Case No: A2/2014/2233

Neutral Citation Number: [2015] EWCA Civ 798
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Romford County Court
His Honour Judge Wulwik
8BT02390

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/07/2015

Before :

LADY JUSTICE ARDEN
LORD JUSTIC PATTEN
and
LORD JUSTICE CHRISTOPHER CLARKE

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Between :

	Chaplair Limited	**Respondent**
	- and -	
	Kumari	**Appellant**

- -
- -

Mark Watson-Gandy (instructed by **Krishan Kumar Solicitor**) for the **Appellant**
Louise Worton (instructed by **Alterman Solicitors**) for the **Respondent**

Hearing dates: Tuesday 18 May

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Judgment **Lady Justice Arden:**

Issues:

(1) Does the court have power to order a tenant to pay any costs to the landlord under the terms of the lease where the costs arose in related leasehold valuation tribunal proceedings?

(2) Does the court have power to order a tenant to pay costs to the landlord (with the amount to be assessed) under the terms of the lease where the case was allocated to the small claims track?

1. On 15 May 2014, HHJ Wulwik, sitting in the Romford County Court on appeal from District Judge Watson, made an order for costs against the appellant, Mrs Kamlesh Kumari ("Mrs Kumari"), in favour of her landlord ("Chaplair"). Chaplair had brought these proceedings ("the County Court proceedings") to recover unpaid rent and service charges payable under a lease ("the lease") executed by Mrs Kumari of Flat 13, Brook Court, 510 Ripple Road, Barking, Essex. As part of its costs, Chaplair sought to recover the costs of the proceedings and the costs of certain related proceedings in the leasehold valuation tribunal ("LVT"). Mrs Kumari was unsuccessful in respect of both sets of costs.

2. Mrs Kumari was partly successful in obtaining permission to appeal against the judge's order. In the heading to this section of my judgment, I have formulated in my own words the two issues which she seeks to raise.

3. Mrs Kumari has permission to appeal the order to pay costs incurred by Chaplair's in the LVT (Issue (1) above), but her application in regard to Issue (2) has been adjourned to this court with the appeal to follow if permission is granted. We have, however, as is customary in this situation heard full argument on both issues as if Mrs Kumari had permission to appeal in respect of both issues, leaving the question of permission to appeal to be determined in the court's written judgments.

4. Costs were incurred in the LVT because Mrs Kumari raised issues about her service charge. Because nine other tenants of the same block were already challenging the service charge before the LVT, the County Court transferred those issues to the LVT. Mrs Kumari did not take an active part in those proceedings, in which Chaplair was successful overall, but she obtained the benefit of some reduction in her service charge as a result of the actions of the other tenants.

5. The County Court proceedings have a long procedural history, but we are not concerned with that save for one procedural step which subsequently became important: the parties to the County Court proceedings agreed to an order which allocated these proceedings to the small claims track ("SCT"). This is the normal track for claims by a landlord not exceeding £10,000. However, significantly for the purposes of this case, the Civil Procedure Rules ("CPR") provide that the court cannot order the payment of any costs, other than the costs of issuing the claim (£260), in SCT cases: CPR 27.14.

6. Quite separately from the power of the court under the CPR to award costs, the lease contains provisions for Mrs Kumari to pay the landlords' costs of various expenses which it incurs. These are clauses 12 and 14 which provide as follows:-

> The Fourth Schedule…

12.

(a) To pay to the Landlord all costs charges and expenses (including legal costs and fees payable to a surveyor) which may be incurred by the Landlord in or in contemplation of any proceedings under Sections 146 and 147 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court

(b) To pay all proper and reasonable expenses including solicitors' costs and surveyors' fees incurred by the Landlord of and incidental to the service of all notices and schedules relating to wants of repair to the Flat whether the same be served during or after the expiration or sooner determination of the term hereby granted (but relating in all cases to such wants of repair that accrued not later than the expiration or sooner determination of the said term as aforesaid)

(c) To pay all reasonable expenses of the Landlords its Managing Agents or Solicitors in respect of any requests for information previously provided…

