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HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SCHEDULE 11 TO THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Case Reference:	LON/00AW/LAC/2013/0002
Premises:	Flat 3, 10 Lennox Gardens, London SW1X 0DG
Applicant:	10 Lennox Gardens Limited
Representative:	Benson Mazure LLP, Solicitors
Respondents:	Frederick Masri Samir Masri
Representative:	
Date of hearing:	15 May 2013
Appearance for Applicant:	Howard Smith, Counsel
Appearance for Respondents:	Piers Harrison, Counsel
Leasehold Valuation Tribunal:	Martin Rodger QC Mrs L Walter
Date of decision:	22 May 2013

Decisions of the Tribunal

(1) The legal costs totalling £90,360.85 sought to be recovered by the Applicant from the Respondents were not incurred for the purpose of or incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 and accordingly do not fall within the scope of clause 3(10) of the Lease of the Premises.

(2) The legal costs being irrecoverable under the terms of the Lease, the Tribunal is unable to determine that the costs are an administration charge under Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

(3) It is not necessary for the Tribunal to reach a conclusion on the other issues raised by the application.

Where we refer in this decision to relevant statutory provisions they are to be found in the appendix.

The application

1. The Applicant seeks a determination pursuant to Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") as to the amount of administration charges payable by the Respondents in respect of costs charges and expenses incurred by the Applicant in conducting proceedings before this Tribunal.

2. The basis of the Applicant's claim is clause 3(10) of the Respondents' Lease under which the Respondents covenanted:

> *"To pay all costs charges and expenses (including solicitors' costs and surveyors' fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 requiring the Lessee to remedy a breach of any of the covenants by the Lessee herein contained notwithstanding forfeiture for such breach shall be avoided otherwise than by relief granted by the Court . . ."*

3. The application was issued on 28 January 2013 and is supported by particulars of the costs sought to be recovered, which total £90,360.85. It is said by the Applicant that those costs were incurred in circumstances falling within the scope of clause 3(10) of the Lease and that they are therefore recoverable from the Respondent.

Background

4. 10 Lennox Gardens is a substantial late Victorian terraced house on six storeys, built for occupation by a single family but subsequently converted to provide six separate flats ("the Building"). Each of the flats is now subject to a long lease.

5. The Respondents (whom we were told are brothers) are the lessees of Flat 3 at 10 Lennox Gardens ("the Premises") under a lease granted on 28 November 2003 by The Wellcome Trust Ltd for a term expiring in 2105 ("the Lease"). The Respondents were formerly lessees of the Premises under an earlier lease granted in 1974; the Lease was granted to them following the exercise of their statutory right to require a new lease for an extended term. It was suggested to us, and we assume, that the previous lease, which is recited in the Lease, was on substantially the same terms. The Lease also recites the intention of the Lessor to grant leases on similar terms of the other flats in the Building.

6. The Applicant is a company formed in 2009 to acquire the freehold interest in the Building from the Wellcome Trust. The members of the company are the lessees of the five flats in the Building other than the Premises, and so do not include the Respondents.

7. Each of the leases includes provisions in clause 4(a) and in the Third Schedule for the payment of a service charge by the lessee to reimburse the Applicant for the cost of services provided to the Building. By clause 2 of the Lease the service charges are reserved as "*further or additional rent*".

8. The Respondents are liable under the terms of the Lease to contribute 14.09% of the costs incurred by the Applicant in managing the Building. Little turns on the details of the service charge provisions, although it should be noted that they entitle the Applicant to recover from the lessees as a whole any costs which it incurs under clause 3(24) in employing solicitors and other professionals in connection with the business of managing the Building, and the costs and expenses which it incurs in discharging its obligation under clause 5(b) to take all reasonable steps to enforce compliance by the lessees of other flats in the Building with the covenants in their leases.

9. The Applicant became entitled to the reversion on the Respondents' Lease when it acquired its freehold interest in the Building in April 2008. Since then the Applicant and the Respondents have been engaged in protracted proceedings before this Tribunal in connection with the service charges payable in each of the service charge years ending 25 December 2008 to 25 December 2011. Those proceedings have resulted in substantive decisions of this tribunal on three occasions: 3 July 2009, 5 May 2010 and 5 May 2012. There have also been a number of procedural hearings attended by the parties.

10. The Applicant has been represented throughout the various proceedings by its solicitors, Benson Mazure LLP, and by Counsel, Mr Howard Smith, and has incurred expenses in connection with those proceedings totalling £98,553.60. Details of those expenses (which have already been paid) are contained in six bills of costs delivered by the Applicant's solicitors.

