



**FIRST - TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY) &  
IN THE COUNTY COURT at  
WOLVERHAMPTON sitting at  
Centre City Tower, 5 – 7 Hill Street,  
Birmingham B5 4UU**

**Case Reference** : **BIR/00CW/LIS/2019/0052;  
BIR/00CW/LLD/2019/0012;  
BIR/00CW/LLC/2019/0013;**

**Court claim number** : **E23YY116 (County Court at Wolverhampton)**

**Property** : **Flat 71, St Cecilia's, Okement Drive,  
Wednesfield, Wolverhampton, WV11 1XE**

**Applicant/Claimant** : **St Cecilia's RTM Company Limited**

**Representative** : **Counsel – Mr Jonathan Gale of St Philips  
Chambers, instructed by Realty Law Limited**

**Respondents/Defendants** : **Mr G P Thomas (1) and Mrs S Glaxin (2)**

**Tribunal Member** : **Judge Gandham**

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

**Date of Decision** : **27<sup>th</sup> April 2020**

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**DECISION**

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## **Summary of the decisions made by the First-Tier Tribunal**

1. The following sums are payable by Mr Glaxin Padmangathan Thomas and Mrs Shainy Glaxin to St Cecilia's RTM Company Limited by 11<sup>th</sup> May 2020:
  - (i) Service charges: £2,625.23; and
  - (ii) Administration charges: £180.00 (inclusive of VAT)
2. The Tribunal makes an order, under section 20C of the Landlord and Tenant Act 1985, that all of the costs incurred by St Cecilia's RTM Company Limited in connection with the proceedings before the tribunal, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by Mr Glaxin Padmangathan Thomas and Mrs Shainy Glaxin.
3. The Tribunal makes an order, under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, reducing Mr Glaxin Padmangathan Thomas' and Mrs Shainy Glaxin's liability to pay any administration charge in respect of the litigation costs incurred or to be incurred by St Cecilia's RTM Company Limited in connection with the proceedings before the tribunal in this matter to £180 (the Administration charges detailed in 1(ii) above).

## **Summary of the decisions made by the County Court**

4. The following sums are payable by Mr Glaxin Padmangathan Thomas and Mrs Shainy Glaxin to St Cecilia's RTM Company Limited by 11<sup>th</sup> May 2020:
  - (i) Costs of £660.00 (inclusive of VAT and court fees); and
  - (ii) Interest at 4.75% calculated on the service charges to the date of judgment: £322.70
5. The Court makes an order, under section 20C of the Landlord and Tenant Act 1985, that all of the costs incurred by St Cecilia's RTM Company Limited in connection with the proceedings before the County Court, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by Mr Glaxin Padmangathan Thomas and Mrs Shainy Glaxin.
6. The Court makes an order, under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, reducing Mr Glaxin Padmangathan Thomas' and Mrs Shainy Glaxin's liability to pay any administration charge in respect of the litigation costs incurred or to be incurred by St Cecilia's RTM Company Limited in connection with the proceedings before the County Court in this matter to £660.00 (the Costs detailed in 4(i) above).

## Introduction

7. St Cecilia's RTM Company Limited ('the Applicant') issued proceedings in the County Court Money Claims Centre against Mr Glaxin Padmangathan Thomas and Mrs Shainy Glaxin ('the Respondents'), under claim number E23YY116. The Respondents filed a Defence in reply, which included a part-admission. The part-admission was not accepted by the Applicant and the defended claim was transferred to the County Court at Wolverhampton on 4<sup>th</sup> June 2019. On 20<sup>th</sup> June 2019, District Judge Webb allocated the claim to the small claims track and, by an order of Deputy District Judge Edden dated 15<sup>th</sup> October 2018, the proceedings were transferred to this Tribunal.
8. The claim against the Respondents in the County Court comprised of the following:
  - (i) service charges amounting to £3,567.52;
  - (ii) interest on arrears of service charges;
  - (iii) administration charges of £540.00 and
  - (iv) the costs of the action.
9. The Respondents made an application for an order to limit service charges payable under section 20C of the Landlord and Tenant Act 1985 ('the Act') and for an order to limit administration charges payable under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act').
10. The Applicant is a right to manage company (RTM), incorporated in November 2013, to manage the development known as St Cecilia's, Okemont Drive, Wednesfield, WV11 1XD ('the Development'). The Respondents are the lessees of 71 St Cecilia's, Okemont Drive, Wednesfield, Wolverhampton, WV11 1XE ('the Property'), under a lease dated 7<sup>th</sup> November 1997 made between Michael Ryan and Andrew Mark Burrows, for a term commencing on the date of the lease and ending on 31<sup>st</sup> December 2118 ('the Lease').
11. The Lease requires 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 the Eighth Schedule to the Lease.
12. The Tribunal issued Directions on 22<sup>nd</sup> October 2019 and a hearing was scheduled for 5<sup>th</sup> February 2020. After the hearing, a further Directions Order was issued, on 10<sup>th</sup> February 2020, requesting any submissions from the parties in relation to the Respondents' applications under section 20C of the Act and Paragraph 5A of Schedule 11 to the 2002 Act.
13. 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.
14. The Tribunal confirmed to the parties in the Directions Order that all the issues in the proceedings would be decided by a combination of the FTT and the Tribunal Judge sitting as a Judge of the County Court.

