CA on appeal from Canterbury County Court (HHJ Poulton) before Lady Justice Arden and Mr Justice Wright : 17th May 2001.

JUDGMENT : LADY JUSTICE ARDEN:

1. This is an appeal by Contractreal Ltd (whom I will call 'Contractreal'), with the permission of Ward LJ, dated 15th December 2000, from the order of His Honour Judge Poulton, dated 25th July 2000. This order contains provisions, expressed to be orders by consent, declaring that the defendant owed the appellant (that is Contractreal) service charges amounting to £5,459.72 under a lease dated 25th October 1998 of Flat 3, 7 Sweyn Road, Cliftonville, Margate, Kent. (I will call the lease in question here 'the lease'.) The lease was for 99 years and provided for a rent of £50 per annum.

2. The order dated 25th July 2000 also provided for the respondents to pay Contractreal's costs of the action, and assessed those costs at £1,750, being, as to £750, the costs thrown away by the respondent's application to set aside a declaration made in default of defence, dated 28th July 1998 and thereafter set aside by the court, and, as to £1,000, the remainder of the costs in the action as assessed by the judge.

3. The appellants seek three alternative forms of order on this appeal. They seek an order that the respondents pay the claimant's costs of the action, such costs to be subject of a detailed assessment and to be on the indemnity basis. In the first alternative they claim an order that the respondents pay the claimant's costs of the action, such costs to be subject to a detailed assessment, ie on a standard basis; and in the further alternative they seek an order that the respondents pay the claimant's costs of the action, such costs to be assessed summarily in accordance with the Civil Procedures Rules (which I refer to 'CPR') "and mindful of the claimant's bill of costs dated 24th July 2000 - "at the sum of £[blank]."

4. There is also a respondent's notice, which seeks to uphold the order made by the judge on the following grounds*: "1. The manner in which the claim had been presented by Contractreal in the proceedings was such as to make it difficult to understand. 2. A major reason for the scale of costs sought was the delay in the case, much of the blame for which lay with the appellants. 3. The appellants had refused an offer before proceedings commenced to have the matter referred for professional mediation."*

5. These proceedings are proceedings under section 81 of the Housing Act 1996. Section 81 prevents a landlord from exercising a right of reentry, or forfeiture in the case of a dwelling-house, unless the amount of the service charges has been agreed or admitted by the tenant or they have been determined by the court or by arbitration. The 'court' here means the county court: see section 95 of the Housing Act 1996.

6. Section 82 states that this section does not affect the exercise by the landlord of a power to serve a notice under section 146 of the Law of Property Act 1925. But section 146(11) of that Act provides that that section does not, save as otherwise mentioned, affect the law relating to reentry or forfeiture or relief in the case of non-payment of rent.

7. Turning to the lease, clause 1 provides that the tenant will pay a yearly rent of £50 payable in advance and provides, further, that the tenant will pay a service charge by way of further rent, being such sums as are payable in accordance with the provisions of the fourth schedule hereto.

8. The fourth schedule applies for the determination of the service charge. In effect the landlord had the responsibility for carrying out repairs to the property and effecting certain insurance. The landlord was then entitled to raise a service charge, being a fraction of the expenditure on those services for the estate, save for certain specified expenditure; and the landlord was to keep a detailed account of the expenditure on services and ensure that a service charge statement was prepared for every year or period by a member of the Institute of Chartered Accountants in England and Wales or the Institution of Certified and Corporate Accountants to whom the landlord shall furnish all accounts and vouchers and afford all facilities necessary for the purpose. The landlord was then to serve the statements on the tenant, and then the service charge was to be paid half yearly. The schedule provides for the service charge statements to be conclusive as to the information shown thereon, but there is some question whether that procedure was followed in this case.

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9. At clause 2(7) of the lease the tenant gave an undertaking to pay costs. I must read this clause in full:

"(7) To pay all costs (including solicitors' costs and surveyors' fees) incurred by the landlord of and incidental to the preparation and service of:-

(i) a notice under section 146 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by order of the court

(ii) a schedule of dilapidations recording the breaches of the tenant's covenant to yield up the flat in repair of the termination of the term hereby granted or

(iii) proceedings for the recovery of any of the rents reserved."

