidoff is able to make such a decision of his own accord without the Claimant's direct instruction.

54. While I have reviewed the 'stock' paragraph from the three PDC letters at **[637 – 648]**, I doubt whether a paragraph that says, in effect, 'we are considering our options' is sufficient to express any such intention to forfeit or contemplation of forfeiture proceedings as the clause requires.

55. Even if I am wrong in that, I must further view that paragraph through the lens of Mr Davidoff's direct oral evidence that ABC has a standard instruction to PDC in "*all cases*" to insert a 'contemplation of forfeiture' paragraph, so that they "*can recover costs*". That is direct and express evidence of ABC's (or perhaps the landlord's – it is not possible to say on the evidence) intention to recover costs, not of contemplation of forfeiture. Moreover, it is direct and express evidence that there has been no turning of Mr Davidoff's mind (even if he is permitted to make such a decision of his own accord, absent evidence of direct instruction by the Claimant) of forfeiture in this *particular* case.

56. To take the benefit of the clause, is not enough simply that the clause might be engaged as a matter of contractual interpretation. As Judge Rodger said in *Barrett*, the second stage is the question, factually, whether the proceedings are brought in or in contemplation of forfeiture proceedings.

57. In this case, while the lease clause does not go so far as that in *Barrett* (it does not include any specific wording about preparation of a section 146 Notice), and it certainly does not go so far as the clause that their lordships were concerned with in *Khan*, I do consider that it is capable of supporting a claim for contractual costs in proceedings such as these, because they are a necessary precursor to proceedings for forfeiture (by reason of section 81 of the Housing Act 1996).

58. However, I find as a fact that the evidence I have been provided by Mr Davidoff amounts only to an intention to recover of costs in "any case" brought or run by ABC.

59. There is no other evidence before me demonstrating that the proceedings are brought by the Claimant in contemplation of forfeiture.

60. I therefore find that on the evidence, the contractual clause is not engaged in this case.

Statutory recovery

61. That being the case, and in light of *Khan*, the costs incurred in the County Court and the costs during the Tribunal part of the proceedings are, in effect, siloed. As Deputy District Judge, I must consider the costs in the proceedings up to the date of the transfer of the claim to the Tribunal.

62. Firstly, there seems to me no reason to depart from the principle that costs follow the event. The question to be answered is what is the quantum of those costs?

63. Having investigated caseman (neither party having provided any of the County Court orders in this case), I have identified that the dispute was allocated to the small claims track by order of Deputy District Judge Gillman by order promulgated on 13 December 2019 (there is no indication on it of the date it was made). That same order lists the small claims hearing to be heard on the 7 August 2020, ie the date associated with PDC's first N260.

64. On 6 August 2020 it is apparent that the Claimant wrote to the Tribunal seeking an adjournment (no copy of the letter is available). On the same day, District Judge Davies vacated the hearing on 7 August 2020 and stayed the claim until 6 September 2020, with a requirement that by 20 September 2020 the Claimant notify the court if any further hearing was required, failing which the claim would be struck out without further order.

65. It appears from caseman that no update was received until 2 October 2020. Nevertheless, on or around 15 October 2020 (the date the order was promulgated) District Judge Davies listed a directions hearing by telephone on 25 March 2021, "to identify the issues remaining in dispute and consider mode of trial".

66. It is on 25 March 2021 that the claim was transferred to the Tribunal by order of Deputy District Judge Repath-Stevens "*for a determination as to the recoverability and payability of the alleged arrears of £7,226.22 for reserve fund and remote [*sic*] charges*". It was only by Judge Redpath-Stevens' order that costs were reserved (the other orders being silent). No indication is given regarding why.

67. The cut off point for County Court costs is therefore 25 March 2021.

68. This is a simple debt claim which was allocated to the Small Claims track.

69. It will be noted that PDC Law inserted the fixed small claims commencement costs pursuant to CPR r.45.2(1)(a) (£100) in the appropriate box in the claim form.

70. Mr Davidoff says that I should consider that the Defendant behaved unreasonably in pursuing his Defence to trial. Though he does not say so, that is a factor that may be taken into account in considering whether a different or additional sum should be awarded from small claims fixed costs (CPR r.27.14(g)).