15. Accordingly, Judge Gandham presided over both parts of the hearing, which has resolved all matters before both the tribunal and the court.
16. This decision will act as both the reasons for the Tribunal decision and the reasoned judgment of the County Court.

### **The Lease**

17. Clause 1 of the Lease defines the expressions in the Lease and states:

*“(C) “The Development” means the land buildings and works described in the First Schedule hereto being known for development purposes as “St Cecilia’s”  
...*

*(M) “The Lessor’s Expenses” means the monies actually expended or reserved for periodical expenditure by or on behalf of the Lessor at all times during the term hereby granted for the purpose of fulfilling the obligations specified in the Eighth Schedule hereto*

*(N) “The Lessee’s Proportion” means the proportion of the Lessor’s Expenses payable by the Lessee in accordance with the Ninth Schedule hereto”*

18. The Sixth Schedule to the Lease details the covenants by the lessee, which include:

*“(3)(a) To pay by way of additional rent and to indemnify and keep the Lessor indemnified from and against the Lessee’s Proportion of the Lessor’s Expenses at the times and in manner [sic] herein provided...*

*(b) To pay also by way of additional rent a sum representing interest at the greater of 12% per annum or 4% per annum above the base rate (or its equivalent) at National Westminster Bank Plc from time to time upon any payment of rent or additional rent on any sum that may remain outstanding and unpaid after the expiration of 28 days from the date upon which such payment fell due or such sum should have been paid and such interest shall be charged from the date that such payment fell due or should have been paid throughout the entire period that the said sum remains outstanding until its receipt by the Lessor*

*(31) Within one month after the date of the execution or coming into effect of any and every assignment transfer underlease or tenancy agreement (including any immediate or derivative underlease or tenancy agreement but excluding any underlease or tenancy agreement for a term not exceeding 21 years) ... to give or procure to be given to the Lessor or its Solicitors notice in writing of such disposition...*

*(32) To pay to the Lessor its proper legal costs and Surveyor’s fees incurred by it in connection with any acts or things required or reasonably to be done by it or its Agents by virtue of this Schedule and in particular to pay all costs charges and expenses (including legal costs and fees payable to a Surveyor) incurred by the Lessor in or in contemplation of any proceedings or the service of any notice under Sections 146 or 147 of the Law of Property Act 1925...”*

19. The Eighth Schedule to the Lease details the ‘Lessor’s Expenses’, which include:

*“(14) The costs charges and remuneration of the Lessor and any agent or agents employed by the Lessor to manage and administer the Development and for the collection of rents of the flats ...”*

20. The Ninth Schedule to the Lease details the lessee’s proportion of the ‘Lessor’s Expenses’ and how payment is to be made:

*“(1) the Lessee’s Proportion means a proportion equivalent to 0.84% of the Lessor’s Expenses*

*...*

*(3) the Lessee shall pay to the Lessor the Lessee’s Proportion of the Lessor’s Expenses in manner [sic] following that is to say: –*

*(a) In advance on the 1<sup>st</sup> January and 1<sup>st</sup> July in every year throughout the said term one half of the Lessee’s Proportion of the amount estimated by the Lessor or its Managing Agents (in their entire discretion) as being the Lessor’s Expenses for the year ending on the next 31<sup>st</sup> December...”*

