FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) and IN THE COUNTY COURT at Walsall
Sitting at Centre City Tower 5-7 Hill Street Birmingham B5 4UU

Case References	**:**	**BIR/00CN/LIS/2019/0003** **BIR/00CN/LLC/2019/0004** **BIR/00CN/LLD/2019/0005**
Court claim number	**:**	**E26YX035**
Property	**:**	**Flat 6 Compton Court, Sutton Coldfield, West Midlands, B74 4AA**
Applicant	**:**	**Compton Court (Four Oaks) RTM Company Ltd**
Applicant's Representative	**:**	**Swaine Allen Solicitors**
Respondent	**:**	**Jatinder Kaur Mattu**
Respondent's Representative	**:**	**Law Connect Solicitors**
Applications	**:**	**(1) Application for a determination of liability to pay and reasonableness of service charges pursuant to s27A Landlord and Tenant Act 1985 (the Act)** **(2) Application for an order that costs incurred by the landlord in connection with the first application are not to be regarded as relevant costs in determining the amount of any service charge payable by the tenant pursuant to s 20C Landlord and Tenant Act 1985** **(3) Application for an order under paragraph 5A to Schedule 11 of the Commonhold and Leasehold Reform Act 2002 reducing or extinguishing litigation costs as an administration charge**
Date of Inspection And Hearing	**:**	**15 April 2019**
Tribunal	**:**	**Judge P. J. Ellis** **Tribunal Member Mr.D. Satchwell**
In the County Court	**:**	**Judge P.J. Ellis (sitting as a Judge of the County Court [District Judge])**
Date of Decision	**:**	**1 May 2019**

DECISION

Decision made by the FTT

1. ***The amount claimed by the Applicant for service charges for the year 2017-8 in the sum of £471.56 is reasonable and payable by the Respondent***

2. ***The Respondent's liability to pay an administration charge in respect litigation costs incurred or to be incurred by the Applicant is reduced to £1750 under paragraph 5A Schedule 11 Commonhold and Leasehold Reform Act 2002.***

3. ***Costs in excess of £1750 are not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondent under s20C Landlord and Tenant Act 1985.***

Decisions made by the County Court

1. ***Judgment for the sum of £471.56***

2. ***Interest from 1 November 2017 to 15 May 2019 £56.00***

3. ***Interest at 8% from the date of judgment on the sum claimed of £471.56 at the daily rate of 0.10p until payment***

4. ***Costs in the sum of £1750.00 including VAT counsel's fee and court fee summarily assessed.***

5. ***The Defendants 's liability to pay an administration charge in respect litigation costs incurred or to be incurred by the Claimant is reduced to £1750 under paragraph 5A Schedule 11 Commonhold and Leasehold Reform Act 2002.***

6. ***Costs in excess of £1750 are not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Defendant under s20C Landlord and Tenant Act 1985.***

Reasons

Background

1. The Applicant is a right to manage company entitled to receive service charges from the Respondent and other occupiers of Compton Court, Four Oaks, Sutton Coldfield, B74 4AA. It was incorporated in 2006. The Respondent is the leaseholder of flat 6 Compton Court (the Property).

2. On 16 March 2018 the Applicant issued proceedings claiming against the Respondent arrears of service charges, interest and costs in the County Court Money Claims Centre under number E26YX035. The Respondent filed an acknowledgment of service indicating an intention to defend the claim. The proceedings were then transferred to the County Court at Walsall. On 9

November 2018 Deputy District Judge Edden allocated the claim to the small claims track. By the order of District Judge Thomas dated 8 January 2019 the proceedings were transferred to this Tribunal.

3. Tribunal Judge Jackson issued directions for determination of the matter on 18 January 2019. The matter came on for hearing on 15 April 2019 after an inspection of the Property that day.

4. The order transferring issues to the Tribunal was in very wide terms: "*the claim shall be transferred to the first tier Property Tribunal*"

5. All First-tier Tribunal judges are now judges of the County Court. Accordingly, where FTT charges sit in the capacity as judges of the County Court, they have jurisdiction to determine issues relating to interest or costs that would normally not be dealt with by the Tribunal.

6. Accordingly the Tribunal wrote to the parties informing them 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

7. In this case, Judge P.J. Ellis presided over both parts of the hearing which has resolved all matters before both the Tribunal and the court. The Tribunal resolved the issue of the reasonableness and payability of the service charge claim. Judge Ellis sitting alone decided the issue of costs and interest This decision will act as both reasons for the Tribunal decision and the reasoned judgment of the County Court.

The Property

8. Flat 6 Compton Court is on the first floor of a block comprising eight flats. There are three flats on each of two storeys and two flats on a third storey. The Respondent's lease is from March 1973 when the block was constructed. There is a separate block of eight garages, one each for the apartments.