71. The Court of Appeal has most recently considered what 'unreasonable behaviour' is in *Dammermann v Lanyon Bowdler LLP* [2017] EWCA Civ 269 at para 30 *et seq*:

> 30. *We doubt if we can usefully give general guidance in relation to the circumstances in which it will be appropriate for a court to decide whether a party "has behaved unreasonably" since all such cases must be highly fact-sensitive. In the somewhat different context of the jurisdiction to order a party's legal (or other) representative to meet what are called "wasted costs" …defined as costs incurred "as a result of any improper, unreasonable or negligent act or omission" of such representative), the court speaking through Sir Thomas Bingham MR said:-*
>
> > *"… conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting in a practitioner's judgment, but it is not unreasonable," see Ridehalgh v Horsefield [1994] Ch 205, 232F.*
>
> *31. While we would not wish to incorporate all the learning about wasted costs orders into decisions under CPR Part 27.14 (2)(g), we think that the above dictum should give sufficient guidance on the word "unreasonably" to district judges and circuit judges dealing with cases allocated to the Small Claims Track. Ridehalgh was, of course,*

dealing with acts or omissions of legal representatives but the meaning of "unreasonably" cannot be different when applied to litigants in person in Small Claims cases. Litigants in person should not be in a better position than legal representatives but neither should they be in any worse position than such representatives.

32. The only other thing we can usefully add is that it would be unfortunate if litigants were too easily deterred from using the Small Claims Track by the risk of being held to have behaved unreasonably and thus rendering themselves liable for costs.

72. The test that *Dammermann* confirms is equivalent to the first stage of the test in *Willow Court Management Limited v Alexander* [2016] UKUT 0290 (LC) in the Tribunal, i.e. does the conduct complained of bear of a reasonable explanation? If the conduct complained of did not pass this test, I must then go on to consider the provisions of CPR r.46.2 in exercising my discretion as to costs for the purpose of r27.14(g).

73. I am satisfied that, despite Mr Davidoff's complaints about the conduct of Mr Behjat, his conduct does bear of a reasonable explanation.

74. Firstly, Mr Davidoff's interpretation of Mr Behjat's evidence in saying that he was "happy to pay" puts a gloss on that evidence. Mr Behjat stated that he *would* have been happy to pay, *had* the Claimant agreed to something else that he wanted (which he would not disclose), on a commercial basis – i.e. that although he continued to consider that the on account charges were neither a proper or a fair estimate, if he obtained a separate benefit to himself he would have paid them.

75. We found against Mr Behjat on this point (see Decision 23 December 2022 paragraph 50). That does not mean that it was not evidence on which he was entitled to rely, nor that there was no prospect of us taking a different view. The way he presented his evidence on the day of the hearing led to the outcome.

76. That one paragraph must also be put into the context of the criticisms of the Claimant's conduct of the litigation, in which it failed to disclose basic documentation that allowed the Tribunal, or Mr Behjat as the leaseholder, to see what works were anticipated to cost what money and so on (Decision 23 December 2022 paragraphs 28 – 33 apply). Where a party chooses to conduct litigation in such a way as the leaseholder is disabled from informing himself (or from his solicitors advising him) of the prospects of his case due to a lack of full and proper disclosure, then it can hardly be surprising that the case will only be resolved at trial.

77. Though we expressed our dissatisfaction at what appeared to be Mr Behjat's representatives' basic want of understanding on the difference

in recoverability of 'on account' and 'actual' service charges, the fact is that they lacked the core information on which the on-account service charges were calculated, despite the Claimant having nearly three years to provide it. I find that continuing to advance Mr Behjat's defence in those circumstances does bear of a reasonable explanation. As can be seen from the decision, Mr Behjat's case is unlikely to be the last word, since there are already serious deficiencies in the consultation process for the works that have been identified, and there remains no explanation of what works have or have not been done according to the 2017 specification for the money demanded. Furthermore, it was only at the hearing for the first time that the Defendant's attention was drawn to *23 Dollis Avenue (1998) Limited v Vajdani* [2016] UKUT 0365 (LC) or *Knapper v Francis* [2017] UKUT 3 (LC).

78. For all of those reasons, and to adopt Sir Bingham MR's words, "*the course adopted may be regarded as optimistic and as reflecting in [*Mr Behjat's or his legal advisor's*] judgment, but it is not unreasonable*".

79. That being the case, I consider that this is not a case in which there should be any additional assessment arising out of CPR r 27.14(g).

80. There appears to me no foundation in the fixed costs regime for PDC Law's costs on the claim form of £840. Neither is it explained where that sum comes from.

81. I then come to Mr Davidoff's, or ABC's, purported costs.

82. As I have already decided, the contractual clause in this case is not engaged. Therefore, Mr Davidoff is not able to rely on the clause for his purported costs.

83. There are, however, a number of additional observations that might be made.

84. Firstly, the Claimant appointed solicitors in this case. ABC's purported costs are simply not litigation costs properly so-characterised. He has not, up until two days after the hearing on 5 December 2022, conducted the litigation. What he did was stand in the shoes of his client as a witness in the case, being the individual (or the director of the company, at least) to whom the day-to-day management of the development was delegated by the Claimant. If the Claimant had engaged in this litigation themselves, they too would have been entitled to only such witness costs as the small claims track would permit, or such costs as the contractual clause supports. Mr Davidoff (and ABC) should not be in a better position than the person in whose shoes he stands, and the Defendant should not have additional costs visited on him because of this arrangement. There is no evidence provided in the bundle, nor was it asserted in oral evidence or with his submissions, to support his assertion that he has contracted for such 'fee' or 'costs' (in circumstances in which he asserts whatever 'services' he has provided

are not part of his management contract (which contract is, as already observed, also absent from evidence).