## **Hearing**

21. A public hearing was held at Centre City Tower, 5 – 7 Hill Street, Birmingham, B5 4UU. The Applicants were represented by Mr Jonathan Gale (Counsel), Ms Zainab Khatoon (a solicitor employed by Realty Law Limited) and Ms Cannon-Leach (a Director) and Ms Dawn Redstone-Keegan (a Property Manager) both from Pennycuik Collins, the Applicant’s managing agent. The Respondents gave evidence on their own behalf.

## **The Issues & Decisions (FTT)**

### ***Service charges***

#### *Applicant’s submissions*

22. Mr Gale, on behalf of the Applicant, confirmed that the RTM company was incorporated in November 2013. The Applicant took over management from SM Properties and appointed Pennycuik Collins as the managing agents of the Development in September 2014.
23. Mr Gale referred to the provisions of the Lease, in particular the Ninth Schedule, which detailed the Respondents’ responsibility to pay their proportion of the lessor’s expenses on 1<sup>st</sup> January and 1<sup>st</sup> July each year. He stated that, under paragraph 3(b) of the Sixth Schedule to the Lease, if payment was not made, then interest would be payable at the rate 12%.
24. Mr Gale stated that, upon the handover to Pennycuik Collins, SM Properties informed the Applicant that there was a balance of £942.29 outstanding on the Respondents’ service charge account (‘the Handover Arrears’). In addition to the

Handover Arrears, the Respondents had failed to pay the service charge demands for the years 2017 and 2018.

25. Mr Gale confirmed that the claim made in the County Court was for a sum of £4,107.52, relating to unpaid service and administration charges and £319.62 for interest on those charges. He stated that, although the Respondents had admitted a sum of £3,257.74, judgment had not been entered against them in respect of the same.
26. Mr Gale referred to the fact that the Respondents had accepted that they were responsible to make service charge payments and had already admitted to being liable for a large proportion of the claim against them but that they did not admit liability to pay the Handover Arrears.
27. Mr Gale stated that the Applicant accepted that the Respondents had been making payments by standing order prior to the handover; however, he referred the Tribunal to the email correspondence contained within the Applicant's bundle between Pennycuick Collins and SM Properties (Exhibit DRK3).
28. In the emails, SM Properties stated that the arrears on the Respondents' account amounted to a figure of £941.06 plus interest on the date of the handover in September 2014. They explained that the Respondents had outstanding arrears at the end of 2013 of £454.46, that the service charge for January 2014 was £555.00, the ground rent was £50.00 and interest of £5.54 was also due; this meant that a sum of £1,065.00 was due on the Respondents' account at the beginning of January 2014, prior to the service charge demand of £520.83 being made in July 2014. They further stated that, although the Respondents had made payments of £720.00 in 2014 (to the date of the handover), these payments were first allocated to cover the outstanding arrears in 2013, the 2014 ground rent and then any interest.
29. Mr Gale stated that the Applicant was a non-profit management company and not in a position to simply write off amounts that are due on leaseholders' accounts.
30. Ms Redstone-Keegan confirmed that SM Properties had not provided them with copies of the previous service charge demands or statements of account and had simply provided the details of the amount of the arrears on the account at the date of handover. She stated that she had requested copies of the relevant statements from the Respondents, so that they could prove that they were not in arrears, but the Respondents had failed to provide the same.
31. Ms Cannon Leach had provided a signed witness statement for the Court, in which she stated, *"I am aware, from my own knowledge that additional sums, besides the service charge were charged to the Defendant [Respondents] by SM Properties. The additional sums claimed were £150 annual charge to all leaseholders who were sub-letting and interest on any unpaid balances"*. She stated, in the witness statement, that she believed that the Defendants had failed to take these sums in to account.
32. At the hearing, Ms Cannon Leach confirmed that she had, since making this statement, spoken to the freeholder and understood that any sums of £150 had

been returned to any relevant leaseholders, so this would not have been the reason for any historical arrears in this matter. She further confirmed that the freeholder had stated that he also had no copies of the accounts or demands that had been sent to the Respondents.