9. Compton Court is located off the Walsall Road behind a small supermarket with which it shares an access road. It is of brick construction with a flat roof. The entrance to the part of the block occupied by flats 3 & 6 open onto a stairway and

landings. The common areas are well lit, clean and tidy and in a good state of decoration and repair.

10. Flat 6 is occupied by the Respondent's tenant. The Tribunal was permitted access to the Property. It is double glazed with electric central heating. Accommodation comprises two bedrooms, living room, kitchen and bathroom with w/c. Traces of damp and mould were noticed but the Tribunal could not determine whether the mould was as a result of use by the occupier or from an external cause. Overall the condition of the Property was reasonable although the occupiers had a large quantity of personal possessions and clothing which probably caused or contributed condensation and consequent mould growth,

11. The grounds to the front and rear of the block are mainly laid out with lawns or small shrubs which are well maintained. The garage block separate from the block is of concrete section construction. Some of the garages are in poor condition.

12. The Respondent acquired her interest in the Property in June 2007.

The Lease

13. The lease of the Property was made on 11 July 1974 between Coppice Commercial Limited and Richard Shirley Vann for a term of ninety nine years with effect from twenty fifth of March 1973. It provides at clause 1 that the leaseholder will pay as additional rent the service charges in accordance with the seventh schedule. That schedule provides at clause 2 that the lessee will pay "*half yearly in advance an estimated sum on account of the service charge in accordance with the demand submitted by the lessor.*"

14. Clause 3 provides that the lessor will *hold "any unexpended balance of the service charge to the credit of the respective lessees proportionately against future liabilities"* and clause 28 provides so far as relevant
"To pay all costs charges and expenses (including legal costs and fees payable to a survey) incurred by the lessor in or in contemplation of any proceedings or the service of any notice under sections 146 and 147 of the Law of Property Act 1925……"

15. Other clauses defined the property to be maintained and the lessor's expenses which were not in dispute.

16. The freehold interest in Compton Court was acquired by Elmbirch Properties plc on 6 January 1992.

The Issues

17. This claim arises because the Respondent refused to pay an increase in service charges imposed by the Applicant. Arrears of service charges accrued as a result of the Respondent's refusal to increase her monthly payments to meet the increased demand. The sum claimed is limited to the arrears which had accumulated by March 2018. The issue for the Tribunal was to determine whether the increase in service charge was reasonable. There are cost applications arising as a result of this dispute alone.

The Submissions

18. The Applicant referred to the terms of the lease which imposed an obligation to make payment of service charges at half yearly intervals but the leaseholders had by arrangement made monthly payments to discharge their liability.

19. On acquiring her interest in the Property in 2007 the Respondent commenced monthly payments of a sum sufficient to discharge all her liabilities under the lease. In March 2010 the sums due payable monthly increased from £79.98 to £90.00. The payments remained at that amount until 1 April 2017 when the service charge demands increased.

20. For the years between 2010 and 2017 the Applicant had issued service charge demands at half yearly intervals. The monthly payments were sufficient to meet the charges passed to the leaseholders without additional demands to meet unbudgeted or additional expenses. This method had operated reasonably smoothly because there were only two occasions when a 'balancing charge' was imposed. First the sum of £41.75 was imposed in September 2013 and secondly there was a 'recharged expenditure' of £145.32 in November 2015. The service charge demands increased by small increments between September 2009 and March 2017 and apart from the increase in payments noted the monthly payment did not increase.

21. However, the practise of nearly matching income to outgoings resulted in a small reserve. In March 2017 there was a reserve of £6575.00.

22. On 29 March 2017 the Applicant acting by its property agent HLM Property Management of Shrewsbury submitted its service charge demand for the first half of the service charge year. The accompanying letter explained the increase was as a result of proposed necessary works which justified increasing the reserve fund. The letter asked for payment of the demand in accordance with the terms of the lease.

23. The Respondent did not increase her monthly payment and in May 2017 the Applicant's agents wrote to the Respondent asking for an increase in the monthly payments to make up the shortfall. The Applicant sent a demand for the second half of the year in September 2017. Further correspondence from the Applicant to the Respondent reminded her the monthly payments were insufficient. By the end of the year the difference between the sum paid and the sum demanded was £471.56 which is the sum claimed in these proceedings.

24. The Respondent challenged the claim on the grounds that the two recharged items were unreasonable and that the Applicant's representatives were making unreasonable demands for both administration charges and legal costs. The Respondent also challenged the contractual nexus between the parties entitling the Applicant to make the demands. Also, she contended the Applicant had issued proceedings too soon by launching the action before the end of the service charge year.