10. At clause 5 there was a proviso for reentry if any part of the rent remained unpaid for 21 days.

11. The matter came on for trial before His Honour Judge Poulton on 25th July 2000, but in the course of that day the parties managed to reach an agreement as to the amount due. That agreement is in part reflected in the order to which I have referred. The parties then invited the court to make an order for costs. Counsel for Contractreal, Miss Heggarty, who appears before us on its behalf today, submitted that the judge should order a detailed assessment. The judge, however, rejected that submission and invited the parties' submissions on a summary assessment.

12. The bill of costs placed before him by Contractreal came to £21,388.57, including value added tax, of which some £13,000 was solicitors' fees for 1995 to date. The judge heard extensive submissions, it appears, about the considerations to be applied on summary assessment. He was taken to CPR 44.5. He was invited to consider the conduct of the parties and the length of the proceedings, and to bear in mind that the litigation was of importance to the parties since the lease was at the root of these matters and was a valuable asset which the claimant was prepared to proceed to forfeiture if no agreement was reached. The court was asked also to bear in mind that one of the parties was in Hampshire rather than in the vicinity of the court. He was asked to look at correspondence between the parties from 1995 to date, showing the amounts which had been in dispute at various points in time. Miss Heggarty fairly accepted, however, that she had not identified to him the costs in the bill of costs which had already been the subject of orders for costs in cause in her client's favour, so the assessment included those costs as well.

13. Mr Roe, for the respondents to this appeal, informs me that he made submissions to the court on summary assessment on the lines of his submissions to this Court, in particular that he referred to mediation and the size of the claim.

14. The judge, having heard these submissions, held that it was inappropriate for Contractreal to have threatened forfeiture as it did in 1995. Moreover, and most importantly, that Contractreal should simply have issued a small money claim in the County Court. He thought that the proceedings would have been pursued much more economically in that way. As it was, the proceedings were commenced on 28th January 1998. The amount claimed in the proceedings as due at the date of the commencement of the proceedings was £5,513.45.

15. There is a schedule to the originating application which sets out the composition of this claim. There are eleven items debited to the respondents, including interim service charges, a balance of a 1993/1994 service charge, insurance and further interim service charges running up to the last quarter of 1997. They all came to £5,934.20. There was then a credit for the sum of £420.75, which had been received on account of the first item in the schedule, the interim service charge for major works. The balance was stated to be £5,513.45.

16. At this date the landlord had in fact received two cheques issued by the respondents. One cheque was in the sum of £1,669.64, which appears to tie up with the third figure in this schedule, which was the balance 1993/1994 service charge. It appears on the correspondence to have been paid in respect of that item. There was a further cheque issued to the landlord prior to the date of these proceedings in the sum of £568. That was not the whole payment of any of the items in the schedule, but a payment on account of one of them. Those two cheques were handed to the landlord, but not cashed by it for fear of waiver of its right to seek forfeiture. That was figure then claimed in the proceedings.

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17. I should say that the total sum which the respondents agreed should be paid to the landlord was a larger sum than that, £8,794.56, no doubt to include service charges which had accrued due at dates subsequent to the issue of the proceedings.

18. It is apparent that if one does a rough computation based on the schedule to the originating application that if one deducts one or possibly both of the cheques which had been paid one comes down to a figure between £3,000 and £3,500 as outstanding. The judge held that the case should have been treated, as I said, as a small claim. As I explained before, he did not deal with the costs which were the subject of a prior order setting aside a judgment in default, but he assessed the balance of the costs, as I have mentioned above, in the sum of £1,000. He rejected the argument that clause 2(7) of the lease which I have read applied to proceedings under the 1996 Act. He held that there was a genuine claim for about £3,300. That figure ties up with the figure I have already mentioned as the difference between the amount claimed in the application and the amount of one or both of the cheques. It is a figure which appears in the judge's judgment without explanation. It is, however, an approved transcript. It has been suggested that this figure was a typographical error for a figure of £1,500 or £1,300, which was a sum in dispute between the parties in 1995. Be that as it may, it seems to me it is capable of explanation in the way that I have suggested. For my own part, it seems to me to be right to take the judge's figure in the approved transcript as the figure he intended. In conclusion, in all the circumstances, the judge considered that the appropriate costs of the action, excluding those the subject of the separate award computation, was a mere £1,000.