### *Respondents' submissions*

33. Mr Thomas, on behalf of the Respondents, contended that the written witness statement submitted by Ms Cannon Leach was “false”. He stated that the Respondents had been residing at the Property at the time of the handover of the management of the Development, so had not been subletting it.
34. He stated that the Respondents had been making regular payments for the service charge, by way of standing order, since their purchase of the Property. He stated that these payments had originally been for a sum of £100.00 per month but that, as they were in credit, they had been told to reduce the payments to £80.00 per month.
35. The Respondents had supplied to the Court, copies of bank statements (which detailed various monthly standing orders for £100.00 and £80.00) and a copy of a service charge demand in 2012, which detailed the estimated service charge for that year as being £1,030.00. They also supplied a Monthly Instalment Statement from September 2012, which confirmed that a payment of £80.00 had been made for that month and that the balance carried forward for the year was a sum of £133.63. Mr Thomas confirmed that the Respondents could not locate any further documentation sent to them by SM Properties but that the Monthly Instalment Statement from September 2012 indicated that, at the end of 2012, they would have been in credit, not arrears. He stated that, as they had continued to make the monthly payments thereafter, they could not have possibly been in arrears for the amount alleged by Applicant.
36. Mr Thomas said that, when he was informed of the Handover Arrears, he had written to the Applicant disputing them. In September 2015, he arranged a meeting with Pennycuik Collins, where he presented copies of his bank statements as evidence of the payments that had been made.
37. Mr Thomas stated that in July 2016, the Respondents were forwarded a letter from Clarke Willmott Solicitors informing them that the Applicant was considering commencing court proceedings against them for the outstanding arrears. Mr Thomas confirmed that he replied to Clarke Willmott, informing them as to why they disputed the alleged arrears, and that on 20<sup>th</sup> September 2016 he was told that Clarke Willmott were placing their file on hold whilst they discussed the matter with the Applicant (he had provided a copy of the email from Clarke Willmott, dated 20<sup>th</sup> September 2016, to the Court). Mr Thomas stated that the Respondents heard nothing further until 2018, when Realty Law Ltd were instructed.
38. Mr Thomas confirmed that the Respondents had always been willing to pay any service charge that they actually owed. In relation to the Handover Arrears, he said that he had asked the Applicant to provide them with a copy of the accounts and statement balances to explain how the Applicant claimed that they had come

to be in arrears. He stated that, instead of dealing with the dispute, the Applicant simply carried forward the outstanding balance on their account each year. As a result, he said that he informed Pennycuick Collins that they would not be making any further payments until the issue of the disputed arrears had been settled. Accordingly, they did not make payments from 2017 to June 2019.

39. In relation to the court proceedings, the Respondents confirmed that when they originally filed their defence in January 2019, they had admitted to owing a sum of £3,257.74, being the service charges due for 2017, 2018 and the first six months' service charge demanded for 2019. He stated that they had not realised that the January 2019 demand was not included within the claim.
40. At the hearing, they clarified that the figures on the claim form which the Respondents admitted were due and payable by them were as follows:

Service charge dated 31<sup>st</sup> December 2015 amounting to £10.62,  
Balancing charge dated 31<sup>st</sup> December 2016 amounting to £79.11,  
Service charge dated 1<sup>st</sup> January 2017 amounting to £612.52,  
Service charge dated 1<sup>st</sup> July 2017 amounting to £612.52,  
Service charge dated 1<sup>st</sup> January 2018 amounting to £655.23, and  
Service charge dated 1<sup>st</sup> July 2018 amounting to £655.23.

41. As such, the only item of service charge in dispute on the claim form was the figure of £942.29, the Handover Arrears.