25. The Respondent further contended the amounts required for the reserve fund were unreasonable because the sums demanded amounted to an increase of 30% since 2015 when the annual demand was £1141.98 rising to £1476.08 in 2017.

The Decision

26. The Tribunal is satisfied the service charge claim in the sum of £471.56 is reasonable and payable. The Respondent did not produce any evidence that the charges were unreasonable instead relying on her assumptions that the charges were not appropriate. The Applicant had behaved reasonably and responsibly in making its decision to increase the service charges in order to build a fund to meet future large expenses connected with maintenance and decoration of the

block. By accumulating a reserve fund the Applicant is not seeking to avoid its obligations of consultation regarding costs of work and services.

27. Moreover, the items of recharge of which the Respondent complains were several years old. There was no complaint about them at the time. The Tribunal was satisfied they were reasonable charges.

The Costs and Interest

Costs

28. The Applicant submitted a costs schedule with a total claim of £5,504.12 including counsel's fee and VAT but without apportioning costs between the Tribunal and the County Court but counsel for the Applicant said the cost claim should be apportioned equally between the County Court and the Tribunal hearings.

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

30. In terms of the award of the costs Judge Ellis (in his capacity as a Judge of the County Court) made an order under s.51 Senior Courts Act 1981 after considering the following matters.

31. He 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. He concluded that the Applicant was the successful party because the Respondent was found liable to pay the sum of £471.56 to the Applicant.

32. Judge Ellis recognised that this is a rebuttable presumption and that an important factor is the contractual provision. He took into account the decision in *Church Commissioners v Ibrahim [1997] EGLR 13* which stated:

> " *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."

33. Also it was recognised that the matter was allocated to the small claims track where costs are restricted pursuant to CPR part 27 rule 14. However, the lease provides that the leaseholder is responsible for legal costs incurred in contemplation of any proceedings. Clause 28 of the lease imposes an obligation upon the leaseholder *"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 all the service of any notice under sections 146 and 147 of the Law of Property Act 1925……"*

34. Judge Ellis concluded that this clause gives the landlord a contractual entitlement to its costs in taking proceedings to recover service charges, costs and interest but it does not entitle the Applicant to indemnity costs. Consequently although the terms of the lease make costs recovery possible the court has a discretion to decide on the reasonableness of the costs claimed (44.5 CPR) which provides

"(1) Subject to paragraphs (2) and (3), where the court assesses (whether by summary or detailed assessment) costs which are payable by the paying party to the receiving party under the terms of a contract, the costs payable under those terms are, unless the contract expressly provides otherwise, to be presumed to be costs which—
(a) have been reasonably incurred; and
(b) are reasonable in amount,
and the court will assess them accordingly.
(2) The presumptions in paragraph (1) are rebuttable".

35. In the Tribunal proceedings the Respondent issued two applications relating to costs being an application under S20C Landlord and Tenant Act that costs of proceedings ought not to be regarded as relevant charges for the purposes of calculating the service charge. Secondly there is an application under paragraph 5A, Schedule 11 Commonhold and Leasehold Reform Act 2002 for an order reducing or extinguishing her obligation to pay a particular charge in respect of litigation costs.

36. The county court costs are assessed in accordance with CPR 44.2, 44.3, 44.4, and 44.5 on the standard basis and may include costs of the FTT hearing to determine service charges as confirmed in *Chaplair v Kumari [2015] EWCA Civ 798* which established two principles, firstly that the costs awarded pursuant to

s.51 Senior Courts Act 1981 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. The principles were endorsed in the decision in *Avon Ground Rents Limited v Sarah Louise Child [2018] UKUT 204 (LC).*

37. Part 44(2) Civil Procedure Rules provides:

"(2) Where the amount of costs is to be assessed on the standard basis, the court will—
(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.
(Factors which the court may take into account are set out in rule 44.4.).

Part 44 r3(5) provides:

Costs incurred are proportionate if they bear a reasonable relationship to—
(a) the sums in issue in the proceedings;
(b) the value of any non-monetary relief in issue in the proceedings;
(c) the complexity of the litigation;
(d) any additional work generated by the conduct of the paying party; and
(e) any wider factors involved in the proceedings, such as reputation or public importance.

38. Applying those principles to the costs claimed in this case, the Judge Ellis decided that the costs were to be assessed on the standard basis applying the principles of proportionality prescribed in Part 44 rule 2 and also the principles governing assessment of costs in contractual entitlement cases set out in Part 44r 5 and made the following observations regarding the reasons for the decision.

39. Much of the Respondent's case revolved around the claims for costs. The Applicant applied administration charges to her service charge account whenever the account was in arrears. The sums debited were unreasonably high and were later credited. Although the Applicant made no claim for administration charges their conduct in connection with such charges exacerbated the dispute leading to extensive submissions from the Respondent.

