



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &
IN THE COUNTY COURTS at
WALSALL & TELFORD sitting at
Telford Magistrates Court, Telford
Square, Malinsgate, Telford TF3 4HX**

Tribunal References : **BIR/00GF/LIS/2018/0067 &
BIR/00GF/LIS/2018/0069**

Court claim numbers : **E7Qz2K8P (County Court at Walsall)
& E7QZ5K1P (County Court at Telford)**

Properties : **168 Burford, Telford, TF3 1LW &
169 Burford, Telford, TF3 1LW**

Applicant/Claimant : **York Montague Limited**

Representative : **Chandler Harris solicitors**

**First Respondent/
First Defendant** : **Rightlet Limited**

**Second Respondent/
Second Defendant** : **Metro Home Limited**

Tribunal Members : **Judge Gandham
Mrs S Hopkins MRICS**

In the County Court : **Judge Gandham (sitting as a Judge of
the County Court [District Judge])**

Date of Decision : **21st June 2019**

DECISION

Summary of the decisions made by the First-Tier Tribunal

1. The following sums are payable by Rightlet Limited to York Montague Limited by 5th July 2019:

(i) Service charges: £850.00; and

(ii) Administration charge: £75.00

The following sums are payable by Metro Home Limited to York Montague Limited by 5th July 2019:

(iii) Service charges: £850.00; and

(iv) Administration charge: £75.00

Summary of the decisions made by the County Court in respect of 168 Burford Road - Rightlet Limited

(v) Costs of £937.50 inclusive of VAT, counsel's fees and court fees; and

(vi) Interest at 3.5% calculated on the service charge demand from 1st April 2018 to the date of judgment: £36.43

Summary of the decisions made by the County Court in respect of 169 Burford Road - Metro Home Limited

(vii) Ground rent: £10.00; and

(viii) Costs of £937.50 inclusive of VAT, counsel's fees and court fees; and

(ix) Interest at 3.5% calculated, both in the case of service charge demand and in the case of ground rent demand, from 1st April 2018 to the date of judgment: £36.86

Introduction

2. York Montague Limited ('the Applicant') issued proceedings in the County Court Business Centre against Rightlet Limited ('the First Respondent'), under claim number E7Qz2k8P, and against the Metro Home Limited ('the Second Respondent'), under claim number E7Qz5K1P. The First Respondent and the Second Respondent ('the Respondents') each filed a Defence and Counterclaim, in response to which the Applicant filed and served a Response to Defence and Defence to Counterclaim. Both sets of proceedings were then transferred to the County Court at Manchester.

3. The proceedings against the First Respondent were transferred to the County Court at Walsall and then to this Tribunal by the order of District Judge Thomas dated 10th October 2018. The proceedings against the Second Respondent were transferred to the County Court at Telford and then to this Tribunal by the order of District Judge Etherington dated 23rd October 2018.
4. The claim against each of the Respondents in the County Court comprised of the following:
 - (i) a service charge amounting to £2,132.91;
 - (ii) a demand for ground rent arrears, in the sum of £17.26;
 - (iii) interest on arrears of service charges and ground rent; and
 - (iv) administration fees of £75.00 and costs of the action.
5. The orders transferring issues to the Tribunal were in very wide terms, simply stating that the claims were to be transferred to the First-Tier Tribunal (Property Chamber).
6. The Applicant is the freehold owner of both 168 Burford, Telford, TF3 1LW and 169 Burford, Telford, TF3 1LW ('the Properties') and KDG Property Limited ('KDG') are the managing agents of the Properties. The First Respondent is the lessee of 168 Burford Road, Telford, TF3 1LW, under a lease dated 19th October 2016, made between it and The Wrekin Housing Trust Limited, for a term of 99 years from 19th October 2016. The Second Respondent is the lessee of 169 Burford Road, Telford, TF3 1LW, under a lease dated 21st January 2015, made between it and The Wrekin Housing Trust Limited, for a term of 99 years from 21st January 2015.
7. The leases of each of the Properties, require the lessor to provide services and for the lessee to contribute towards their costs by way a variable service charge. The services are detailed in Schedule 6 to each of the leases.
8. The Tribunal issued directions on 11th December 2018. The Applicant forwarded a Statement of Case in relation to each matter and confirmed that they purchased the freehold interest in the Properties in December 2017. They stated that the service charge that they were claiming against each of the Respondents comprised of £1,027.91 in service charge arrears at handover of their completion of the purchase of the freehold interest, with the remaining sum of £1,105.00 being the service charge they had demanded from each of the Respondents on 20th April 2018. They confirmed, in their Statements of Case, that they would no longer be pursuing the service charges arrears at handover, of £1,027.91, against either of the Respondents, but would still be proceeding with the claim for the remaining service charge, the outstanding rent arrears (including sums of £7.26 due on handover), the administration fees, the legal costs and any interest.
9. An inspection was arranged to take place on 27th March 2019 with a hearing to take place on 27th and 28th March 2019.