#### *The Tribunal's Deliberations and Determinations*

42. The Tribunal considered all of the written and oral evidence submitted and notes that the dispute now relates solely to the Handover Arrears of £942.29.
43. The Applicant submits that, having been informed that there were service charge arrears on the Respondents' account by SM Properties, the burden of proof is upon the Respondents to disprove the same. The Tribunal does not agree.
44. The Tribunal refers to the decision of the Upper Tribunal in *Schilling v Canary Riverside Developments Ltd* LRX/26/2005 ('*Schilling*'), a case which related to an application under section 19 of the Landlord and Tenant Act 1985. His Honour Michael Rich QC stated in his judgment, at paragraph 13:

*"Mr Gavaghan suggested that it would be a nonsense for the burden in regard to such matters to depend on who makes the application. It appears to me, on the contrary that the only practical way of dealing with such an application is by so treating the burden. If the applicant does not have the burden, what determination is the LVT to make if an application is made but not pursued? It is, in my judgement, this commonsense consideration which justifies the assertion in Halsbury that "the legal burden of proof rests upon the party desiring the court to take action"."*

He continued, at paragraph 14, to discuss the evidential burden and referred to the decision in *Arbrath v North Eastern Ry. Co.* (1883) 11 QBD 440 in which



Bowen LJ, discussed the evidential burden and how it shifted between the parties during a case. In relation to the matter before him, HHJ Rich, QC went on to state:

*“I accept Mr Gavaghan’s submission that the fiduciary duty of a landlord to account for any service charge which he collects, and the landlord’s statutory duties under ss.21 and 22 of the Act of 1985, mean that it is sufficient for a tenant to raise the absence of a proper account in order to place upon the landlord an evidential burden to satisfy the tribunal that costs have, in fact been incurred.”*

45. In *Schilling*, the management company had discharged this burden, so the Upper Tribunal went on to consider the evidential burden relating to the reasonableness of those costs. In this matter, the Respondents have raised the lack of any accounts and disputed the figure that the Applicant claimed is owed. They have also provided some evidence which indicates that their concerns are legitimate. The burden of proof, therefore, rests upon the Applicant to firstly show that the service charges claimed are payable.
46. The witness statement from Ms Cannon-Leach indicated that she knew that the Respondents had been charged additional sums for subletting the Property which might have accounted for the discrepancy the Respondents’ alleged; however, at the hearing she stated that such sums would have been refunded so would not have formed part of the Handover Arrears. The Tribunal notes that paragraph 31 of the Sixth Schedule to the Lease would not allow such charges to be made by the lessors unless any subletting was for over 21 years. In addition, the Respondents had confirmed that they were residing at the Property during this time.
47. The Applicant does not have a copy of any of the accounts, service charge demands or service charge statements relating to the period for which the arrears arose. They, instead, rely on a figure provided by the previous managing agents as to the figure they state was owed by the Respondents on handover.
48. The Tribunal considers this insufficient evidence to satisfy the burden of proof upon the Applicant to show that the alleged service charge arrears were, in fact, payable by the Respondents.
49. Accordingly, based on the evidence before it, the Tribunal determines that the Handover Arrears, of £942.29, are not payable by the Respondents.

### ***Administration charges***

#### *Applicant’s submissions*

50. On the claim form, the Applicant had detailed five separate administration charges. The first was for an amount of £60.00 invoiced in 2015, the second an amount of £90.00 invoiced in June 2016, the third an amount of £120.00 invoiced in July 2016, the fourth an amount of £90.00 invoiced in July 2018 and the final charge an amount of £180.00, also invoiced in July 2018. At the hearing, the Applicant confirmed that they would no longer be pursuing the first three of these administration charges, thus leaving the amount claimed as £270.00, for the invoices in 2018.

51. Mr Gale confirmed that these two charges related to the managing agent's administration fees for chasing the Respondents for the failure to pay their service charge on time. In the first instance, a reminder letter was sent to the defaulter fourteen days after payment became due. If payment was still not received, a second reminder letter was sent and a default notice issued with a charge of £75.00 plus VAT. If payment was still not received, the matter was referred to solicitors and a further charge of £150.00 plus VAT was made.

#### *Respondents' submissions*

52. Mr Thomas claimed that the administration charges were not justified as the managing agents were aware that the reason he was withholding payments was due to the fact that he was disputing the Handover Arrears.

