

General Form of Judgment or Order

In the County Court at Southend sitting in the Magistrates' Court, 80 Victoria Avenue, Southend SS2 6EU	
Claim Number	E4QZ3Y85
Date	25 September 2019

NOTTING HILL GENESIS	1st Claimant Ref
MR ALAN PEARSON	1st Defendant Ref

BEFORE Tribunal Judge J R Morris, sitting as a Judge of the County Court (District Judge)

UPON the claim having been transferred to the First-tier Tribunal for administration on 2nd October 2018 by order of District Judge Ashworth sitting at the County Court at Southend

AND UPON hearing Mrs Stephanie Lovegrove of counsel for the Claimant and the Defendant in person

AND UPON this order putting into effect the decisions of the First-tier Tribunal made at the same time

IT IS ORDERED THAT:

1. The Defendant shall pay to the Claimant by 1st November 2019 the sum of £7,508.81 being the sum found due and payable in respect of service charges, and £491.64 interest to the date of judgment;
2. The Defendant shall pay to the Claimant by 1st November 2019 the sum of £5,430.00 in respect of the Claimant's summarily assessed costs;
3. The reasons for the making of this Order are set out in the decision of the court dated 25 September 2019.

Dated: 25 September 2019



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &
IN THE COUNTY COURT AT SOUTHEND
sitting at the
Magistrates' Court,
80 Victoria Avenue,
Southend SS2 6EU**

Tribunal Case Reference: CAM/22UL/LSC/2019/0020
County Court Claim No.: E4QZ3Y85
Property : Flats 25, Lucam Lodge, The Garners,
Rochford, Essex SS4 1DS
Claimant/Applicant : Notting Hill Genesis
Defendant/Respondent: James Alan Pearson
Date of Transfer Order : 2nd October 2018
Judge : Judge JR Morris
Date of Hearing : 21st August 2019
Date of Decision : 25th September 2019

DECISION

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Decision

1. The First-tier Tribunal having determined the Service Charge claimed of £7,508.81 to be reasonable and payable it is ordered that the said service charge be paid by the Defendant/Respondent to the Claimant/Applicant by 1st November 2019.
2. The Defendant shall pay to the Claimant the sum of £491.64 by 1st November 2019 being interest at 5% calculated in the case of the service charge demands from 1st June 2018 to 25th September 2019 (the date of judgement).

3. The Defendant shall pay to the Claimant by 1st November 2019 the sum of £5,430.00 by way of legal costs under clause 3(2) and 3(7)(c) of the Lease.

Reasons

Application

4. This is an application by way of transfer from the County Court to the Tribunal of claim no. E4QZ3Y85 by an order dated 2nd October 2018 by District Judge Ashworth. The order required the Tribunal to make a determination as to the reasonableness and payability of service charges pursuant to section 27A of the Landlord and Tenant Act 1985.
5. The transfer is also of all the other issues which are payment of the Service Charge determined by the First-tier Tribunal together with interest, contractual costs, court fees and counsel's fees to be dealt with by the First-tier Tribunal Judge sitting alone pursuant to amendments made to the County Court Act 1984 by which judges of the First-tier Tribunal are now also judges of the County Court. This means that in a suitable case, the judge can also sit as a judge of the County Court and can decide issues that would otherwise have to be separately decided in the County Court and this might result in savings in time, costs and resources. These matters are dealt with in this written Decision and Reasons and attached Order.
6. Directions were issued on 22nd August 2019. The Claimant served its schedule of costs by 4pm on 28th August 2019 on the Defendant who served written objections by 4pm on 4th September 2019. The Claimant replied by 4pm on 11th September 2019.

The Lease

7. A copy Lease was provided for the Property. The Lease is dated 6th February 1989 and is for a term of 99 years from 25th March 1988.
8. The Lease is between Springboard Chelmer Housing Association Limited (Freehold Lessor although referred to in the Lease as the Association) (1) and Gwendoline Susanna Knight (the Tenant) (2). Springboard Chelmer Housing Association Limited was taken over by Genesis Housing Association Ltd in 2011 and Genesis Housing Association Ltd, together with three other Housing Associations, was amalgamated to form Notting Hill Genesis (the Claimant/Applicant) on 20th April 2011.
9. The Freehold Reversion of the Lease was assigned to Notting Hill Genesis in July 2018 as evidenced by the Official Copy of the Register, Title Number EX747706 provided. The Leasehold interest was assigned in November 2007 to James Alan Pearson (the Defendant) as evidenced by the Official Copy of the Register, Title Number EX556268.