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(a) To comply with all requirements whatsoever of any local or other competent authority corporation or others in relation to the demised Premises and to comply at the Tenant's own expense with any notices whatsoever served by any such authority or others whether on the Landlord or the Tenant in relation to the Demised Premises

(b) At all times hereafter to indemnify the Landlord from and against all actions proceedings costs losses expenses claims and demands arising out of any failure by the Tenant to observe or perform any of its obligations under this Lease in relation to any legislation for the time being in force and non-compliance with any of the provisions herein contained in general or any matters referred to in sub-clause (a) and (b) hereof in…

7. At the end of the LVT proceedings, Chaplair made an application to the LVT under schedule 12 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")

for the tenants to pay some costs on the basis that they had conducted the proceedings "vexatiously, abusively, disruptively or otherwise unreasonable" for the purposes of schedule 12. That application failed.

8. The tenants countered with an application under section 20C of the Housing Act 1985 that the landlord should not be able to add the costs of the proceedings to the service charge. The tenants did not have to proceed with this application because Chaplair conceded that it could not add the costs to the service charge.

9. There was no order as to costs in the LVT. Following the determination of the LVT proceedings, the issues in the County Court proceedings were also at an end, save for any order for costs. Chaplair applied to the County Court to determine costs as it would be unable to rely in any forfeiture notice on non-payment of those costs unless they had been determined by a court (Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), section 168). Accordingly, Chaplair applied to the county court to restore these proceedings for hearing. It was common ground that the judge would have to deal with their contractual claim to costs (which Chaplair had pleaded) as well as all other issues.

10. District Judge Watson held that, since the County Court proceedings had been allocated to the SCT, the court could not award more than £200, the amount fixed by CPR 27.14. Chaplair appealed that order.

Judgment of the judge

11. The judge allowed an appeal against District Judge Watson's decision. He held that Chaplair could recover the LVT costs in the County Court under the terms of the lease. He directed himself that the discretion to award costs should normally be exercised in favour of an order which reflects the contractual rights to costs: this point is established in relation to a mortgagee's costs in *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)* [1993] Ch 171, and was extended to the landlord's costs in *Church Commissioners v Ibrahim* [1997] EGLR 13.

12. The judge had to determine the appropriate proportion of the LVT costs to be paid by Mrs Kumari. The judge accordingly ordered that Mrs Kumari should pay 90% of 10% of the costs of the LVT proceedings, to be the subject of a detailed assessment on the indemnity basis in accordance with the terms of her lease from the respondent to this appeal ("Chaplair").

13. The judge further held that the limitation of costs on the SCT did not apply because the costs were not payable under the CPR but the terms of the lease. He also

awarded Chaplair its costs of the County Court proceedings on the same basis.

14. The judge's decision is recorded in the following provisions of his order:

> 2. The Defendant shall pay to the Claimant 90% of 10% of the costs of the proceedings before the Leasehold Valuation Tribunal, to be the subject of a Detailed Assessment if not agreed, such Detailed Assessment to be on an indemnity basis in accordance with the provision of the lease dated 17th December 2002.
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> 3. The Defendant shall pay to the Claimant 90% of the costs of the County Court proceedings up to and including the hearing before Deputy District Judge Watson on the 29th July 2013 and 100% of the costs of the Appeal to be the subject of a Detailed Assessment, if not agreed, such Detailed Assessment to be on an indemnity basis in accordance with the provisions of the lease dated 17th December 2002 and to be subject to the very anxious scrutiny approach referred to by the Court of Appeal in *O'Beirne v Hudson* [2010] 1 WLR 1717.

15. The direction to the costs judge that these costs should be assessed on a "very anxious scrutiny" basis is derived from this court's decision in *O'Beirne v Hudson*, where this court held that, the case having been settled before allocation by a consent order ordering costs to be paid on the standard basis, the costs judge was entitled to take the view that the case would have been allocated to the SCT and, in determining what costs were necessarily or reasonably incurred, to decide, if he thought fit, that it was not reasonable for the paying party to pay more than would have been recoverable in a case that was allocated to the SCT.