#### *The Tribunal's Deliberations and Determinations*

53. The Tribunal notes that the Applicant has decided not to pursue the figure of £270.00, in relation to the administration charges relating to the alleged arrears on handover. The two administration charges remaining relate to the non-payment by the Respondents of the 2017 and 2018 service charges.
54. The Tribunal notes that the Respondents had admitted that both of these service charge payments were due and payable by them. As they had failed to pay the same, the Tribunal considers that the Applicant was entitled to make an administration charge for both chasing the late payment and for the referral to the solicitors.
55. The Tribunal considers the sums of £75.00 plus VAT and £150.00 plus VAT for a pro forma letter chasing service charge arrears and a standard solicitor referral letter to be excessive and reduces the sums payable to £50.00 plus VAT and £100.00 plus VAT respectively.
56. As such, the Tribunal determines that a figure of £180.00 (inclusive of VAT) is reasonable and payable by the Respondents.

#### ***Costs of the Tribunal Proceedings***

57. In considering the assessment of costs, the Tribunal has had regard to the decision of Martin Rodger, Deputy Chamber President, sitting as a judge of the County Court, in *John Romans Park Homes Limited v Hancock* [2019] (unreported) ('*John Romans Park Homes*'). The costs regime for tribunal proceedings under the Tribunal Rules is quite different to the costs relating to County Court matters. It is normally (subject to Rule 13) a 'no costs jurisdiction'.
58. The Tribunal does not consider that any order for costs under Rule 13 is appropriate in this matter and awards no costs in relation to the proceedings before the Tribunal.

### ***Section 20C and Paragraph 5A in the Tribunal Proceedings***

59. Both parties provided written submissions in relation to the Respondents' applications for orders under section 20C of the Act and paragraph 5A of the 2002 Act.
60. The Applicant contended that any section 20C application should be dismissed, as the Applicant had been forced to bring a claim against Respondents due to unpaid service charges, that they had made numerous attempts to obtain evidence of the Respondents' defence, that the Respondents documents had been submitted late at hearings which had put the Applicant to additional expense and caused delay and that it would not be equitable and just to require the costs to be borne by the other leaseholders.
61. In relation to paragraph 5A, the Applicant stated that, as it had been forced to pursue proceedings both through the County Court and tribunal, at considerable expense, it would be just and equitable that the Respondents should be liable to pay the Applicant's costs, particularly as the Applicant has a contractual right, under the terms of the Lease, to recover the same.
62. The Respondents stated that they had provided evidence in relation to their defence from the start. They further stated that they had always admitted liability in relation to the service charges for 2017 and 2018 and had only stopped making payments of service charge after the Applicant had failed to resolve the dispute concerning the arrears. They stated that they had requested the Applicant to provide details of evidence of their arrears but that the Applicant had failed to do so. The Respondents submitted that it was unjust for the Applicant to have taken the Respondents to court when they were not able to provide basic evidence as to how the arrears had occurred. In addition, the Respondents contended that the Applicant had amended their statements during the proceedings.
63. The Tribunal notes that the majority of the costs in relation to the Applicant's claim against the Respondents were incurred before the transfer of the matter from the County Court. The Directions Order, dated 22<sup>nd</sup> October 2019, indicated that the matter was ready for Trial and would be determined at the hearing, taking into account the witness statements already submitted by the parties.
64. The Tribunal does not consider that, either counsel or any other legal representation, was required at the hearing, as the Respondents had already admitted that they were liable for the 2017 and 2018 service charges and the main area of dispute related to historical arrears which could easily have been dealt with by the Applicant's managing agents.
65. As such, in relation to the application under section 20C of the Act, the Tribunal considers it just and equitable in the circumstances to make an order that any relevant costs in relation to the tribunal proceedings are not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondents.

66. The Tribunal also considers it just and equitable, under paragraph 5A of Schedule 11 to the 2002 Act, to reduce the Respondents' liability to pay any administration charge in respect of the litigation costs incurred or to be incurred by the Applicant in connection with the proceedings before the tribunal in this matter to £180, the costs of the administration charges detailed at paragraph 56 above.