10. The relevant provisions of the Lease with regard to the Service charge and costs are as follows:
11. Clause 3(2) specifies the service charge share to be one twenty sixth part. This has since been varied as from 15th August 2016 to 2%.
12. Clause 3(2) sets out the provision for payment of a service charge and states:

To pay to the Association without any deduction by way of further and additional rent 2% of the expenses and outgoings incurred by the Association in the repair and maintenance renewal and management of the Buildings and the estate the provision of services therein and the other heads of expenditure incurred by the Association in the performance of its covenants hereinafter contained including the fees of its Managing Agents and Accountants or other professional persons plus Value Added tax (if applicable) such further additional rent (hereinafter called the "service charge")

13. Clause 3(7)(a) states that the Tenant hereby covenants with the Association as follows:

To pay all expenses including solicitor's costs and surveyor's fees incurred by the Association incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 or incurred in contemplation of proceedings under sections 146 and 147 of that act notwithstanding in any case such forfeiture is avoided otherwise than be relief granted by the Court

14. Clause 3(7)(c) states that the Tenant hereby covenants with the Association as follows:

To pay all costs charges and expenses which may be incurred of the Association or its Managing Agents in connection with the recovery of arrears of the service charge Provision re sinking fund...

The Issues

15. The Claimant/Applicant's claim in the County Court was for arrears of service charges of £7,508.81 together with interest under section 69 of the County Court Act 1984 at the rate of 8% a year from 1st June 2018 to 22nd June 2016 of £36.30 and also interest at the same rate up to the date of judgement or earlier payment at a daily rate of £1.65.
16. At the hearing, Mrs Stephanie Lovegrove, Counsel for the Claimant, informed the Judge that the ground rent was not in issue and no administrative charges were being claimed.
17. The contractual costs claimed are £6,302.00 including VAT (Costs £5,852.00 plus VAT of £450.00).

Evidence and Decision

Service Charge

18. Following a hearing on 21st August 2019 at The Court House, Southend on Sea, the First-tier Tribunal determined the Service Charge claimed of £7,508.81 was reasonable and payable.
19. The Judge therefore orders the said service charge claimed be paid by the Defendant/Respondent to the Claimant/Applicant by 30th October 2019.

Interest

20. The Claimant claimed interest under section 69 County Courts Act 1984 on these sums at the rate of 8%.
21. At the hearing on 21st September 2019 the Judge pointed out that rates of interest had been low and the rate claimed did not reflect the current rate of interest.
22. Mrs Stephanie Lovegrove, Counsel for the Claimant in response submitted that the sums claimed had been outstanding for some time and the Claimant had had to continue to pay for the services from which the Defendant benefited notwithstanding the lack of income. She added that it was accepted that interest rates were low and requested a rate of 5%.
23. Mr Pearson, the Defendant also submitted that rates were low but reluctantly conceded a rate of 5%.
24. The Judge awards interest at the rate of 5% after balancing the arguments that: (a) interest rates have been generally low for many years, and (b) that the Claimant would have to continue to pay the costs incurred in respect of the service charge attributed to the Defendant notwithstanding the non-payment. In addition, the Judge considered the Claimant's reasons for non-payment could have been answered at an earlier stage if the Defendant had taken legal advice.
25. The interest awarded on £7,508.81 at the rate of 5% per annum up to the date of judgement is at a daily rate of £1.02 from the 1st June 2018 to 25th September 2019. The interest payable is therefore £491.64.

Costs

26. The Claimant provided a Statement of Costs for a summary assessment on form N260 in accordance with CPR PD44 9.5.
27. The Claimant's fee earner is Mr C Ashplant whose Grade A charge is £80.00 per hour. The Claimant's charges for attendances and the Defendant's counter to them are as follows:

	Claimant	Defendant
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	Time Hours	Amount £	Time Hours	Amount £
Attendances on Claimant				
Personal attendances	1.00	80.00	0.25	20.00
Letters out/emails	4.10	328.00	1.00	80.00
Attendances on Opponents				
Personal attendances	1.50	120.00	0.4	32.00
Letters out/emails	1.80	128.00	0.5	128.00
Attendances on Others				
Letters out/emails	1.60	128.00	0	0
Telephone	0.80	64.00	0	0
Total		848.00		260