16. The direction would thus mean that it would be a matter for the costs judge to take into account whether the costs should be assessed at the fixed costs provided for in CPR 27.14. Even under the terms in the lease, there would be an implied terms as to reasonableness.

17. As noted above, there are two issues: (1) did the judge have jurisdiction to make an order in respect of the costs of the LVT proceedings when the LVT had declined to make an order? and (2) could the judge make an order for the payment of costs of the County Court proceedings in excess of the fixed costs payable in a case on the SCT, to which these proceedings had been allocated?

18. It is common ground that the judge exercised the power to determine costs under the lease and not simply the court's power under the CPR to award costs. I make this point because the judge did not make the position explicit.

Issue (1): Does the court have power to order a tenant to pay any costs to the landlord under the terms of the lease where the costs arose in related leasehold valuation tribunal proceedings?

19. Mr Watson-Gandy, for Mrs Kumari, has two submissions.

20. His first submission is based on *res judicata*.

> A *res judicata* is a decision, pronounced by a judicial or other tribunal having jurisdiction over the cause of action and the parties, that disposes once and for all of all the fundamental matters decided, so that, except on appeal, they cannot be re-litigated between persons bound by the judgment. (*Res Judicata*, 4th edition, Spencer Bower & Handley, 2009, LexisNexis).

He submits that the costs of the proceedings (including the county court proceedings) had already been dealt with by the LVT because the tenants had applied under section 20C of the Housing Act 1985 for an order that the landlords' costs in the LVT should not be added to the service charge and Chaplair had conceded that was correct.

21. I do not accept this argument. The only matter decided by the LVT on that application was the fact that the LVT costs could not be added to the service charge. The judge was concerned with the recovery by court order of the costs.

22. Mr Watson-Gandy's alternative approach is based on the principle that a party may be estopped under the rule in *Henderson v Henderson* (1843) 3 Hare 100 from bringing a claim if he had the opportunity to bring it with an earlier claim and failed to do so. He submits that there was a transfer to the LVT of all the proceedings, including those in the county court. The court in *Henderson v Henderson* held:

> the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special

> circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.

23. The modern approach is not to apply this rule mechanically but, as Lord Bingham held in *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31 to apply

> a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

24. By the end of his submissions he had, correctly in my view, modified this submission in the light of the fact that the LVT would have no jurisdiction save in relation to the disputes over the service charge. It would have no jurisdiction in relation to any claim by Chaplair under the terms of the lease.

25. In short, Mr Watson-Gandy cannot show on either his first or alternative submission that the judge did not have power to deal with any costs incurred in the LVT proceedings. The LVT had not dealt with an order for payment of those costs and Chaplair could not be estopped from claiming them in the County Court because the LVT could not have ordered it its costs under the terms of the lease.

26. Nonetheless Mr Watson-Gandy maintains his submission that, since the question of costs was argued in the LVT, Chaplair could not obtain any further costs since it should have made its application for any further costs in the proceedings at the same time: see *Henderson v Henderson*.

Issue (2): Does the court have power to order a tenant to pay costs to the landlord (with the amount to be assessed) under the terms of the lease where the case was allocated to the small claims track?

27. Mr Watson-Gandy argues that the costs incurred in the County Court proceedings should be limited to the fixed costs that are permitted in cases on the SCT. This applies even if the landlord has a contractual claim for costs. He submits that, by virtue of CPR 27.14, the court could not award more than the fixed costs. This had indeed been the view of District Judge Watson. Mr Watson-Gandy accordingly submits that the judge gave inappropriate weight to the terms of clauses 12 and 14 of

the lease. The parties were bound by the allocation to the SCT, which they had agreed. Therefore, fixed costs only ought to have been ordered.

28. Ms Louise Worton, for Chaplair, submits that CPR 27.14 cannot extend to varying the terms of a contract that parties to litigation have made. She points out that the Civil Procedure Act 1997, under which the CPR are made, merely provides for rules to be made governing "the practice and procedure "in certain courts.

