**IN THE COUNTY COURT**
**JUDICIAL DEPLOYMENT PILOT**

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| **Case Reference** | **:** | CHI/00MR/LSC/2018/0056<br>E52YX208 |
| **Property** | **:** | 3 Burlington Lodge, 89 Victoria Road South, Southsea PO5 2BU |
| **Claimant** | **:** | 89 Victoria Road South Ltd |
| **Representative** | **:** | Jonathan Wragg of counsel, instructed by PDC Law solicitors |
| **Defendants** | **:** | (1) Ziad Said and (2) Sufian Ali |
| **Representative** | **:** | In person |
| **Type of Application** | **:** | Liability to pay service charges: Landlord and Tenant Act 1985 s.27A |
| **Judge** | **:** | Tribunal Judge Mark Loveday |
| **Date and venue of hearing** | **:** | 9 and 10 July 2019, Havant Justice Centre |
| **Date of Judgment** | **:** | 10 September 2019 |

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**JUDGMENT**

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1. This is a claim for payment of service charges and administration charges relating to 3 Burlington Lodge, 89 Victoria Street South, Southsea PO5 2BU. The Claimant is the landlord and the Defendants are the lessees.

2. By a claim dated 11 May 2018 issued in County Court Money Claims Centre (Claim no.PBA 0087579), the Claimant sought payment of £8,184, together with a "court fee" of £455 and "legal representative's costs" of £100. The Particulars of Claim attached to the Claim Form particularised the £8,184 as (a) £6,947 for service charges, (b) £361 for administration charges and (c) £840 for contractual costs. The Defendants filed a Defence and Counterclaim dated 15 June 2018 contesting the charges and raising a counterclaim for damages for disrepair in excess of £12,500. By an order dated 6 September 2018, the claim was transferred to the Portsmouth County Court. On 16 October 2018, District Judge Ackroyd referred the matter to the Judicial Deployment pilot. This involved (i) transferring the questions of liability to pay the service charges and administration charges to the First-tier Tribunal (Property Chamber) for determination under s.176A of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), and (ii) allocating the remaining issues for determination by a Tribunal Judge sitting alone as a judge of the County Court under s.5(2) of the County Courts Act 1984.

3. The principal issue reserved for the County Court Judge was the question of costs under s.51 of Senior Courts Act 1981 and CPR Pt.44 ("s.51 costs"). There was no claim for interest or ground rent in this case.

4. A Tribunal hearing took place on 9 and 10 July 2019 to determine the service charge and administration charge issues. The counter-

claim had already been disposed of in earlier directions given by the Tribunal. I chaired the Tribunal in my capacity as a Tribunal Judge and in that capacity sat with Mr B Simms FRICS as the professional member of the Tribunal. The Claimant was represented by Mr J Wragg of counsel and the First Defendant appeared in person. The Tribunal reserved its decision. I then rose for a short time and re-convened as a judge of the County Court to consider the remaining issues within the exclusive jurisdiction of the court. Once again, the Claimant was represented by counsel and the First Defendant appeared in person. At the conclusion of the County Court hearing I reserved judgment in respect of s.51 costs, but gave directions for further written representations to be made in the light of legal submissions made by counsel in relation to the case of Chaplair v Kumari [2015] EWCA Civ 798 (a copy of which was not available in court on the day). The Defendants made further written submissions about Chaplair (and indeed other costs matters) on 19 July 2019.

5. The Tribunal's decision in respect of liability to pay service charges and administration charges is set out in a separate written Tribunal determination given on 14 August 2019. The Tribunal found the Defendants liable to pay service charges of £2,904 but dismissed the remaining claims. This is my judgment on the remaining County Court issues. I regret there has been a further short delay in giving this judgment while further enquiries were made with the parties about costs.

6. In its costs application, the Claimant seeks (i) pre-action litigation costs and the cost of issuing the claim, amounting to £1,395, and (ii) post-issue litigation costs. The latter claim is supported by a Schedule of Costs dated 5 July 2018 in the sum of £7,849.20. It should be said that the £1,395 was originally claimed as contractual administration charges, but counsel for the Claimant withdrew

them from consideration as administration charges during the course of the Tribunal hearing. Indeed, some of these expenses should perhaps always have been treated as part of the s.51 costs rather than administration charges: Avon Ground Rents Ltd v Child [2018] UKUT 204 (LC); [2018] H.L.R. 754 at para 15.