40. The position was worsened by the claims for costs made in correspondence from the Applicant's solicitors. Disproportionate sums were claimed for simple debt collection letters before action. The Applicant decided to use legal representation at both the allocation hearing and the Tribunal hearing. Although counsel was used the solicitors did not arrange attendance themselves. The matter was not

complicated and legal representation at first sight appears excessive.

41. In this case the Respondent served long statements of case and pleadings thereby exacerbating the work of preparation required by the Applicant's representative. Also the Respondent made unrealistic settlement proposals which inevitably resulted in a hearing and the attendant costs of preparation.

42. The Applicant's schedule of costs proposes hourly rates of £201.00 for a grade A fee earner and £110.00 for a grade D fee earner. Those rates are not unreasonable. The distribution of work indicates the grade A fee earner was heavily engaged in the conduct of the case. The case was a simple debt collecting matter which did not warrant the time claimed by a grade A fee earner. As stated in *Avon Ground Rents v Child [2018] UKUT 0204 (LC):*

"*The procedure before the FTT is intended to be relatively informal and cost effective. The legal principles for assessing the reasonableness of service charges are well-established and clear. In many cases there will be no issue about the relevant principles to be applied, and their application will not be so difficult as to make legal representation essential or even necessary. In such cases a representative from the landlord's managing agents should be able to deal with the issues involved. After all, those agents will have been directly involved in the decisions taken pursuant to the lease to provide services, to set annual budgets and estimated charges, to incur service charge costs and to serve demands for service charges. Where that is so, a court may reach the conclusion that it was unreasonable for the costs of legal representation to be incurred, whether in whole or in part*"

43. There was a substantial bundle of documents presented by the Applicant which was excessive. Time taken in drafting documents including short form particulars of claim, witness statements and instructions to counsel on two occasions was substantial. In total the claim for time taken on documents was £2086.20, attendance time taken was £1091.40. Counsel was used at the allocation hearing and the Tribunal hearing with fees of £1150.00. Court fees were £305.00.

44. Use of counsel who was not attended by solicitors at the Tribunal hearing was a matter of choice for the Applicant for such a matter but the Respondent is a solicitor and had opposed the Applicant from the issue of the demand for payment of the service charge.

45. Before making the final decision on the summary assessment of costs Judge Ellis also had regard to the obligation to award costs which are just and equitable in accordance with para 5A(2) of Schedule 11 and the guidance given by the Upper Tribunal in *Avon Ground Rent v Child*
"*Had the para 5A jurisdiction been available to the Respondent in the litigation before the County Court and the FTT in the present case, it may well be that those bodies would have considered it "just and equitable" to reduce the Respondent's contractual liability to pay the legal costs that the Appellant had incurred in relation to that litigation to an amount which was proportionate to the sums in dispute, the issues involved and the level of representation appropriate to deal with those matters (and not simply by reference to whether costs had been incurred reasonably and were reasonable in amount). We recognise that this would have effected an alteration to the parties' contractual position, but that is the very purpose of the para. 5A jurisdiction"*

46. The Court substitutes the sum of £1750.00 inclusive of VAT counsel's and court fees for which makes a reasonable allowance for responding to the defence and extensive submissions served by the Respondent. Accordingly the Applicant is entitled to that sum for its costs of the County Court and the Tribunal hearings.

47. The Tribunal determined that the application referring litigation costs under Paragraph 5A Schedule 11 Commonhold and Leasehold Reform Act 2002 will apply the sum determined by Judge Ellis sitting as a judge of the County Court.

48. The Tribunal then considered the application for an order relating to costs under s20C Landlord and Tenant Act. The Tribunal determined that any sum incurred by the Applicant for costs may not be regarded as relevant costs to be taken into account in determining service charges payable by the Respondent under s20C Landlord and Tenant Act 1985.

Interest

49. The Applicant made a claim for interest at the rate of 8% from November 2017 at the daily rate of £0.10. The lease makes no provision for payment of interest in the event of late payment of service charges.

50. In the absence of a contractual entitlement to interest the right to interest in the county court is a matter for the court to decide (s69 County Courts Act 1984).

The sum for interest due at the date of the claim on 5 March 2018 was £12. 82. Interest due from 6 March 2018 to the date of the decision given on 1 May 2019 is 421 days at £0.10 being £42.10. The total for interest to the date of this decision is £54.92. Payment is due by 15 May 2019 therefore the sum for interest is £56.00 to that date.

Appeal

Appeals in respect of decisions made by the FTT

51. 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 (Rule 52 of The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013).
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 capacity as a Judge of the County Court

52. 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 capacity as a Judge of the County Court and in respect the decisions made by the FTT

53. 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.

Dated the 29 day of April 2019

Judge PJ Ellis
Chair