29. As to clauses 12 and 14 of the Fourth Schedule to the lease, Ms Worton submits that Chaplair's claim for costs of the county court proceedings and for the LVT were within either clause. They were sought by the particulars of claim and then the defence put everything in issue.

30. Ms Worton accepts that the judge only awarded the landlord 90% of the costs properly incurred. Chaplair takes no point on that.

31. Ms Worton also relies on CPR 44.5 which enables the court to make an assessment of costs for which there is a contractual claim. At the time of the judge's judgment this was CPR 48.3.

32. Ms Worton submits that, if the claim was a small claim, that was one of the factors to be taken into account but that the court was not confined to the fixed costs permitted on the SCT.

33. In my judgment, the judge applied the correct principle. He had to deal with the landlord's contractual right to costs. It is not suggested that this right was other than to a full indemnity for costs properly incurred. In this situation, the relevant law is as it was held to be in *Church Commissioners v Ibrahim*.

34. In that case, Roch LJ, with whom Butler-Sloss LJ agreed, examined the principles applicable to the recovery by mortgagees of their costs under indemnity clauses. He cited the summary provided by Scott LJ, giving the judgment of the court in *Gomba Holdings*:

> 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.

(iii) The power of court to disallow a mortgagee's costs sought to be added to the mortgage security is a power that does not derive from section 51 but from the power of courts of equity to fix the terms on which redemption will be allowed.

(iv) A decision by a court to refuse costs, in whole or in part, to a mortgage litigant may be a decision in the exercise of the section 51 discretion or a decision in the exercise of the power to fix the terms on which redemption will be allowed or a decision as to the extent of a mortgagee's contractual right to add his costs to the security or a combination of two or more of these things. The pleadings in the case and the submissions made to the judge may indicate which of the decisions to which we have referred has been made.

(v) A mortgagee is not, in our judgment, to be deprived of a contractual or equitable right to add costs to the security merely by reason of an order for payment of costs made without reference to the mortgagee's contractual or equitable rights and without any adjudication as to whether or not the mortgagee should be deprived of those costs.

The recorder is, in my view, correct that parties to litigation cannot tie the hands of the court on the question of costs by agreement whether that agreement is one made after the commencement of proceedings or in the contract, breach of the terms of which gives rise to the proceedings. The court's power to decide by whom costs should be paid could probably not be fettered by a prior contract between the parties to the effect that a successful litigant should have to pay costs to an unsuccessful litigant. Clearly it would be contrary to the public interest that the court should be deprived of the powers given under

> section 51(6) to disallow wasted costs. Further, section 51(8) requires the person responsible for determining the amount of costs to take account of the factor there mentioned if it exists and that duty placed on that person cannot, in my view, be abrogated by a term in the contract. Whether the court's discretion to decide by whom the costs of proceedings should be paid could be fettered by a contractual agreement made before the litigation is started is a more difficult question which does not arise in this appeal.

35. Roch LJ held that these principles were not confined to mortgage cases and applied in other cases where a party claiming costs had a contractual right to recover those costs. He analysed the relationship between the court's power to award costs and the party's contractual rights. As he explains in the following passage, the party's contractual right is highly relevant to the exercise by the court of its discretion and the court would in general give effect to his contractual right:

> The successful litigant's contractual rights to recover the costs of any proceedings to enforce his primary contractual rights is a highly relevant factor when it comes to making a costs order. He is not, in my view, to be deprived of his contractual rights to costs where he has claimed them unless there is good reason to do so and that applies both to the making of a costs order in his favour and to the extent that costs are to be paid to him. Indeed I would adopt the citation in the *Gomba Holdings* case from the judgment of Vinelott J which appears at p193A, namely:
>
> > If the parties have agreed the basis of taxation it would, I think, be an improper exercise of the court's discretion to direct the taxation on some other basis, unless satisfied that there had been some conduct on the part of the mortgagee disentitling him to costs or to costs on the agreed basis.
>
> A good reason for depriving a successful litigant to part of the costs to which the contractual term would entitle him would be that that part of the costs came within the definition of wasted costs in section 51(7), that is to say they were costs incurred by him as a result of improper, unreasonable or negligent conduct on his part or that of his legal or other representatives. There may well be other sufficient reasons

for interfering with the basis of taxation.