11. On three occasions during the previous proceedings the Respondents have been ordered by the Tribunal to make contributions to the Applicants costs totalling £1,500. Those orders, each of which was at the maximum level permitted by the relevant statutory provisions (, reflected the views of successive Tribunals that the Respondents had acted frivolously, vexatiously, abusively and unreasonably in the proceedings before them.

12. It is not necessary for us to refer in any greater detail to the behaviour which led the previous Tribunals to make the orders which they did, since they are very well known to the parties and do not touch directly on the issues which we have to decide at this stage.

13. The Applicant has also been permitted by each of the previous Tribunals to add a proportion of the costs which it has incurred to the service charge payable by the Respondents and other lessees of flats in the Building. Those orders were made after consideration by the Tribunals of applications by the Respondents under section 20C of the Landlord and Tenant Act 1985 seeking to prevent the addition of any of the costs to the service charge. The Respondents have paid the service charges for the years in which the relevant costs were incurred and have therefore indirectly discharged a further £6,692.75 of the costs and expenses incurred by the Applicant in the various Tribunal proceedings.

14. The sum which the Applicant now seeks to recover as an administration charge is the balance of the total £98,553.60 which they have paid out, after giving credit for the sums of £1,500 and £6,692.75 already paid by the Respondents.

The hearing

15. At the hearing before us the Applicant was again represented by Mr Howard Smith and the Respondent by Mr Piers Harrison. Both Counsel submitted detailed written argument before the hearing, and we are grateful to them for their considerable assistance.

16. As it was the Respondents' case that they were not liable to make any contribution to the costs incurred by the Applicant, beyond those payments already made, the Tribunal indicated at the commencement of the hearing that we would first consider and rule on the question of principle namely whether the costs incurred in the previous Tribunal proceedings were payable by the Respondents under clause 3(10) of the Lease, before going on to assess at a later stage, if necessary, the amount which was due. There were a number of detailed issues which might arise in relation to individual components of the bills submitted by the Applicant's solicitors, and a further hearing would be required to deal with those if they arose.

17. No oral evidence was called by either party at the hearing. The Applicant relied on a short witness statement of Mr M A Zuckerman dated 7 May 2013. Mr Zukerman is a partner in Benson Mazure LLP, the Applicant's solicitors, and has represented the

Applicant throughout the various proceedings between the parties. He was in attendance at the hearing, but neither Counsel considered it necessary for him to give oral evidence or to be cross examined on his statement.

The Applicant's case

18. Mr Smith made reference to the relevant parts of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), which provide this Tribunal's jurisdiction to determine whether any amount is payable by a tenant of a dwelling as an administration charge. His submission was that the costs incurred in the previous proceedings were an administration charge and were recoverable from the Respondents under clause 3(10) of the Lease which is set out at paragraph 2 above. Before the Applicant could bring proceedings to recover those costs it was first necessary for it to obtain a determination by this Tribunal under paragraph 5 of Schedule 11 to the 2002 Act.

19. Mr Smith submitted that sums claimed to be due under clause 3(10) were administration charges because they fell within paragraphs 1(1)(c) or (d) of Schedule 11. Clause 3(10) required the lessees to pay costs charges and expenses incurred for the purpose of or incidental to the preparation and service of notice under section 146, as a preliminary to forfeiture of the Lease for breach of covenant. The proceedings before the Tribunal had been a necessary preliminary to the forfeiture of the Lease for the Respondents' failure to pay the service charges. The sums claimed were within paragraph 1(1)(c) because they were amounts payable by the Respondents in respect of a failure by the Respondents to pay the service charges to the Applicant by the due date, or they were within paragraph 1(1)(d) as being payable in connection with a breach of the covenants in the Lease requiring the payment of the service charges.

20. Mr Smith submitted that clause 3(10) did not require that a notice under section 146 should have been served before costs falling within the scope of the clause could be recovered. All that was required was that costs should have been incurred for the purpose of such a notice, which would be the case if costs were expended in taking preliminary steps which were required to be taken before a notice could be served. Section 81(1) of the Housing Act 1996 prevented the exercise of a right of re-entry or forfeiture, including the service of notice under section 146, unless a tribunal or court had finally determined the amount of the service charge which was payable. That restriction applied despite the fact the service charge was reserved as rent, and meant that all of the costs of the Tribunal proceedings had had to be incurred before a section 146 notice could be served or any other steps taken to forfeit the Lease.