19. The appellant has made a number of submissions. Her first submissions relate to clause 2(7) of the lease. She submits that proceedings under section 81 were for the recovery of rent because the declaration was as to the amount of service charge, which would enable the appellant to progress to forfeiture. She also relies on the fact that there had been discussions between the parties for settling the case, which involved offers of the payment of arrears. Alternatively, she submits that the costs of these proceedings are incidental to the proceedings for the recovery of rent. It was necessary for the service charge to be determined before the landlord could forfeit the lease: see section 1 of the Housing Act 1986. Thirdly, she submits that, if clause 2(7) applied, the costs should have been assessed on an indemnity basis.

20. Moving on, Miss Heggarty submits that there were certain costs, totalling £7,686.15, included in the bill of costs, which related to the period before 26th April 1999, that is before the Civil Procedure Rules came into effect, and they are clearly identified in the statement of costs. On the first page, for instance, there is a note saying: *"Please note that a significant proportion of the costs incurred in relation to this case was before 26th April 1999."*

21. Miss Heggarty submits that costs incurred before that date may not under CPR 51.18(2) be disallowed if they would have been allowed on taxation prior to 26th April 1999. She submits, therefore, that the assessment of these costs could and should only have been done on a detailed assessment.

22. Miss Heggarty reminds us of the provisions of CPR 44.5. I have not so far read that rule, but I turn to it now. Paragraph (1) provides that the court is to have regard to all the circumstances in deciding whether costs were:

"(a) if it is assessing costs on a standard basis---
(i) proportionately and reasonably incurred; or
(ii) were proportionate or reasonable in amount, or
(b) if it is assessing costs on the indemnity basis---
(i) reasonably incurred; or
(ii) unreasonable in amount."

23. Then paragraph (2): *"In particular the court must give effect to any orders which have already been made.*
(3) The court must have regard to---
(a) the conduct of all the parties, including in particular---
(i) the conduct before, as well as during, the proceedings; and
(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;
(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;
(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
(e) the skill, effort, specialised knowledge and responsibility involved;
(f) the time spent on the case; and
(g) the place and the circumstances in which work or any part of it was done."

24. I should also make it clear that there is a distinction between the standard basis of assessment and indemnity basis of assessment. That is explained in CPR 44.4 where the costs are being assessed on a standard basis the court can only allow costs which are proportionate to the matters in issue and resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable in favour of the paying party. This is to be contrasted with paragraph 3, where costs are being assessed on an indemnity basis. Then the court will resolve any doubt it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

25. So it makes a considerable difference to the claimant's case as to whether their costs are to be assessed on the indemnity basis pursuant to the contractual provision in the lease or simply on a standard basis.

26. In relation to the summary assessment which the court carried out, Miss Heggarty has taken the point that the judge did not deal separately with the costs the subject of the previous costs order. But, as I have already mentioned, these figures were not actually identified for the judge and the judge was asked to deal with all the costs in a statement of costs, which includes the costs the subject of the previous costs orders. So for my own part I do not think the judge could be criticised for proceeding on the basis he did, namely by including these costs with the other costs. Miss Heggarty further submits that the court should not have undertaken a summary assessment here because of the complexity of the case. Although the sum claimed was relatively small, the computation of the various items set out in the schedule to the originating application involves detailed consideration and I am told that there were substantial bundles of documents before the judge at the trial.

27. Miss Heggarty further submits that the judge failed to take into account that when the offer of payment of £1,669.64 was made there were other arrears amounting to £3,385.85; he failed to take into account, on her submission, that the respondent's position changed. There were, at later stages, other amounts due, and the appellant did not admit the amounts claimed in the schedule, and, indeed, the case opened on the basis that all the items there mentioned were in dispute. She submits that there was no offer in any event to pay the costs of the proceedings. There was no open admissions, as opposed to admissions in correspondence, that any amount was payable. She submits that Contractreal offered to go to arbitration in 1997 and they had sought to narrow the issues. She submits that the appellants could not accept the cheques because there might be a risk of waiver of forfeiture.

28. Mr Roe has not satisfied me on this question that there was no risk to the landlord here. In my judgment, the landlord was entitled to take a cautious view unless the law clearly showed that it could safely accept sums without risking loss of its accrued right to forfeiture.