28. The Claimant's charges for work done on documents and the Defendant's counter to them are as follows:

	Description of Work	Claimant's Submission		Defendant's Submission	
		Hours	£	Hours	£
1	Reviewing court papers	0.5	40.00	0.5	40.00
2	Reviewing further papers provide by client	1.0	80.00	1.0	80.00
3	Considering accounts	1.0	80.00	0	0
4	Considering 3 previous decisions	1.0	80.00	0	0
5	Considering Defendant's statement of case	1.0	80.00	1.0	80.00
6	Drafting Statement in reply	7.0	560.00	4.0	320.00
7	Collating documents to send with reply	1.0	80.00	0	0
8	Re-collating documents at D's request	0.5	40.00	0	0
9	Drafting statements	8.0	640.00	4.0	320.00
10	Considering further documents	0.3	24.00	0	0
11	Preparing bundles	4.0	360.00	0	0
12	Drafting instructions	1.0	80.00	1.0	80.00
	Total		2,144.00		840.00

Defendant's Case

29. The Defendant submitted that the Claimant's claim for costs should be dismissed because the Claimant had acted unreasonably in that:
- a) It failed to deal with matters over many years and to answer points raised by the Defendant as to reasonableness of the service charges.

- b) It failed to enter into meaningful discussions with the Defendant and explain the “internal correction mechanism” which seriously discriminated against the Defendant.
 - c) The matter had been exaggerated by changes of staff within the Claimant’s organisation
 - d) The Management Fees and Salaries cover their internal overheads and arrears mechanisms.
30. With regard to the attendances the Defendant submitted that they covered 4 cases with which the parties were engaged and that only a quarter of the costs should be attributed to this claim.
31. With regard to the Letters out and emails the Defendant said that this duplicated the Schedule of work and that there were only a limited number of short emails. The Defendant could not see why “attendances on others” was necessary at all.
32. The Defendant submitted in respect of the Schedule of Work on Documents as follows:
- 3. The amounts in the accounts had to be re-worked as they were not clear, no charge is reasonable;
 - 4. The in-house team should have been aware of the 3 previous decisions without having to consider them for this case, no charge is reasonable;
 - 6. The time taken of 7 hours in drafting a reply is excessive and 4 is reasonable;
 - 7. The collating of documents is an administrative matter; no charge is reasonable;
 - 8. Re-collating documents at Defendant’s request was necessary because the bundle of papers was received damaged and incomplete because insufficient postage had been paid, no charge is reasonable;
 - 9. Neither of the witnesses worked for the Claimant at a time relevant to the dispute. The time taken appears to duplicate item 6 and is excessive. The time should be halved to 4 hours.
 - 10. The Defendant is not aware of any other documents considered; no charge is reasonable.
 - 11. The preparation of bundles is an administrative cost; no charge is reasonable.
33. The Defendant questioned whether the Claimant was entitled to charge VAT.

Claimant's Case

34. Mrs Lovegrove, Counsel for the Claimant, stated that the Court has a discretion whether to order one party to pay the other's costs, over the amount of these costs and when they are to be paid (CPR r 44.2(1). Where the court decides to make a costs order, the general rule is that the unsuccessful party will be ordered to pay those of the successful party CPR r 44.2(2)(a).
35. She referred to *Chaplain Ltd v Kumari* [2015] EWCA Civ 798 in which it was held that as a general rule, a County Court Judge has power to make an award of costs in favour of a landlord in proceedings for rent or service charge arrears brought under the small claims track where the terms of the lease allowed for recovery of the costs of legal proceedings against the tenant.
36. Counsel submitted that the Claimant had a contractual entitlement to recover its costs under clauses 3(7)(a) and (c) of the Lease in connection with the recovery of arrears of service charge, regardless of the outcome of the claim. Therefore, it is entitled as a matter of contract to recover all the costs incurred in the proceedings on an indemnity basis. The claim for costs was justified.
37. The Defendant's reasons for dismissing the claim for costs are merely a re-run of the arguments the Defendant put forward in respect of the claim in the proceedings before the Tribunal. The reference to the "internal correction mechanism" is not relevant to the claim for arrears, which is that the Defendant has failed to pay any service charges since July 2015, when his defence would have only have amounted to a nominal reduction if successful.
38. The Claimant denies that it has acted unreasonably. The reference to the 2011 tribunal decision is irrelevant as that tribunal could not have altered the apportionment which was not varied until 2016.
39. The Claimant has made efforts to settle the matter, reference was made to correspondence on pages 89 to 96 of the Bundle to which the Defendant made no reply. Two 'before action' letters were sent on 7th and 23rd March 2019 to which no reply was received. Following receipt of the vague defence there was a without prejudice meeting on 21st May 2019 without resolution, the Defendant persisting in his defence which did not address the whole of the arrears outstanding.
40. The current staff are aware of the matters raised by the Defendant and were able to provide cogent evidence without having the opportunity to refer to contemporaneous notes because the specific issues raised by the Defendant at the hearing on 21st September 2019 were not included in the defence.
41. With regard to the Attendances, Counsel for the Claimant said that the claim for costs only relates to the arrears of service charge in respect of 25

Lucam Lodge and no other case. There was no duplication of work between the letters and emails and the schedule relating to the work on documents.