7. At this point, it is convenient to refer briefly to the terms of the Lease dated 19 April 1969 ("the Lease"). It was granted for a term of 150 years from 25 December 1968. The tenant's obligations appear in clause 3, and include the following material provision:

   "3(vi) To pay unto the Landlord all costs charges and expenses (including legal costs and charges payable to a Surveyor) of may be incurred by the Landlord in contemplation of any proceedings under Section 146 and 147 of the Law of Property Act 1925".

8. The first issue is whether a costs order should be made, which requires consideration of CPR 44.2.

9. Mr Wragg argued that costs should follow the event. Of course, counsel made these submissions without the benefit of knowing the eventual outcome of the Tribunal determination. But in support of the Claimant's arguments on costs, I am mindful of the principle of 'who writes the cheque': see for example, Burchell v Bullard [2005] EWCA Civ 358. In this case, the Defendants must write out a cheque for £2,904. So, the Defendants are the "unsuccessful" party for the purposes of CPR 44.2(2)(a). The starting point is therefore that the Defendants should pay the Claimant's costs.

10. The court nevertheless has the power to make a different order under CPR 44.2(2)(b). In connection with the question of who should pay, I consider a number of general arguments about costs advanced by the Defendants at the hearing and in their written submissions:

(a) The First Defendant submitted that the Claimant failed to follow "the Pre-Action Protocol", which I take it is a reference to the Pre-Action Protocol for Debt Claims. This is an unpromising argument, since the hearing bundle includes a Protocol Letter of Claim dated 18 March 2018, and it was preceded by numerous demands for payment. Insofar as there may have been minor failures to comply with the Protocol, I do not consider they are sufficient to sound in costs.

(b) The next argument is that the Defendants have tendered the sums claimed, but the Claimant has rejected these offers. No Defence of tender has been raised, and I have not been told of any CPR Pt.36 offer or payment into court. At the hearing, the Defendants suggested they made a total of 7 payments (£3,300). In their written submissions, the Defendants said these cheques were paid in relation to the 2015 to 2017 service charges, but the cheques were returned. They made a further 2 payments (about £2,800) for the period 2018 to 2019. The Defendants produced various letters sent between March and September 2017 which showed that some of these payments were tendered on the basis of interim charges of £900 per annum for the 2017 service charge years. This is, of course, the precise figure for service charge liability found by the Tribunal in its decision today. The bundle does not include a complete set of correspondence explaining why the cheques were returned, but it is a fair assumption that the Claimant wished to avoid any question of waiving the right to forfeit the Lease. I therefore attach limited weight to the tendering of at least some of the sums which the Tribunal has found the Defendants were liable to pay. In any event, it is hard to characterise this as an admissible offer to settle under CPR 44(4)(c).

(c) The Defendants next argue that many of the demands for payment were unclear or contained mistakes. That may well be, but each sum found by the Tribunal to be payable was supported by a demand in proper form. I attach no weight to this.

(d) A number of points are made about forfeiture, which are not relevant to the question of who must pay the costs.

11. In this regard, I also consider the Tribunal's determination, which was not of course addressed by the parties at the hearing. There is little doubt that the Claimant has succeeded – but succeeded only in part. It sought payment of service charges of £4,278 and recovered this to the extent of £2,904. Of the service charges which were found to be due, the 2015 service charges were admitted by the Defendants (albeit at the hearing). The Claimant also sought payment of administration charges of £2,165, but failed to recover these under the terms of the Lease. The Defendants have plainly succeeded on some issues: see CPR 44.2(4)(b). But I do not find that the Claimant deliberately exaggerated its claim for the purposes of CPR 44.2(5)(d).

12. I have considered very carefully whether the Defendants' success with some issues before the Tribunal is sufficient to exercise my discretion under CPR 44(2)(b). I have come to the conclusion I should not depart from the general rule. This is because the Defendants' success in respect of the primary service charge claim was fairly limited – the Claimant achieved over two thirds of the sums it sought. Indeed, the Defendants' success in relation to interim service charges may well be a temporary one, since they may possibly be liable to pay the same or similar sums for the relevant service charge years by way of balancing service charges. As to the administration charges, the Defendants achieved complete success – although the litigation costs element of those charges could still be the subject of further claims. But overall, I consider the Claimant has succeeded, and the general principle of "who writes the cheque" must prevail.