10. All First-tier Tribunal (“FTT”) judges are now judges of the County Court. Accordingly, where FTT judges sit in the capacity as judges of the County Court, they have jurisdiction to determine issues relating to ground rent, interest or costs, that would normally not be dealt with by the tribunal.
11. The Tribunal confirmed to the parties in the Directions Order that the two cases would be consolidated and heard together and that all the issues in the proceedings would be decided by a combination of the FTT and the Tribunal Judge member of the FTT sitting as a Judge of the County Court.
12. Accordingly, Judge Gandham presided over both parts of the hearing, which has resolved all matters before both the tribunal and the court.
13. This decision will act as both the reasons for the Tribunal decision and the reasoned judgment of the County Court.

Inspection

14. The Tribunal inspected the Properties on 27th March 2019 in the presence of Mr Sakol Tobwongsri (the Property Services Officer at KDG), Mr Andrew Kelleher (a director at KDG and York Montague Limited), Mr Chris Green (an agent for the Applicant’s Representative), Mr Baljit Singh (a director at Rightlet Limited) and Mr Karpal Singh (a director at Metro Home Limited).
15. The Properties are situate in a residential area within Telford known as Brookside, in a block comprising six properties - 164, 165, 166, 167, 168 and 169 Burford (‘the Building’). There is a small, grassed area fronting the Building, with a pathway leading to the front communal entrance. At the rear of the Building is a shared cycle and bin store. A communal car park is located at the front of the Building, accessed directly from Burford, there are no spaces allocated and the parking is used in common with other nearby apartments and houses.
16. The Properties, which are both apartments, are located on the second floor of the Building. The Building contains a communal lobby and staircase, from which all of the properties located within the Building are accessed. There are entrance doors to both front and rear on the ground floor. Access is restricted to the Building with an electronic door entry system to the front and an electronic fob to the rear door, which leads to the refuse store.
17. The staircase has three landings. No lift is installed. The stairwell is constructed with double glazed windows on each landing. The stair compartment and landings are all tiled. Emergency lighting was installed but there was no fire detection or audible fire alarm system.
18. The Building was in an average condition and state of repair when considered against the condition of other similar blocks of apartments on the Brookside Housing Estate.

19. The Tribunal, at the time of inspection, noted some areas of loose plasterwork on the landing ceiling and the mechanism on a landing window was damaged and did not operate to be able to open it. Cables from the roof were not fixed and hung loosely over the rear porch and were visible from the rear of the Building. The Tribunal, also, saw a large amount of refuse had been deposited upon the rear porch - a flat roof covering over the rear door; the refuse had been deposited from the rear first floor landing upward. There was also fly tipping of assorted items of domestic furniture at the front of the Building, immediately adjacent to the front door.

