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Littlestone v Macleish

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The Judgment of the Court of Appeal in Littlestone & Ors v Macleish (2016) is good news for landlords, and bad news for tenants, in two respects. Firstly, the Court awarded costs to the landlord on the more favourable indemnity basis. Secondly, it did so even though this was a dilapidations claim and not a simple claim for rent arrears.

The case concerned a claim for approximately £75,000 for damages for disrepair. The landlord was awarded approximately £48,000 at trial together with interest and other sums and the tenant was ordered to pay the landlord's costs on the standard basis. The standard basis of assessing costs means that i) the Court will only allow costs which are proportionate to the matters in issue and ii) the onus of proving the costs are reasonable rests on the receiving party. This is the basis on which most costs orders are ordinarily made.

The landlord appealed and sought indemnity costs. Under this basis of assessment, there is no requirement for the costs to be proportionate and the onus is on the paying party to show that the costs claimed are unreasonable. It is therefore a far more favourable method of assessment for the receiving party (but there still remains no guarantee of full recovery as it does not affect hourly rates).

Most leases provide for certain circumstances in which the landlord is able to recover its costs from the tenant. Sometimes the clause will expressly state that the tenant is to "indemnify" the landlord. In this case, the relevant lease clause did not include the word "indemnify" but it was fairly typical in that the tenant covenanted "to pay to the Lessor all costs and expenses

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(including legal costs and fees payable to a surveyor) which may be incurred by the Lessor... [in] the recovery or attempted recovery of arrears of rent or other sums due from the Lessee".

The Court of Appeal held that the basis upon which costs could be recovered should be dealt with in the way that the parties had contractually agreed and, despite the omission of an express obligation to indemnify, it determined that the requirement upon the tenant to pay "all" costs and expenses was akin to an indemnity, although these still have to be reasonably incurred and reasonable in amount.

What is surprising is that the Court held that the reference to "other sums due from the Lessee" did extend to damages for breaches of covenant and was not restricted to service charge, VAT, insurance and other such payments.

Accordingly, under many leases, a landlord pursuing any claim for breach of covenant of whatever nature, can, if successful, seek costs on an indemnity basis and tenants will need to try to achieve early settlements to minimise their liability for costs.

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