## **The Issues & Decisions (County Court)**

### ***Interest on Service Charges***

67. In the claim form, the Applicant stated that they had claimed interest under the default rate detailed in the Lease, which they calculated as 12.75% per annum, being a sum of 12% per annum above the base rate of National Westminster Bank Plc ('Natwest'). Judge Gandham, sitting in her capacity as a judge of the County Court, considered that the Applicant had misinterpreted the wording of clause 3(b) of the Sixth Schedule to the Lease. This stated that the interest to be paid was to be "*the greater of 12% per annum or 4% per annum above the base rate (or its equivalent) at National Westminster Bank Plc*". It would make little sense for the clause to be interpreted as either 12% above the base rate of Natwest or, in the alternative, 4% above the base rate of Natwest (as per Applicant's interpretation), as the first alternative would always be higher.
68. Judge Gandham considered the interest rate of 12% to be extremely high, considering interest rates had been generally low for many years, and instead substituted a figure of 4.75% (being 4% above the Natwest's bank base rate at the date of the claim).
69. Taking into account the fact that the Respondents knew and admitted that they were liable to pay the 2017 and 2018 service charges, and there being no good reason for the Respondents not to have paid the sums in question sooner, Judge Gandham determines that the Applicant is entitled to interest against the remaining service charges at the rate of 4.75%. These are payable from the dates such sums became due until the date of judgment.
70. As such, the interest awarded against and payable by the Respondents in relation to each of the service charges demanded is as follows:

£2.18 for the service charge dated 31<sup>st</sup> December 2015 (1,580 days);  
£12.49 for the balancing charge dated 31<sup>st</sup> December 2016 (1,214 days);  
£96.66 for the service charge dated 1<sup>st</sup> January 2017 (1,213 days);  
£82.24 for the service charge dated 1<sup>st</sup> July 2017 (1,032 days);  
£72.28 for the service charge dated 1<sup>st</sup> January 2018 (848 days); and  
£56.85 for the service charge dated 1<sup>st</sup> July 2018 (667 days).

### ***Costs of the County Court Proceedings***

71. The Applicant's Representative had produced a schedule of costs amounting to a figure of £7,092.40. This included costs before the tribunal proceedings.

72. Mr Gale stated that the Applicant relied on paragraph 32 of the Sixth Schedule to the Lease which, he said, entitled the Applicant to claim the costs of proceedings in respect of service charges on an indemnity basis.
73. The Respondents had requested that the court allow them to make a reasonable financial claim as they had spent a lot of time replying to letters and notices sent by the Applicant. They also referred to the fact that the constant worry of proceedings had been very stressful, which had impacted on their family life.
74. As previously stated, Judge Gandham noted the decision in *John Romans Park Homes* and that under the County Court proceedings the Applicant was only entitled to the costs relating to the County Court matters, which are governed by the CPR.
75. 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.
76. 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]”*
77. Judge Gandham recognised that this is a rebuttable presumption and that, in cases which have a contractual right to costs, an important factor is also the contractual provision. She took into account the decision in *Church Commissioners v Ibrahim* [1997] EGLR 13 but recognised that an order to pay costs is discretionary and that the Court retains that discretion (see *Forcelux v Martyn Ewan Binnie* [2009] EWCA Civ 1077). Judge Gandham concluded that the provision for contractual costs carries considerable weight but does not displace the Court’s overall discretion.
78. In this matter, the original claim against the Respondents, filed in December 2018, included a sum for arrears of service charge at handover of the freehold together with the interest payable on the same. In the Defence to the claim, filed in February 2019, the Respondents admitted to a sum of £3,257.74. Although the figure that was admitted included the service charge figure for January 2019, it is clear from the documents filed by the Respondents that they admitted that they owed the services charges that were due in 2017 and 2018 and their main dispute related to the Handover Arrears of £942.29.
79. The part admission was not accepted by the Applicant and the case proceeded as a defended claim. The matter was allocated to the small claims track and proceeded to be heard in the County Court at Wolverhampton. The first proceedings were adjourned, at the request of the Respondents, who were ordered

to pay the Applicant's costs for that hearing, which they did. At the second hearing, the matter was transferred to the Tribunal.