42. The attendances on others includes corresponding with the court, the tribunal and counsel, essentially any person not a party.
43. With regard to the objections raised by the Defendant to the schedule of work done on documents, counsel said that the main reason for the quantity of work done was due of the vagueness of the Defendant's pleaded case in the County Court assisted only marginally by the statement of case in the Tribunal proceedings. The reply to the specific points was as follows:
 3. The re-working was the product of the Defendant's lack of understanding rather than the account being misleading. Such running accounts are commonplace in social housing.
 4. In house advisors would be acting negligently not to re-read determinations dating back several years.
 6. The time recorded is accurate but the Claimant will accept 5 hours.
 7. Collating documents to send with the drafted reply was directed by the Tribunal. The work would not have been done as quickly by a lay person. The cost is recoverable under the Lease irrespective of whether it is administrative or legal task.
 8. The incorrect postage is conceded. The claimant is content that the amount is zero.
 9. The witnesses who attended were in the best position to give evidence regarding the period of the arrears. The witness evidence took longer to prepare as a result of the need for them to familiarise themselves with the Defendant's case going back several years. The Claimant is nevertheless willing to accept 6 hours for this work.
 10. The claimant provided its legal advisor with additional pages relating to the accounts. There was no duplication.
 11. The preparation of the Bundle was ordered by the Tribunal.
44. Vat is payable on Counsel's Fees.

Decision

45. The first issue is whether to award some or all of the costs. The second issue is the qualification of such costs as are awarded. The Judge applied the presumption in CPR 44.2 of the Civil Procedure Rules, namely that the general rule is that the unsuccessful party will be ordered to pay the

costs of the successful party. In making this decision the judge referred to:

Barnes v Time Talk (UK) Ltd [2003] EWCA Civ 402

In deciding who is the successful party the most important thing is to identify the party who is to pay money to the other. That is the surest indication of success and failure [28]

Day v Day [2006] EWCA Civ 415

In a case like this, the question of who is the unsuccessful party can easily be determined by deciding who has to write the cheque at the end of the case.

46. The Judge recognised that this is a rebuttable presumption and the order for the payment of costs of proceedings by one party to another is always discretionary but where there is a contractual right, the discretion should be exercised so as to reflect that right, *Church Commissioners v Ibrahim* [1997] EGLR 13 [35] however the contractual rights do not displace that discretion.
47. This was endorsed in *Chaplain Ltd v Kumari* [2015] EWCA Civ 798 which stated that the costs awarded pursuant to s 51 Senior Courts Act 1981 can include the costs of the First-tier Tribunal proceedings and that the contractual provision displaces the provisions of CPR r 27.14 which limit the costs in the Small Claims Track.
48. The Judge firstly finds that the Defendant is the unsuccessful party. The Judge then considered the wording of clause 3(2) and found that it related to the recovery of *the fees of its Managing Agents and Accountants or other professional persons* through the service charge and did not create a personal liability of a tenant for legal costs. Clause 3(7)(a) related to the recovery of legal costs incurred in the proceedings and service of a section 146 Notice which was not the case here. However, clause 3(7)(c) does create a personal liability for legal costs against a tenant and gives the landlord a contractual entitlement (on an indemnity basis) to its costs in taking proceedings to recover service charges. Having identified the unsuccessful party and having found the provisions of the Lease give the landlord an entitlement to costs and not having found any reason to rebut the presumption as to the liability of the unsuccessful party, the Judge went on to assess the amount of the costs.
49. The costs are assessed in accordance with CPR 44.3, 44.4 and 44.5. The proportionality test does not apply. Costs which have been unreasonably incurred or which are unreasonable in amount will not be allowed. However, there is a rebuttable presumption that costs have been reasonably incurred and that they are reasonable in amount. In assessing the costs, all the circumstances have to be taken into account, particularly those in CPR 44.4(3)
50. The Judge found the hourly rate of £80.00 to be reasonable. The Judge found the following to be reasonably incurred and in amount:

Attendances on the Claimant,
 Attendances on the Opposition/Defendant,
 Letters out and emails to the Opposition/Defendant,
 Letters out and emails to others,
 Telephone to others.