13. The next issue is the '<u>Chaplair</u>' question. The claim was allocated to the small claims track on 1 November 2018, and it is therefore *pri-*

*ma facie* subject to CPR 27.14. But I agree with Mr Wragg that the effect of Chaplair is that where parties have agreed a contractual basis of costs, the costs provisions applying to the small track claims will not ordinarily apply. I am not persuaded by anything in the Defendants' written submissions that that is not the case. In its determination, the Tribunal concluded that clause 3(vi) of the Lease is engaged in the present matter – and inevitably I reach the same conclusion sitting as a judge of the County Court for the same reasons given by the Tribunal. So, I apply the contractual basis of assessment under CPR 44.5 rather than CPR 27.14. And I accept clause 3(v) of the Lease provides for indemnity costs.

14. I am asked summarily to assess these indemnity costs and I do so.

15. As to pre-action costs and the costs of issuing the claim, the Claimant seeks (i) pre-action litigation costs of £840 paid to PDC Law, including the cost of drafting the Claim Form and Particulars of Claim (ii) court fees of £455 and (iii) £100 paid to the solicitors for issuing the claim. The total is £1,395. There is very little supporting documentation for these and no Schedule of Costs. However, I do not consider it would be proportionate to the sums involved to require the Claimant to serve a further Statement of Costs. In my view, it is clear enough that extensive legal work was undertaken before the issue of the claim, including drafting a Letter of Claim, drafting Particulars of Claim and some correspondence. The court fees are fixed, and the Claimant had to pay these to issue the claim. Taking a broad-brush approach, and considering the indemnity principle, these costs are in my view reasonably incurred and reasonable in amount. Indeed, if anything they are fairly modest sums for the work involved.

16. As to the post-issue costs, I have considered the Schedule of Costs in some detail and take the provisional view that the costs set out in the same are reasonably incurred and reasonable in amount. Given

the comments made by the Tribunal in respect of the Scott Schedule, it might well be argued this item of cost should not be allowed at all. But the time spent by the solicitors in preparing the Scott Schedule (£225) is again fairly modest, and I do not therefore consider anything should be deducted for this sum on the indemnity basis.

17. At one stage, I was concerned whether it was appropriate (or indeed permissible) for me to award any costs of and in connection with the Tribunal proceedings as part of the s.51 costs. In this case, the bulk of the Claimant's post-issue costs were incurred in connection with the Tribunal part of the claim after the substantive issues were transferred to the Tribunal under s.176. Ordinarily, the Tribunal would not order any costs, save under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. But ultimately, I am satisfied that Kumari is authority for this being the proper approach. It follows I consider the post-issue costs may be recovered insofar as they were incurred in connection with the Tribunal proceedings.

18. It follows that I order the Defendants to pay the Claimant costs of £1,395 and £7,849.20, amounting to £9,244.20.

19. Although this disposes of the only matter specifically reserved to the County Court, I indicated at the start of the hearing that I was also prepared to make an order giving effect to the Tribunal's decision under s.176C of the 2002 Act (as suggested in Avon Ground Rents Ltd v Child). Both parties agreed this was a sensible course to take. I therefore also make an order giving effect to the Tribunal's decision and a copy of my order is attached.

Judge Mark Loveday
10 September 2019

# General Form of Judgment or Order

| To: |
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| **In the County Court at Havant Justice Centre** | |
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| **Claim No.** | E52YX208<br>CHI/00MR/LSC/2018/0056 |
| **Claimant (including ref)** | 89 Victoria Road South Ltd |
| **Defendants (including ref)** | 1. Zaid Said and<br>2. Sufian Ali |

SEAL

BEFORE Tribunal Judge Loveday sitting as a judge exercising the jurisdiction of a District Judge of the County Court at Havant Justice Centre Elmleigh Road Havant PO9 2AL

UPON reading the Tribunal's determination in case reference CHI/00MR/LSC/2018/0056.

AND UPON hearing Mr J Wragg of counsel for the Claimant and the First Defendant in person.

AND UPON reading the papers in the court file.

**IT IS ORDERED** that the Defendants shall pay to the Claimant:

1. The sum of £2,904 for service charges.
2. Costs summarily assessed in the sum of £9,244.20.

Dated 10 September 2019

Note: If judgment is for £5,000 or more, or is in respect of a debt which attracts contractual or statutory interest for late payment, the claimant may be entitled to further interest