85. Further, early on in the proceedings I had to stop Mr Davidoff from trying to make submissions on case law while giving witness evidence, neatly demonstrating his misunderstanding of his role and that of the Claimant's legal representatives.

86. Secondly, on the information provided, it is impossible to ascertain when and what specific work was carried out to justify sums almost as high as those charged by the Solicitor in the two N260s combined, in this modest small claim.

87. Thirdly, in the circumstances of the paucity of evidence as recounted in the decision of 23 December 2022, I find Mr Davidoff's account of the time and research put into this case wholly incredible. As will be seen from paragraph 41 of that decision, we found that Mr Davidoff was unable to help us on many aspects of the case, which is not reflective of someone spending the hours claimed poring over the documents. It is evident from the document bundle itself that he was not the individual managing Mr Behjat's account at the material time. That was a that Mr Stuart Burchell, also naming himself the managing agent in the employ of ABC, having prepared the witness statement for the 7 August 2020 hearing. In the Decision of 23 December 2022 we already observed that Mr Davidoff may not have been the appropriate witness if he did not have personal knowledge of the events, and so charging to read another person's first-hand knowledge to put himself in position of primary witness is not, I find, reasonable. Moreover, his witness statement simply fails to deal with what is in his knowledge and what information has come to his attention through a case file or the designated managing agent's notes, to support any such 'reading in'.

88. Fourthly, if I am to go by the date on the 'invoices', all of the sums incurred were incurred after the transfer order. The Tribunal has made a finding that there has been no unreasonable conduct to engage its costs jurisdiction. I cannot bring the decision into my jurisdiction as a County Court Judge as the costs are siloed (*Khan*).

89. Additionally, there is no evidence of an unnamed 'service charge accountant' incurring the additional hours claimed. Property management requires the Claimant or his appointed managing agent to engage in proper accounting practices. No further such work ought to have been required in this particular case, and none is evident from the bundle or from oral evidence.

90. Finally, the sums claimed are unreasonable in amount and unreasonably incurred even if true, for all of the above reasons and those in the 23 December 2022 *passim*.

91. In the circumstances, I refuse in its entirety Mr Davidoff's claim for the £12,900 sought.

92. Having obtained the County Court orders from caseman as set out above, I also make no order for witness expenses on 7 August 2020, the hearing having been vacated at the request of the Claimant.

93. The Claimant also paid the trial fee in the County Court in the sum of £355. There appear from the costs schedule dated 7 August 2020 to be neither any additional court fees incurred, nor disbursements. I am aware, however, that there must have been at least one further application fee incurred, because PDC had a paralegal sign the Particulars of Claim instead of someone authorised to conduct litigation. Any such application fee connected with that is therefore refused, if it has not already been dealt with, as it was incurred solely through basic want of correct litigation practice on the part of the Claimant's solicitors, not through anything Mr Behjat did or omitted to do.

94. In the circumstances, and from the documents provided, I make the following costs award in favour of the Claimant in these proceedings:

Court fee (costs on the claim form):	£455
Commencement costs:	£100
Trial Fee:	£355
Total	**£910**

Conclusion

95. There being no section 20C Landlord and Tenant Act 1985 or para 5A of schedule 11 of the Commonhold and Leasehold Reform Act 2002 applications before us (or me), we (and I) cannot make any such order at this time, though it remains open to the Defendant/Respondent to make those applications to the appropriate Court/Tribunal.

Deputy Regional/District Judge N Carr

ANNEX - RIGHTS OF APPEAL

Appealing against the Tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional tribunal office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.
3. 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.
4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers
5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.

Appealing against the County Court written decision

1. A written application for permission must be made to the court at the Regional tribunal office which has been dealing with the case.
2. The date that the judgment is sent to the parties is the hand-down date.
3. From the date when the judgment is sent to the parties (the hand-down date), the consideration of any application for permission to appeal is hereby adjourned for 28 days.
4. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.
5. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers.
6. If an application is made for permission to appeal and that application is refused, and a party wants to pursue an appeal, then the time to do so will be extended and that party must file an Appellant's Notice at the appropriate County Court (not Tribunal) office within 14 days after the date the refusal of permission decision is sent to the parties.
7. Any application to stay the effect of the order must be made at the same time as the application for permission to appeal.

Appealing against the decisions of the tribunal and the County Court

In this case, both the above routes should be followed.