51. However, the time taken with regard to emails to the Claimant was not found to be reasonable. The time taken was so significantly more than any other recorded attendance, letter out/email or telephone communication that it was likely that emails of little or no significance were being included. Therefore, the Judge reduced the amount to 2.00 hours, £160.00, which is more in line with the other attendances.
52. The reasonable costs for this are therefore:

	Claimant		Judge's Decision	
	Time Hours	Amount £	Time Hours	Amount £
Attendances on Claimant				
Personal attendances	1.00	80.00	1.00	80.00
Letters out/emails	4.10	328.00	2.00	160.00
Attendances on Opponents				
Personal attendances	1.50	120.00	1.50	120.00
Letters out/emails	1.80	128.00	1.80	128.00
Attendances on Others				
Letters out/emails	1.60	128.00	1.60	128.00
Telephone	0.80	64.00	0.80	64.00
Total		848.00		680.00

53. The Judge found that neither the consideration of the accounts nor the consideration of the three previous decisions to be reasonably incurred costs (Items 3 and 4).
54. The Claimant will already have determined that the Defendant is in arrears and this should be apparent from the accounts without special consideration. The accounts should be sufficiently clear without having to transcribe the information into another format because the Defendant is in arrears. Notwithstanding that the running account is common with regard to social housing the service charge should always be available in an easy to understand format for leaseholders.
55. Where the consideration of the past cases is pertinent to the current proceedings the Judge is of the opinion that this work should be included in the consideration of the Defendant's case and drafting of the reply.
56. The Judge accepts the reduced amount for drafting the reply to the Defendant's case on the basis that it takes into account any time needed to consider the past cases and the collating of documents to send with the

reply. There are only four issues to be dealt with in the reply. Also, three of the eight pages of the reply are the clauses of the Lease that were amended, making it a less substantial document than might at first appear. The additional time allowed for collating was not considered to be reasonable as the total time of 6 hours for considering the statement of case and drafting the reply should be sufficient to look at the cases and collate the documents (Items 6 and 7).

57. Item 8 is withdrawn.
58. The Judge found that Ms Ozgen's statement was brief and although important in confirming evidence, should not have taken as much as an hour to prepare. Ms Wright's statement is an altogether more substantial document and much more informative. The Judge considers that a time of 5 hours for both witness statements is reasonable. (Item 9).
59. The documents having been drafted, the consideration of further documents, if pertinent and warranting inclusion in the Bundle, should be included in that item (Item 10).
60. Certain items might be considered to be administrative tasks, the cost of which is included within the hourly rate. Item 11 is not one of these tasks but is required by the Tribunal Directions and is determined to be reasonable.
61. The reasonable costs for this are therefore:

	Description of Work	Claimant's Submission		Judge's Decision	
		Hours	£	Hours	£
1	Reviewing court papers	0.5	40.00	0.5	40.00
2	Reviewing further papers provide by client	1.0	80.00	1.0	80.00
3	Considering accounts	1.0	80.00	0	0
4	Considering 3 previous decisions	1.0	80.00	0	0
5	Considering Defendant's statement of case	1.0	80.00	1.0	80.00
6	Drafting Statement in reply - reduced by Claimant	5.0	400.00	5.0	400.00
7	Collating documents to send with reply	1.0	80.00	0	0
8	Re-collating documents at D's request – conceded by Claimant	0	0	0	0
9	Drafting statements - reduced by Claimant	6.0	480.00	5.0	400.00
10	Considering further documents	0.3	24.00	0	0
11	Preparing bundles	4.0	360.00	4.0	360.00

12	Drafting instructions	1.0	80.00	1.0	80.00
	Total		1,784.00		1,440.00

62. The combined cost of attendances and document work determined to be reasonable is £2,120.00 (£680.00 plus £1,440.00).
63. The total amount payable for costs is therefore:

Attendances	£680.00
Work on Documents	£1,440.00
Counsel's Fees	£2,700.00 (£2,250.00 plus £450.00 VAT @ 20%)
Court Fees	£610.00
Total	£5,430.00

64. Accordingly, the Court finds that the sum of £5,430.00 is payable in respect of costs.

Judge JR Morris

ANNEX 1 - RIGHTS OF APPEAL

1. An application for permission to appeal may be made to the Tribunal Judge who dealt with the case or to an appeal judge in the County Court.
2. A Notice of Appeal must in any event be lodged within 21 days of the date of the decision against which you wish to appeal.
3. Further information can be found at the County Court Offices (not the Tribunal Offices) or on-line.

Note: Appeals relating to the Tribunal Decision are to the Regional Office of the Tribunal and appeals relating to the County Court Decision are to the County Court Offices or on-line. They are separate routes of appeal.