80. Judge Gandham noted that the Respondents dispute has always been in relation to the payment of the Handover Arrears. This had led to them withholding payments for some of the service charge demands that followed. Judge Gandham also noted that the Respondents had entered in to correspondence with the Applicant regarding the disputed figure, had obtained copies of their bank statements and attended a meeting to try and resolve the dispute prior to withholding their service charges.
81. The Applicant, at the hearing, decided not to pursue the claim for the administration charges relating to the Handover Arrears and the Tribunal has now determined that, based on the evidence before it, the Handover Arrears of £942.29 are not payable by the Respondents.
82. That being said, the Respondents were liable to pay the remaining service charges and balancing service charges detailed on the claim, which they readily admit, and there was little indication that they would have done so without the Applicant pursuing legal action. In addition, court proceedings could have been avoided had the Respondents continued to pay their service charge and, instead, made an application to the Tribunal regarding the disputed arrears.
83. Having weighed up all of the evidence, Judge Gandham decided that the appropriate order was that the Respondents should pay 33% of the Applicant's costs, taking into account that the part admission was made by the Respondents at the earliest opportunity and the main issue in dispute was decided against the Applicant.
84. 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.
85. The Applicant's claim for costs amounted to a sum of £7,092.40, this included an amount of £1,366.00 for 'Other expenses' (which included court fees). Other than the County Court fee of £455.00 and the tribunal hearing fee of £200.00, there were no other court fees identified at the hearing. As Judge Gandham could also only consider those items that related to the costs before the County Court, she reduced the sum detailed as 'Other expenses' to £461.00, being the County Court costs and the cost of the Office Copies. In addition, at the hearing, there was an error identified in the calculation of the travel and waiting time for attendances at hearings, so an amount of £97.50 was deducted from the sum claimed.
86. Judge Gandham also excluded the instructions to Counsel and Counsel's fees for attending the hearing (£2,130.00 inclusive of VAT). As agreed by the Applicant at the hearing, this was a relatively straightforward matter in which the Respondents had already made a part admission for a substantial amount of the sum claimed.

87. Judge Gandham noted that the majority of the Applicant's other costs appeared to have been incurred prior to the transfer to the Tribunal and related to the County Court proceedings.
88. Having regard to the provisions of CPR 44.3(5), Judge Gandham was not satisfied that the remaining sum of £3,959.90 was proportionate based on the value of the claim and the issues involved. She, therefore, substitutes the sum of £2,000.00, inclusive of VAT and court fees.
89. As the Respondents are only liable to pay 33% of the costs, as detailed above, the Court finds the sum of £660.00, inclusive of VAT and court fees, is payable by the Respondents in respect of costs.

### ***Section 20C and Paragraph 5A in the County Court Proceedings***

90. The parties' submissions are as detailed above at paragraphs 60 to 62.
91. For the same reasons as detailed in relation to the tribunal proceedings, Judge Gandham did not consider that Counsel was required at the hearing, as the Respondents had already admitted that they were liable for the 2017 and 2018 service charges and the main area of dispute related to Handover Arrears, which could easily have been dealt with by the Applicant's managing agents alone without legal representation.
92. With regard to the Applicant's argument in relation to the 20C application, Judge Gandham noted that the Respondents' defence had remained consistent throughout the proceedings and, based on the documentation provided, had been put to the Applicant prior to the proceedings commencing. In addition, the Respondents' Defence to the claim set out the part admission in relation to the 2017 and 2018 service charge arrears. Judge Gandham was not satisfied that any confusion or additional expenses had been incurred as a result of Respondents actions and the Tribunal has determined that the Applicant failed to satisfy the burden of proof that the alleged arrears at handover had been incurred and were payable by the Respondents.
93. In relation to the Applicant's assertion, that it had been forced to pursue recovery proceedings at considerable expense, Judge Gandham noted that the failure of the Applicant to deal with the dispute regarding the arrears at handover precipitated the Respondents' actions to withhold their payment of the service charges. Although this did not excuse the Respondents' actions, as they are evidently liable to pay service charges under the Lease provisions, the Applicant (just as the Respondents) could have bought an application before the tribunal to determine whether the arrears at handover were payable at a considerably reduced expense.
94. Taking into account all of the circumstances, Judge Gandham was satisfied that it was just and equitable for an order to be made under section 20C of the Act, that all of the costs incurred in connection with the proceedings before the County Court should not be regarded as relevant costs to be taken into account when determining the amount of any service charge payable by the Respondents.

95. Judge Gandham also considered it to be just and equitable, under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002, that the Respondents' liability to pay any administration charges in respect of the litigation costs incurred or to be incurred by the Applicant in connection with the proceedings before the County Court in this matter to be reduced to £660.00, the costs detailed at paragraph 89 above.

**Name:** Judge Gandham

**Date:** 27<sup>th</sup> April 2020



## **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.