29. Miss Heggarty submits that the judge was wrong to say that the claim could have been commenced as a money claim. She also relies on the conduct of the parties in these proceedings and to the complexity and importance of the proceedings to the parties and the time which these proceedings had taken. The negotiations went back to 1995, and there was clearly a substantial amount of time spent by the legal representatives in this matter.

30. For the respondents, Mr Roe submits in relation to clause 2(7) of the lease that these proceedings were not for the recovery of rent and the fact that offers of settlement involving the payment of rent were made does not make the proceedings into proceedings for the recovery of rent. He further submits that the costs in one set of proceedings could not be "*incidental to"* the costs of other proceedings. In this regard he refers to authorities under section 51 of the Supreme Court Act 1991, particularly **Aiden Shipping Ltd v Interbulk Ltd (**1985) 1 WLR 1222 at 1226. He submits that the costs which the landlord incurred here were not incurred reasonably and the costs should not have gone beyond December 1995. He submits that the was entitled to exercise its discretion in the way it did and that this Court should not interfere and that Contractreal had conducted the case in a way that made it

unnecessarily complex and - this is a reflection of one of the points made in the respondent's notice - that the appellants were responsible for delay. He further submits that the respondents had made an offer to go to professional mediation on 26th February 1997, which was not accepted by the landlord.

31. I should say that the judge was informed of this. Indeed, he had the correspondence at all material times before him in which he could see the offers that had been made at various points in time. He does not refer to this particular offer to go to mediation in his judgment, and it clearly did not play a part in his decision on this matter. It was, of course, open to the respondents, after proceedings were commenced, to apply for a stay for alternative dispute resolution, but that did not happen.

32. Turning now then to my conclusions. I would start by saying that this is an appeal from an order for costs. On the facts of this case Contractreal either has to show the judge made an error of law about clause 2(7) of the lease or was under some misapprehension of a material fact which vitiated the exercise of his discretion or that the exercise of his discretion was outside the generous ambit in which disagreement is possible: see **G v G** [1985] 1 WLR 647.

33. So I turn now to the first point: should the costs have been ordered to be paid and assessed on the indemnity basis pursuant to the charging clause of the lease? This particular question is a question of the construction of clause 2(7). In my judgment the judge was right. These proceedings are not themselves proceedings for the recovery of rent. They are proceedings for a declaration as to the amount of the service charge which was, under the lease, to be treated as part of the rent and constituted rent, but the landlords did not wish to make a demand for rent because of the risk of waiver of their right of forfeiture. Moreover, as the judge observes, section 81 of the Housing Act 1986, under which the application is made, was not in force when the lease was entered into.

34. In any event, Miss Heggarty accepts that if these are proceedings for the recovery of rent under the terms of the lease, the only costs which would be recoverable would be costs incurred by the landlord *"of and incidental to"* the preparation and service of these proceedings: see clause 2(7). That phrase would seem to be apt to include little more than the drafting of the original application and any witness statement required to be filed on issue, the issue fee payable to the court on the issue of the originating application and service; and those costs are, of course, in the context of this statement of costs, of a very minor nature.

35. Miss Heggarty has two further submissions. She submits that the costs of these proceedings were incidental to future proceedings for the recovery of rent. If this argument is right, it would enable all the costs that had been incurred to be claimed by the landlord, Contractreal, under this clause and require them to be assessed on an indemnity basis.

36. It seems to me that there are several answers to this point. Firstly, if the whole of the costs were costs incidental to the costs of the preparation and service of proceedings for the recovery of rent it would be, as it seems to me, a case of the tail wagging the dog. Normally the natural meaning of the word 'incidental' is to denote a lesser or subordinate sum, whereas on this argument the incidental costs are a very substantial sum indeed.

37. Second, in the context of costs orders and in the context of the Supreme Court Act 1981 and its predecessors, the courts have taken the view that the word '*incidental'* in the phrase *"of and incidental to"* has a limited meaning. In **Wright v Bennett** [1948] 1 QB 601, CA, the Court held that the costs of providing documents to counsel in proceedings at first instance or in the Divisional Court could not be regarded as costs 'incidental to' the proceedings in the Court of Appeal and therefore did not form part of the costs of the appeal. The costs had been incurred in the Divisional Court and the bundle of documents was simply passed on to counsel for use in the appeal.