The Lease

20. Schedule 6 to each of the leases details the services that the lessor will use “reasonable endeavours” to provide. Paragraph 1.2 of Schedule 6 states:

“1.2 The Services are:

(a) The repair, decoration, improvement, maintenance, renewal, replacement and rebuilding of the Retained Property (including the Conduits and Plant that form part of the Retained Property), including painting the exterior of the Building as often as we consider necessary;

(b) paying the Outgoings in relation to any caretaker’s flat;

(c) the cleaning and lighting of the Common Parts;

(d) the provision of heating and hot water to the Building Common Parts;

(e) the provision and maintenance of equipment (if any) relating to fire at the Building;

(f) the provision and maintenance of reasonable facilities for rubbish disposal;

(g) the provision and maintenance of a suitable entryphone system;

(h) the provision and maintenance of a lift (if applicable)

(i) the provision and maintenance of a communal television aerial or aerials serving the Building;

(j) complying with all of our obligations in relation to insurance under this Lease;

(k) the provision of any other services and the carrying out of any other works (including improvements) which we may, from time to

time, consider necessary or desirable for the proper maintenance, safety, enjoyment or administration of the Building.”

21. In the Lease, the “*Building*” has the same definition as in this decision (referring to the six properties comprising the Building - 164 to 169 Burford); the “*Retained Property*” is defined as all parts of the Building except any parts which have been individually leased - such as the Properties, and includes the “*Common Parts*”; and the “*Common Parts*” is defined as all parts of the Building provided for the common use of more than one of the lessees including, but not limited to, the staircase, landings, walls, roads, accessways, paths and bin stores.
22. There is no caretaker’s flat and no lift at the Building, so paragraphs 1.2 (b) and (h) are not applicable.
23. Both leases define the service charge as being a fair proportion of the “*Service Costs*”, together with any reasonable flat rate charge in relation to the costs incidental to the management of the Building. The “*Service Costs*” are defined in both leases as all costs reasonably incurred by the lessor in the “*running and management of the Building and the provision of works and services to it*”.

The issues & decisions (FTT)

Service charges

Applicant’s submissions

24. Mr Green, on behalf the Applicant, stated that the service charge requested was an estimated service charge, and that such a charge was payable under the provisions of the leases. He confirmed that the budget was based on the service charge demand that had been charged by the previous lessor, 365 Asset Management Ltd, from whom the Applicant had purchased the freehold of the Properties. Mr Green stated that all items detailed on the Service Charge Budget were recoverable under the provisions of the leases and that the costs that had been estimated were reasonable.
25. Mr Green confirmed that an Asbestos Survey and Health, Safety & Fire Risk Assessment had now been carried out in respect of the Building and that the actual costs had been slightly more than the estimated costs, indicating to the Tribunal that the estimates had been reasonable.
26. In relation to the figure detailed for “*Refuse collection*”, he referred to the fact that there was a general problem in relation to fly tipping in the area, which was clearly visible on the inspection. He also stated that the inspection showed that there were some repairs required to the Building, in particular in relation to the plasterwork to the ceiling.

27. In relation to the item referred to as “*Security*”, he stated that this related to any repairs to door locks.
28. In relation to the communal electricity, Mr Green stated that the Applicant had had to investigate who supplied the electricity to the common areas and how any bills were calculated, as this had not been clear on their purchase.
29. In relation to the sum requested for the “*Estate Gardening*”, Mr Green confirmed that The Wrekin Housing Trust dealt with the maintenance of the same and that they had provided a quote for the year 2018 to 2019; however, this quote had not been supplied until after the Applicant had issued the service charge demand to the Respondents.

