



GETTING YOUR MONEY BACK

Jonathan Upton looks at the issues surrounding the recovery of legal costs in small claims cases

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It is common for landlords to issue debt proceedings in the county court to recover service charge arrears - often as a pre-cursor to forfeiture. In the vast majority of cases the amount claimed is less than the small claims limit of £10,000 and the claim is allocated to the small claims track (Civil Procedure Rules Part 27). Unless a party acts unreasonably, in such claims the general rule is that there should be no order as to costs. In many cases, service charge disputes are transferred to the First-Tier Tribunal (FTT) which is often (wrongly) described as a 'costs-free' jurisdiction. Where, however, a lease includes a tenant covenant to indemnify the landlord against any costs incurred arising out of the lessee's breach or to pay the landlord's legal costs in recovering the service charge, the landlord will seek to recover his costs. So there is a mismatch between the costs rules in the small claims track and the FTT on one hand and the terms of the contract (in this case the lease) on the other.

This issue has now been resolved by the recent Court of Appeal decision in *Chaplain Limited v Kumari* [2015] EWCA Civ 798. The court held that when a lease has a costs recovery clause, the court can and should permit recovery of costs in a small claim, including those incurred in tribunal proceedings, despite the rules governing small claims costs. In this ruling, the Court of Appeal followed a line of authority which began with the mortgage case of *Gomba Holdings (UK) Ltd v Minorities Finance Ltd (No 2)* [1993] Ch 171 and was followed by *Church Commissioners v Ibrahim* [1997] EGLR 13. The decision in the Ibrahim case determined that, if the lease has a costs recovery clause the court can and should award costs in line with the recovery clause regardless of the fixed costs regime for possession claims under Part 45 of the Civil Procedure Rules (CPR).

In the Chaplain case, Arden LJ held that the reason Part 27 of the CPR does not prevent costs recovery is that the costs the landlord

seeks are contractual costs under the lease. The court retains a discretion as to whether to award contractual costs, but the contractual right to costs is highly relevant here. CPR 27.14 which limits small claims costs must be read subject to CPR 44.5 (dealing with contractual costs) as it gives statutory effect to *Gomba Holdings*, and is not excluded by CPR 27.2. The contractual costs are recoverable subject to the court's discretionary right to disallow unreasonable expenses.

Gomba Holdings and *Ibrahim*, are decisions of long standing, but their affect on costs in the small claims track has been much less clear. The precise reasoning for the disapplication of the small claims costs rules has also been unclear; CPR 27 works differently from fixed costs in possession claims under Part 45, where the court retains an express discretion not to follow the fixed costs rules. In Part 27, there is no such discretion, unless there has been unreasonable conduct. In *Chaplain*, Patten LJ explained that where costs are payable under the contract, not as part of the courts general costs jurisdiction, Part 27 does not exclude the contractual entitlement. This is clearly a useful case for landlords.

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