38. In **Department of Health of the Envoy Farmers Ltd** [1976] 1 WLR 1018, Jupp J held that costs of an inquiry held pursuant to a reference to the Secretary of State were not costs 'incidental' to the court action in which the reference was made.

39. In **Aiden Shipping v Interbulk Ltd** [1985] 1 WLR at 1222, 1226, Sir John Donaldson MR, with whom the other members of the Court agreed, held that costs of an action ordered to be paid by a charterer to a subcharterer were not costs 'incidental to' the charterer's defence of an action by the owner, even

though the unsuccessful proceedings against the subcharterer were the inevitable consequence of the owner's unsuccessful action against the charterer. Indeed, the two sets of proceedings were heard simultaneously (but had not been consolidated). This point was upheld by the House of Lords: see [1986] 1 AC 895 at 981C-D, per Lord Goff: *"I think it right, before concluding this opinion, to refer briefly to certain other submissions which Mr Rix advanced on behalf of the appellants. He submitted that the costs which the charterers were ordered to pay to the subcharterers should be regarded as 'costs incidental to' the owner's originating motion, within those words as used in section 51(1) of the Act of 1981. I do not think that that submission is well founded: I cannot accept that the word 'incidental' can be stretched that far."*

40. Likewise in **In Re: Llewellin** (1887) 37 Ch D 317 Stirling J held, in a case on the application of capital money under the Settled Land Act 1882, section 21(x), that force had to be given to the words "incidental to". He held that they meant that in addition to the costs, charges and expenses which directly and necessarily arose out of the exercise of powers under the Act, the words included those which were incurred *"casually or incidentally in the course of that exercise"*. Under section 21(x) money was to be applied in the payment of costs, charges and expenses 'of and incidental to' the exercise of powers under the Act. That case is cited by Sir Robert Megarry V-C in **In re: Gibson Settlements** [1981] 1 Ch 179.

41. So those authorities show that the expression *"of and incidental to"* is a time-hallowed phrase in the context of costs and that it has received a limited meaning, and in particular that the words *"incidental to"* have been treated as denoting some subordinate costs to the costs of the action. If Miss Heggarty was right in this action it would mean that the costs of some very substantial proceedings would be treated as costs of and incidental to other proceedings.

42. Next, there have not yet been, and indeed may never be, any proceedings for the recovery of rent to which such costs would be incidental. Finally, in the particular context of this clause I note that the expression is "of and incidental to the preparation and service of proceedings for the recovery of any rents and any of the rents reserved". It would, it seems to me, be odd if the effect of the clause is that the costs of the whole of the proceedings under section 81, claimed to be £21,000 or more, could be recovered from the tenants, but only a much narrower category of costs could be claimed under this clause in respect of the proceedings for recovery of rent themselves, namely the costs of and incidental to the preparation and service of those proceedings.

43. For all those reasons, I reject Miss Heggarty's submission that the costs of these proceedings are costs of and incidental to some further proceedings for the recovery of rent.

44. Finally, Miss Heggarty submitted that the charging clause applied because these proceedings were incidental to a notice under section 146. This is because section 82 provides that no section 146 notice can be served without a statement of the amounts claimed by way of service charge and that section 81 applied. She submits it is immaterial that there are not likely to be section 146 proceedings, and that if the Court were not to hold that the costs were recoverable under this part of the clause, the landlords would be encouraged to serve section 146 notices unnecessarily.

45. The difficulty with this argument is that section 146(11) makes it clear that in these circumstances (that is, non-payment of rent) a notice under section 146 is not required. There will be no intention by the landlord to serve such a notice. In all the circumstances, it seems to me that that part of the clause cannot apply.

46. Accordingly, in my judgment the claimant has failed to show any error of law on the judge's part in deciding that the charging clause was inapplicable in the circumstances of this case.

47. I now move to the further submissions. The way Miss Heggarty puts her submissions is that the judge was plainly wrong in the exercise of his discretion to assess the costs summarily and to assess them in the sum of £1,000. She submits, first, that the judge should not have proceeded to a summary assessment.