Respondents’ submissions

30. The Respondents stated that the Applicants purchased the freehold of the Properties from 365 Asset Management Ltd, who in turn had purchased it from The Wrekin Housing Trust in July 2017. They stated that since the transfer from The Wrekin Housing Trust the service charges had increased by 250% and that they believed that the increase was unrealistic and unreasonable.
31. The Respondents provided, within their Statement of Case, details of service charges levied for other, very similar blocks of apartments in the locality of Brookside. These included a copy of the previous service charge accounts for 164 Burford and 167 Burford, from The Wrekin Housing Trust, together with copy budgets for properties managed by the Second Respondent.
32. The Respondents stated that there should be no charge for the “*TV Aerial*”, as no faults had been reported with the same, and no separate charge for “*Security*”. They also did not believe that there should have been a charge for “*Refuse collection*”, as The Wrekin Housing Trust had historically undertaken to do this task and had just informed them if items of rubbish needed to be removed so that they could arrange for the removal themselves.
33. Regarding the “*Estate Gardening*” they stated that the Applicant could have easily found out the information regarding the cost of the same from The Wrekin Housing Trust as they had been always dealt with the estate and grounds maintenance. This cost could have then been passed on to the lessees in the budget.
34. The Respondents confirmed that they had not sought out any alternative quotes in their written submissions for the cost of an Asbestos Survey or Health and Safety Assessment & the Fire Risk Assessment; however, they stated that any other costs referred to in the Service Charge Budget were excessive and unreasonable, especially when taking in to account the costs

that had generally been charged by the previous freeholders, The Wrekin Housing Trust.

The Tribunal's Deliberations and Determinations

35. The Tribunal considered all the written and oral evidence submitted. The Tribunal noted that the service charge requested was an estimated service charge and that such a charge could be demanded under the provisions of the leases.
36. In cases relating to estimated charges, the Tribunal needs to determine under section 19(2) of the Act, whether the estimated contribution requested by the Respondent exceeded a figure which would reasonably be payable under the provisions of the leases. The Tribunal is not concerned as to whether any actual service costs have been reasonably incurred, as this could only be queried after the actual service charge statement had been produced.
37. The Tribunal did not consider that the Applicant should have had to have regard to any historical service charge statements produced by The Wrekin Housing Trust and believed that the method used by the Applicant for the calculation of the service charge budget to be a reasonable approach.
38. Having considered the service charge budget provided, the Tribunal considered that the Applicant's description of the item referred to as "*Security*" fell within general repairs. In addition, the Tribunal considered that the budgeted amount on account for repairs and maintenance to be excessive, considering that the Building was in an average state of repair as noted by the Tribunal at the time of inspection.
39. The Tribunal also considered the sum payable in relation to the television aerial to be unreasonable. The aerial was not newly installed, and had been in place for some time and, at the inspection, there was no evidence of any fault occurring. It was also noted by the Tribunal that the sum requested for communal electricity was high, particularly when the Tribunal identified that the only items utilising the communal electricity supply within the common areas was the door entry system and communal lighting.
40. The Tribunal considered that the sum requested for the management fee to be excessive. No fire alarm system was installed in the Building, which had there been so, would have required regular and frequent periodic tests. Within the staircase and landing areas there did not exist any areas requiring substantial redecoration and this was also the case for the external common parts.
41. Finally, the Tribunal considered that, as The Wrekin Housing Trust had always dealt with the estate gardening and continued to do the landscape maintenance, it considered that the Applicant could have easily obtained

this figure and incorporated this amount into the service budget provided to the Respondents.

42. Accordingly, the Tribunal determined that the following items were reasonably payable on account for the service charge for the period 1st April 2018 to 31st March 2019:

Audit and accountancy	£ 360
Repair and maintenance	£1,000
Management fee (including VAT)	£ 900
Building insurance (including IPT)	£ 820
Communal electricity	£ 150
Communal cleaning	£ 600
Estate gardening	£ 220
Fire Risk and Health & Safety Assessment	£ 250
Refuse collection	£ 300
Door Entryphone	£ 250
Asbestos Assessment	<u>£ 250</u>
Total	<u>£ 5,100</u>

Administration charges

Applicant's submissions

43. Mr Green stated that the administration charge was reasonable and payable under the leases. He confirmed that the Applicant had a three stage response in relation to demands and that a standard fee of £75.00 was charged at the final stage, when issuing a Letter Before Action.
44. He stated prior to the Letter Before Action, reminders were sent out in relation to the payment of the estimated service charge. A copy of the Letter Before Action sent to the each of the Respondents, dated 7th June 2018, was submitted to the Tribunal.