> In my opinion, it is not a proper exercise of a judge's discretion to refuse to allow a successful litigant to recover his contractual entitlement to costs because the judge considers that a lessor has an unfairly strong bargaining position or it is desirable that the courts keep a careful control of costs in undefended possession claims. Of course a landlord cannot by contract provide that he should recover a greater sum by way of costs than the costs that he has actually and reasonably incurred.

36. However the landlord could not simply add the costs to the service charge, he had to come back to the court to obtain an order. In that situation, the court had a discretion whether to award the costs but it is established that in general the court should exercise its discretion in line with the parties' contract.

37. In my judgment, it follows that the judge had power to make an award of costs having regard to the terms of the lease. Moreover in the present case the judge went on to exercise that discretion. He was entitled to take into account the costs before the LVT because they formed part of the costs covered by the contractual right. He was also entitled to take into account the costs occurred in pursuing the claim on the SCT. Because Chaplair had a right to all its costs, it was not restricted to the fixed costs which can be awarded under the CPR in a case on SCT. Save as conceded, (see paragraph 30 above), Chaplair has done nothing to disentitle it to the exercise by the court of its discretion in accordance with its contractual rights.

38. I accordingly reject Mr Watson-Gandy's submission that the judge has a discretion exercisable at large. In my judgment, *Ibrahim* is inconsistent with that proposition.

Conclusion

39. For the reasons given above, I would answer both of the issues set out at the start of this judgment: Yes.

40. I would also dismiss the appeal on the first issue: there is no question of any *res judicata* or estoppel which arose because of the decisions of the LVT on costs or because the LVT was not asked to make the orders for costs ultimately made by the judge.

41. The second issue concerns the court's discretion to award costs in a case on the small claims track where the parties have agreed that the paying party should be

responsible for those costs. In the light of the authorities I do not consider that the second issue satisfied the second appeal requirement that there should be an important point of principle or practice. The judge was applying law which is now well-established. Accordingly I would refuse permission to appeal on the second issue.

Lord Justice Patten:

42. I agree that the appeal and the application for permission should be dismissed. By way of a footnote to what Arden LJ has said, it is important to emphasise the relatively narrow issue we were asked to decide in relation to the costs order made in the LVT. It was common ground that the order of HH Judge Wulwik was a determination not merely under the relevant costs rules in the CPR but also of the landlord's pleaded contractual claim for an indemnity under the provisions of the Fourth Schedule to the lease.

43. It was therefore accepted by Mr Watson-Gandy that the landlord's concession that it could not recover the costs in the LVT under s.20C of the Housing Act 1985 was not a waiver of its contractual claim and that it was open to the County Court to determine that claim once the matter had been restored for hearing. The only issue about the recoverability of the LVT was an argument based on the principle of *res judicata* which fails for the reasons which Arden LJ has given.

44. The argument based on CPR 27.14 that the costs in the County Court should be capped at £260 depends upon treating CPR 27.14 as imposing a limit on the contractual claim. But it has to be read as subject to CPR 44.5 which gives statutory effect in the CPR to the decision in *Gomba Holdings* and is not excluded from the SCT regime by CPR 27.2.

45. What the decision in *Gomba Holdings* seems to establish is that a contractual claim for a costs indemnity should ordinarily be given effect to through the machinery of what is now CPR 44.5 according to the principles set out by Scott LJ in the passage from his judgment quoted by my Lady. But that does not alter the fact that it remains a contractual entitlement which the court will enforce subject to its equitable power to disallow unreasonable expenses. There is nothing in the rule making powers in respect of the CPR which enable the rules to exclude or override that contractual entitlement and I therefore agree with Arden LJ that the judge had jurisdiction to assess the costs free from any restraints imposed by CPR 27.14.

Lord Justice Christopher Clarke

46. I agree with both judgments.