48. But, as I see it, that is plainly a matter for his discretion and that he was not precluded from doing so simply because the matters were relatively complex or that the proceedings had been going on for a very long time. The judge was rightly mindful that in these proceedings a comparatively small

amount had been recovered. In my judgment his decision to proceed to summary assessment was not such as to render his discretion susceptible to review by the court.

49. So that leaves the issue whether, having determined to assess costs summarily, the exercise of the judge's discretion was susceptible to review on the basis which I have mentioned, namely that the exercise of his discretion was outside the generous ambit for which disagreement is possible or was based on some misapprehension of a material fact.

50. I would start by saying that on a matter of assessment of costs I would be very reluctant indeed to entertain any challenge to the trial judge's assessment. Summary assessment is an essential part of the civil procedure reforms. It allows a party who has won an application to receive reimbursement of his costs in the amount awarded by the court within a very short period of time indeed, usually fourteen days. It avoids the need for a full-blown detailed assessment. The fact that the court has this power tends to focus the mind of well-advised parties and helps avoid unmeritorious, tactical applications and contentions.

51. On the other hand, it must be accepted that the process is not as detailed as would occur on an assessment by a costs judge over a period of time. Summary assessment is a relatively rough and ready process. It is there because as Voltaire said, the best can be the enemy of good, but it is a rough and ready process. The margin for which disagreement is possible must, in my judgment, be a large margin. The trial judge is in the best position to know the details of action. He cannot be expected to explain those matters at length in a judgment simply dealing with costs, and indeed he may not give any reasons at all on a summary assessment if the matter is not greatly contested.

52. It is important that these assessments, particularly summary assessments, are made, because, as I have explained, they lead to prompt payment of costs in favour of the receiving party. I would therefore not encourage any appeal against a summary assessment.

53. I do not accept that in this case the judge was wrong in his assessment because he did not single out costs which were already the subject of the costs orders in cause in favour of the respondent. It has been said, as I have explained, that he should have assessed these costs separately. But, as Miss Heggarty has fairly accepted, they were never properly identified for him.

54. There are, as it seems to me, arguments for the judge reaching the conclusion that the costs claimed in this case were simply too high. The bill was for over £21,000. The amount claimed in the proceedings was £5,513 plus interest. Of this, the sum ultimately agreed to be payable was only £5,459.72, some 25% of the costs. The total sum which the respondents agreed to pay was larger than that, namely £8,794.56, but that was because of the agreement as to matters which were not claimed in the proceedings. It would have to be an exceptional case to justify assessing the costs in the order of the amount claimed in the statement of costs. In addition, the judge may well have had in mind that the costs in the statement of costs included costs incurred in respect of service charges which only accrued due after the issue of proceedings and which were not claimed in it. So it was, on the face of it, likely to be an excessive bill. It was also prepared on the indemnity basis, for obvious reasons, and not on the standard basis. It included costs of correspondence before the letter which seems to have been the letter before action, a letter dated 11th September 1997. It is obviously open to argument that costs incurred before that date should not have been allowed on assessment.

55. On the other hand, there are grounds for saying that the judge misapprehended the material facts before him. First, the judge drew no distinction in his assessment between costs incurred before 26th April 1999 and those incurred after that date. In my judgment there is a material distinction between those two tranches of costs. The latter set of costs would be subject to the Civil Procedure Rules, which introduced for the first time the requirement that costs be proportionate. Secondly, the judge appears to have been in error about the amount in issue in the proceedings. I have referred to the fact that he said that there was a genuine claim for some £3,500, and I have proceeded on the basis that that figure represents the amount claimed in the action less the amount of the two cheques or one of them tendered by the respondents. The position is that the parties commenced their dispute in 1995, and, without going into exhaustive detail, the dispute between them revolved particularly around the first item in the schedule to the originating application, which is in the sum of about £1,200. In respect of

other sums, they made it clear there was no dispute. But after October 1995 further sums accrued due, and, apart from the two cheques that I have mentioned, there was no attempt to tender those sums or to pay the sum into court. What is said by Mr Roe is that if only the landlord had started its proceedings in 1995 the proceedings would have been a small claim for the purposes of the County Court jurisdiction and, in those circumstances, the costs would have been very much less.