Respondents' submissions

45. The Respondent stated that they had always disputed the service charge demand as it had contained an 'Opening Balance' of £1,027.91, being the purported service charge due on handover on the completion of the Applicant's purchase. They pointed to the fact that the Applicant had, now, decided not to pursue their claim for this sum.
46. They stated that they had always confirmed that they would pay the service charge as long as it was fair and reasonable.

The Tribunal's Deliberations and Determinations

47. The Tribunal noted that the Summary of the Tenants' Rights and Obligations, referred to the fact that a charge of £75.00 would be incurred

if the service charge was not paid and a Letter Before Action was issued. The Tribunal also noted that the Applicant sent reminders to the Respondents prior to issuing the Letter Before Action and that the Respondents did not contact the Applicant to dispute the service charge until the date on which the Letter Before Action was issued. As such, the Tribunal determined that the £75.00 charge was reasonable and payable by each of the Respondents.

The issues & decisions (County Court)

Ground rent

48. Judge Gandham, sitting alone as a judge of the County Court, found that the rent for the year commencing 1st April 2018 had been properly demanded and was payable by the Second Respondent.
49. The First Respondent had provided evidence of the payment of the ground rent for the year commencing 1st April 2018 and both Respondents had provided evidence, by way of emails from The Wrekin Housing Trust, that the rent for the year commencing 1st April 2017 had been paid.

Interest on Service Charges and Ground Rent

50. The Applicant had claimed interest under s.69 County Courts Act 1984 on these sums at the rate of 8% or in the alternative under the 'Default Rate' detailed in the leases of 3% above the base lending rate from time to time of Barclays Bank plc (being 0.5% at the time of the demands).
51. Judge Gandham, sitting alone as a judge of the County Court, awarded interest at the rate of 3.5% after balancing the arguments that: (a) interest rates generally had been low for many years, and (b) there was no good reason for the Respondents not to have paid the sums in question.
52. The interest awarded against, and payable by, the First Respondent amounts to £36.43 and the interest awarded against, and payable by, the Second Respondent amounts to £36.86.

Costs

53. The Applicant's Representative had produced a schedule of costs (which had been sent to the tribunal offices and to the Respondents a week before the final hearing) amounting to £4,861.70
54. Mr Green stated that the Applicant relied on paragraph 16.1 of the Fourth Schedule to the leases which, he said, entitled the Applicant to claim the costs of proceedings in respect of ground rent and service charges on an indemnity basis. In the alternative, the Applicant sought an order for costs in the court's discretion.

55. Paragraph 16.1 of the Fourth Schedule states as follows:

“16.1 To pay us on demand on a full indemnity basis all costs, expenses, losses and liabilities incurred by us as a result of or in connection with:

(a) any breach by you of your obligations under this Lease;”

56. The first issue for the County Court is whether to award some or all of the costs. The second issue is then the qualification of such costs as are awarded.

57. In terms of the award of the costs, Judge Gandham made an order under s.51 Senior Courts Act 1981. She applied the presumption found 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. She concluded that the Applicant was the successful party, applying the test found in *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. [Para 28]”

58. In cases which have a contractual right to costs, she recognised that this is a rebuttable presumption and that an important factor is the contractual provision. She took into account the decision in *Church Commissioners v Ibrahim* [1997] EGLR 13 which stated:

“35. In our opinion, the following principles emerge from the cases and dicta to which I have referred.

(i) An order for the payment of costs of proceedings by one party to another party is always a discretionary order: section 51 of the Act of 1981.

(ii) Where there is a contractual right to the costs, the discretion should ordinarily be exercised so as to reflect that contractual right.”

She recognised that this is a discretion to be exercised and that the court retains this discretion (see *Forcelux v Martyn Ewan Binnie* [2009] EWCA Civ 1077 which stated:

“But 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.”

