

When a tenant indemnifies a landlord for all proper and reasonable costs, will a court allow the landlord to recover 100% of those costs? The answer seems to be “nearly”.

In the recent case of *Chaplair Ltd v Kumari* [2015 EWCA Civ 798], the Court of Appeal confirmed that where a tenant agrees to indemnify its landlord for costs, the landlord can recover more than the minimal Small Claims Court limit.

### Background

The landlord, Chaplair Ltd, issued a claim to recover rent and service charge arrears. The proceedings were allocated to the Small Claims Court, and a dispute about the level of service charge was then referred to the Leasehold Valuation Tribunal (LVT). Kumari was one of 10 tenants involved in the proceedings before the LVT.

The LVT has limited power to award costs, and so at the end of those proceedings, the landlord had recovered only £200 of the total costs of the proceedings (awarded in the Small Claims Court). The landlord's costs incurred in the Small Claims Court proceedings were greater than £200, but were fixed at that amount by the Civil Procedure Rules.

Unless the landlord could recover the costs as part of the service charge (which can be prevented by statute in residential service charge disputes), it therefore risked having to pay its own costs of the proceedings. To try to avoid this, it sought to claim the unrecovered costs by referring the matter back to the County Court, relying on the contractual indemnity for costs in the lease.

On appeal from the County Court proceedings, it was held that, under the contractual terms of the lease, the landlord could recover more than the £200 fixed costs of the Small Claims Court proceedings because costs were awarded on the terms of the indemnity, which was more generous to the landlord than the standard costs rules.

### Decision

The Court of Appeal ordered that where the terms of a lease include a contractual indemnity, this takes precedence over the rules set out in the CPR.

It held that the judge could use the terms of the lease to make an award for costs, and was not bound by the costs fixed in the Civil Procedure Rules. The Court did, however, still have a degree of discretion in deciding whether the landlord would achieve 100% recovery under the indemnity – here the court allowed approximately 90%.

### Comment

This decision confirms that landlords may generally rely on contractual indemnities for costs included in their leases, and that their ability to recover costs of proceedings will not usually be limited to those that might be fixed by the courts. The discretion of the courts to limit the costs which the landlord may recover under an indemnity is limited.

When negotiating the terms of a lease, landlords should therefore insist on the costs indemnity. Tenants should meanwhile consider whether the terms of the indemnity put them under a greater liability than they would otherwise have in the courts if they are an unsuccessful party in litigation.

If you require further information in relation to these issues, please do not hesitate to contact Leanne Meredith or Alison Hardy.

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