56. That may or may not have been so. Certainly if the case had gone to arbitration there is a prospect that the costs would have been much lower. But if the case could not have been conducted in that way then some of the same complexity that has arisen would indeed have arisen in those proceedings. But the fact is, as it seems to me, that the landlord was not bound to start its proceedings in 1995. The dispute rumbled on. As I have said, it was not until January 1998 that in fact proceedings were started. At that date it claimed £5,513.45, which was the amount unpaid, save only for the two cheques that I have mentioned. So although originally there had been a dispute which centred on a figure of £1,200, by the time the proceedings were issued there were further sums which had accrued due, which had not been paid. Again, there was no valid tender of the sums other than the sum paid by the first cheque for £1,669. In relation to the second cheque, it appears this was a cheque for part only of a debt and therefore not a valid tender, even in respect of an item in a schedule. But there was no tender of the balance; and in my judgment it was for the defendants to protect themselves by making a valid tender, that is of all of the amounts due or a payment into court. When the parties arrived at trial all the matters in the schedule remained in issue. The court had an estimate of two days for the trial. On my figures the amount which was due in 1998, if account is taken of the first of the cheque, that is the cheque for £1,669, was £3,844. So the proceedings would not, as the judge had thought, have been before the small claims limit in the County Court. But whether they were above or below that amount, it seems to me that the proceedings did involve some measure of complexity and the detailed examination of some vouchers and accounting figures.

57. Be that as it may, the judge proceeded on the basis, as I have said, that it was a genuine claim for £3,300 and that led him to believe that these claims could have been more economically conducted as a small claim. For the reasons that I have explained, I do not consider that that would have been the case. Indeed, when the CPR came into force, the small claims limit became £5,000, but that was not the material limit. So, as I see it, the judge was under a misapprehension amount the amount of the dispute.

58. I next turn to the resultant figure of the judge's assessment. He assessed the costs in the sum of £1,000, plus £750 for the costs thrown away by the respondents' application to set aside the declaration given in default of defence in July 1998, and which the respondents had agreed to pay. The sum of £1,000 is a very small amount of costs indeed, to recover £5,400 odd out of the amount claimed in these proceedings. Even if one simply takes the court fees of £425, which are unchallengeable, and deducts those disbursements from the £1,000, one is left with a figure of £675. Counsel's fees as per the statements of costs are £4,836. Even assuming that on an assessment of costs that these fees would be reduced by the process of assessment and that some of the fees related to the application to set aside the default judgment, nonetheless a significant sum on account of brief fees was certainly incurred in this case and there was also probably drafting which had to be done by counsel. It seems to me in all the circumstances of this case that the figure £675, to be shared between solicitors and counsel, for the entire costs of the action other than the judgment in default, was a very low figure.

59. Now the judge is clearly to be commended for having applied a principle of proportionality in this case. It is important that parties remember that costs will only be allowed on a standard basis if they have been proportionately and reasonably incurred. The concept of proportionality reflects the overriding objective in the Civil Procedure Rules, in particular Part 1 says:

"(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as practicable ..."

60. I need not read any other paragraph but (c): *"dealing with the case in ways that are proportionate---*
(i) to the amount of money involved;

(ii) to the importance of the case;
(iii) to the importance of the issues; and
(iv) to the financial position of each party."

61. That paragraph makes it clear that it is not simply a question of comparing the total amount claimed in the bill of costs with the total amount claimed or recovered in the proceedings, there are other considerations to be taken into account, such as the importance of the case and the complexity of the issues. In this regard, I would quote from the "Guide to the Summary Assessment of Costs on or after 26th April 1999" issued by the Supreme Court Costs Office with a foreword by the Head of Civil Justice, then Sir Richard Scott VC, dated 1st November 1999, which states: *"The Guide will, it is hoped, enable judges at all levels to conduct summary assessment with minimum difficulty and delay, with broadly consistent results and in accordance with the overriding objective of the CPR."*

62. Paragraph 16 of this Guide makes the point that 'proportionality' is not defined in the rules or the Practice Direction supplementing Parts 43 to 48 of the CPR. It adds: "The Directions relating to rule 44.5 indicate, however, that in applying the test of proportionality the court will have regard to rule 1.1(2)(c) by, so far as practicable, dealing with cases in ways that are proportionate" to the matters referred to in the overriding objective, which I have already read. Paragraph 17 of the Guide then states:

"17. Paragraph 3.1 to 3.3 of the Directions relating to Part 44 give the following warnings as to the test of proportionality.

i. The relationship between the total costs incurred and the financial value of the claim may not be a reliable guide. A fixed percentage cannot be applied in all cases to the value of the claim in order to ascertain whether or not the costs are proportionate.

ii. In any proceedings there will be costs which will inevitably be incurred and which are necessary for the successful conduct of the case. Solicitors are not required to conduct litigation at rates which are uneconomic. Thus in a modest claim the proportion of costs is likely to be higher than in a large claim and may even equal or possibly exceed the amount in dispute..."

63. I need not read further, but those passages emphasise that proportionality is a more complex exercise than simply comparing the amount of the costs with the amount that was recovered and scaling down the costs accordingly.

64. In my judgment the judge gave too much weight to the size of the bill in relation to the amount of the costs that were recovered. On any basis, the resultant figure which he left for the assessed costs of solicitors and counsel seems to me to be much too low and to be capable of being properly described as being outside generous ambit within which a reasonable disagreement is possible (see **G v G** [1985] 1 WLR 647, 652 per Lord Fraser). In those circumstances, it seems to me that the judge's exercise of his discretion in the conduct of the summary assessment has, in this case, on its particular facts, to be set aside.

65. Mr Roe argued that this Court should undertake a summary assessment for itself and come to the same conclusion or one very similar to it. In my judgment it would not be appropriate for this Court, which is hearing an appeal, itself to conduct a summary assessment. In my judgment the right course is to direct a detailed assessment.

66. Accordingly, I would allow this appeal and direct a detailed assessment of the costs of Contractreal of the action on a standard basis.

MR JUSTICE WRIGHT:

67. I agree. It is only because we are differing from the learned judge in the County Court on a matter involving the exercise of his discretion that I feel it desirable to add a very few words of my own.

68. First of all, I agree with my Lady that the charging clause in the lease, even with the limited effect that I agree with her it has, has no impact on the landlord's entitlement to costs in this action. The costs incurred were not "*of and incidental to*" the preparation and service of a section 146 notice, since no such notice was necessary to support a claim for forfeiture in the circumstances of this case, the service charges in the lease having been expressly reserved as rent by the terms of the lease. Nor, in my

judgment, were these costs of and incidental to a claim for recovery of the rent reserved. The proceedings launched by the claimant in this action were expressly related to the new requirement imposed upon landlords by section 81 of the Housing Act 1996, which is a requirement governing the right not of the recovery of rent but of reentry or forfeiture.

69. Turning now to the learned judge's exercise of his discretion, I also consider that he can be shown to have fallen into error in the approach that he made to the matter at any rate in two ways. First, he does not appear to me to have taken into account the fact that, as at the date of the issue of proceedings in January 1998, the sum for which the claimant had, as he expressed it, a genuine claim, even after taking into account the sums represented by the cheque tendered on behalf of defendant, and, for the reasons explained by my Lady, I accept, as amounting to a sum of anything between £3,300 and £3,800; that sum was of course outwith the amount of the small claims arbitration procedure then available in the County Court.

70. Secondly, the learned judge also, in my view, failed to give sufficient weight to the fact that a substantial proportion of the costs incurred in these proceedings (certainly upwards, on my calculations, of some £5,000) was incurred under the costs regime which existed prior to the introduction of the CPR on 26th April 1999. Taxation of these costs alone would, in my view, have been likely to produce a figure for recoverable costs in excess of the sum that was actually awarded by the learned judge under the summary procedure that he adopted.

71. These matters lead me to conclude that the learned judge's exercise of his discretion in this regard is open to review by this Court. For the reasons set out in her judgment by my Lady, with which I respectfully agree, I also agree that this appeal should be allowed, that the costs incurred by the claimants in the prosecution of these proceedings should be referred for detailed assessment.

ORDER: Appeal allowed, costs incurred by claimant in prosecution of these proceedings to be referred for detailed assessment; costs of appeal also to be referred to detailed assessment; respondents' notice dismissed. (Order does not form part of approved Judgment)

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