The above principles have been endorsed in *Chaplain Ltd v Kumari* [2015] EWCA Civ 798 which established two principles, firstly that the costs awarded pursuant to s.51 can include the costs of the FTT and, further,

that the contractual provision displaces the provisions of CPR 27.14 which limit the costs in the Small Claims Track. Again, the above principles have been endorsed in the decision in *Avon Ground Rents Limited v Sarah Louise Child* [2018] UKUT 204 (LC).

59. Judge Gandham (in her capacity as a Judge of the County Court) concluded that the provision for contractual costs carries considerable weight but does not displace the overall discretion.
60. The original claim against each of the Respondents included a sum for arrears of service charge at handover of the freehold. This, in effect, doubled the amount claimed against each of the Respondents. It was only once the matter had been transferred to the Tribunal, in the Applicant's Statements of Cases, that the Applicant withdrew the claims for these sums.
61. Regarding the ground rent, the Respondents had established that they had paid the ground rent for the year commencing 1st April 2017. The First Respondent had also paid the sum due for the current year, in July 2018, which the Applicant did not concede until double checking its records after the hearing.
62. Despite this, Judge Gandham noted that, although the Respondents had stated that they would have been willing to pay a fair and reasonable service charge, they did not forward any sum on account of the service charge to the Applicant and there was little indication that they would have done so without the Applicant pursuing legal action.
63. Having weighed up all the circumstances, Judge Gandham decided that the appropriate order was that the Respondents should pay 75% of the costs.
64. Judge Gandham decided that the costs were to be assessed on the standard basis applying the principles of proportionality prescribed in Part 44 rule 4 and also the principles governing the assessment of costs in contractual entitlement cases set out in Part 44 rule 5 and made the following observations.
65. The Applicant's claim for costs amounted to a sum of £4,861.70, including a court fee of £410.00 and counsel's fees of £900.00. This matter was a relatively straightforward claim involving the recovery of an estimated service charge of £1,105.00 and annual ground rent, being £10.00 per annum, from each of the Respondents. There were no wider issues involved. The Applicant had confirmed that the service charge was a sum requested on account, so all that was required was for the Applicant to demonstrate that the sum demanded was reasonable.
66. Taking consideration of CPR 44.3(5) in to account, Judge Gandham was not satisfied that the sum of £4,861.70 was proportionate based on the value of the claims and the issues involved. The Court, therefore,

substitutes the sum of £2,500, inclusive of VAT, counsel's fees and court fees.

67. As the Respondents are liable to pay 75% of the costs, as detailed above, the Court finds the sum of £1,875.00, inclusive of VAT, counsel's fees and court fees is payable by the Respondents in respect of costs (the sum of £937.50 to be payable by each Respondent).

Counterclaim

68. In relation to the counterclaims submitted by each of the Respondents, both Respondents stated that their counterclaim figure of £3,000.00 was simply in reference to the amount that had been claimed against each of them by the Applicant. There was no foundation to either of the counterclaims and the Court, therefore, dismisses the same.
69. Given that the FTT has made a decision regarding the Service Charges, the Applicant is entitled to a judgement in that sum. A separate County Court order, reflecting this decision is attached.

Name: Judge Gandham

Date: 21st June 2019

Rights of appeal

Appeals in respect of decisions made by the FTT

A written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

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

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appeals in respect of decisions made by the Tribunal Judge in his/her capacity as a Judge of the County Court

An application for permission to appeal may be made to the Tribunal Judge who dealt with your case or to an appeal judge in the County Court.

Please note: you must in any event lodge your appeal notice within 21 days of the date of the decision against which you wish to appeal.

Further information can be found at the County Court offices (not the tribunal offices) or on-line.

Appeals in respect of decisions made by the Tribunal Judge in his/her capacity as a Judge of the County Court and in respect the decisions made by the FTT

You must follow **both** routes of appeal indicated above raising the FTT issues with the Tribunal Judge and County Court issues with either the Tribunal Judge or proceeding directly to the County Court.