21. In this case no section 146 notice had in fact been prepared or served. That, Mr Smith suggested, was because the Respondents had always paid the service charges due from them after the Tribunal had determined the amount which was properly payable. As to its intention to forfeit the Lease, the Applicant relied on the witness statement of Mr Zuckerman, in paragraph 4 of which he states:

> *"Despite the actions of the Respondents, I can confirm that my client has always been determined to pursue them in order to require them to pay what is due from them and that if there were any chance of forfeiting the Respondents' lease my client would have taken it. The ideal solution from my client's standpoint would be if the Respondents were no longer lessees. Following each LVT determination the Respondents have invariably paid the share of service charge found due from them, usually on the last day of a deadline imposed by the Applicant for payment. But if the Respondent s had failed to pay their share of the service charge certified by the LVT I believe the Applicant would have instructed me to proceed to forfeit the lease."*

22. Mr Smith relied on the decision of the Court of Appeal in *Freeholders of 69 Marina v Oram* [2011] EWCA Civ 1258 in support of his submission that the previous proceedings before the Tribunal had been a necessary precondition to the service of a notice under section 146, and for his submission that the costs incurred were within the scope of clause 3(10) of the Lease.

The Respondents' case

23. In his written material Mr Harrison made nine points in support of the Respondents' case that none of the sums claimed were payable them. As they were developed in oral submissions some of those points blended into each other. We would summarise them as follows:

    1. Service of a section 146 notice was not a necessary precondition to the forfeiture of the Lease for non-payment of rent and therefore clause 3(10) simply had no application in this case.

    2. Clause 3(10) was narrower than the clause considered by the Court of Appeal in the *69 Marina* case and did not cover costs incurred in proceedings to determine the amount of a service charge payable by the Respondents under section 27A of the Landlord and Tenant Act 1985.

    3. The parties cannot have intended that clause 3(10) would allow for recovery of legal costs in relation to such proceedings because, prior to the decision in the *69 Marina* case, the law was understood not to require service of a section 146 notice before the commencement of proceedings to recover service charges reserved as rent. Additionally, the Lease allowed recovery of such expenses as service charges and the parties would have intended that such costs would have been recovered as service charges.

    4. Clause 3 (10) only allowed recovery of costs incidental to the preparation and service of a section 146 notice. The Applicant had never contemplated forfeiture and had always indicated that in default of payment it would sue for recovery of the service charges rather than serve a section 146 notice as a

prelude to forfeiture. None of its costs have been incurred incidental to such a notice.

5. A charge cannot be both a service charge and an administration charge, and the Tribunal had already decided that the legal costs were recoverable under the service charge provisions of the Lease and therefore they could not be recovered as an administration charge.

6. If a charge can be both an administration charge and a service charge the landlord had to make an election whether to treat it as one or the other and here the Applicant had elected to treat it as a service charge and was bound by that election; alternatively there has been accord and satisfaction.

7. Both parties had acted on the basis that the legal costs were recoverable as service charges, it would be inequitable now to allow the Applicant to seek to recover the same sum as an administration charge, so the Applicant was estopped from doing so.

Is the Tribunal bound to follow *Freeholders of 69 Marina v Oram*?

24. The first of Mr Harrison's propositions was, as he acknowledged, contrary to the decision of the Court of Appeal in *Freeholders of 69 Marina.* The leading judgment in that case (which was a second appeal to the Court of Appeal) was given by Sir Andrew Morritt C. The issue was whether the costs incurred by a landlord in obtaining a determination of the LVT under section 27A as to the amount of a service charge payable by a lessee were recoverable under the lessee's covenant to pay expenses, including solicitors' costs, incurred by the landlord "*incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 or in contemplation of proceedings under section 146 ...*". In that case, as in this, the service charge had been reserved as rent, and it was argued for the lessee that the covenant was therefore irrelevant, since no section 146 notice was required before such a service charge could be recovered and no proceedings under section 146 could ever have been properly in contemplation. The Chancellor disagreed and, after considering the restriction on forfeiture imposed by section 81(1) of the Housing Act 1996 and the restriction on service of a section 146 notice imposed by section 168 of the 2002 Act, concluded (at [12]) that:

> "*Subsection (2) and (4A)* [of section 81] *plainly recognise that the s 146 procedure is applicable in the case of re-entry or forfeiture in the case of non-payment of a service charge. Given that the definition of service charge includes "an amount ... payable as a part of ... the rent", the evident intention is that the s 146 procedure, as modified, is to be applicable in cases of non-payment of a service charge even when such charge is recoverable as part of the rent.*"

25. Mr Harrison submitted that *69 Marina* should not be regarded as binding authority, even at the level of this Tribunal, because it was contrary to the established law and inconsistent with prior decisions of the Court of Appeal in *Escalus Properties Ltd v Robinson* [1996] Q.B. 231 which appears not to have been cited to the Court. *Escalus* was binding authority for the proposition that service of a notice under section 146 was *not* required as a preliminary to forfeiture for non-payment of a service charge reserved as rent. Although it had been decided in 1995, *Escalus* had subsequently been followed by the Court of Appeal in *Mohammadi v Anston Investments Ltd* [2003] EWCA Civ 981, a case decided after the enactment of the Housing Act 1996.

26. Mr Harrison argued that prior to *69 Marina* the law on the forfeiture of leases for non-payment of service charges has been correctly understood as follows:

(1) Section 81, Housing Act 1996 applied in every case and provided that a landlord could not "*exercise a right of re-entry or forfeiture*" unless it has been determined or admitted that the service charge is payable.
(2) Where the service charge was reserved as rent, the landlord could proceed to forfeit after obtaining such a determination or admission and relief against forfeiture would be governed by section 138 County Courts Act 1984 which applied to forfeiture for non-payment of rent.
(3) Where a service charge was not reserved as rent, the landlord needed to serve a section 146 notice after obtaining a determination or admission and the issue of relief would be governed by section 146 Law of Property Act 1925.
(4) Section 168 of the 2002 Act did not apply at all to service charges because (i) it only prevents the service of a section 146 notice, which is not required where the service charge is reserved as rent, and (ii) where the service charge is not reserved as rent, so that a section 146 notice is necessary, section 169 (7) of the 2002 Act provides that section 168 does not apply.

27. For the Applicant, Mr Smith suggested that *Escalus* was open to a narrower interpretation which had left the Court of Appeal free in *69 Marina* to reach the conclusion which it did. Alternatively, he submitted, the later decision should be followed, since it involved consideration of subsequent statutory provisions. This Tribunal was not at liberty to disregard a recent decision of the Court of Appeal directly on the point in issue.

28. This is a formidable debate which we respectfully suggest deserves consideration at a higher level than this Tribunal. We are reluctant to express our own conclusions on that debate unless it is necessary to deal properly with this application. For us to do so would add nothing to the weight of the argument on either side.

29. Having considered Mr Harrison's more conservative submissions, we have reached the conclusion that a proper determination of the Respondents' liability to contribute towards the Applicant's legal costs of previous proceedings ought to begin by focussing on the contractual provision under which the costs are sought to be recovered. Until we are satisfied that the covenant is broad enough to include costs of previous proceedings before this Tribunal, the relationship between those

proceedings and a prospective section 146 notice will not arise. For that reason we turn first to clause 3(10) of the Lease before tackling the question whether *69 Marina* is binding on this Tribunal.

What costs are covered by clause 3(10)?

30. Mr Smith submitted that the proper construction of clause 3(10) was that any costs, charges or expenses which could be regarded as having been incurred for the purpose of a notice under section 146, or incidental to the preparation and service of such a notice, was recoverable from the lessee. The purpose of a notice under section 146 was the enforcement of the lessee's obligations by the threat of forfeiture. Any costs incurred in the enforcement of the lessee's obligation to pay the service charge were therefore within the covenant.

31. Mr Harrison submitted that only costs incurred for the purpose of preparing and serving a notice, or incidental to the preparation and service of a notice, were within the covenant. The focus of the clause was on the preparation and service of a notice. Recoverable costs would therefore include the costs of drafting the notice specifying the breach of covenant complained of and of having it served or delivered. They would also involve the costs of preliminary investigations to ascertain whether there had been a breach. The fees of a surveyor who prepared a schedule of dilapidations, or of an inquiry agent who investigated how the premises were being used, would be incidental to the preparation and service of a notice requiring the remedy of any breach which was detected.

32. In considering the general purpose of clause 3(10) we bear in mind that both parties would be likely to have regarded it as fair and appropriate that any costs reasonably incurred by the landlord in response to a breach of the lessees' covenants in the Lease should fall on the lessees and not on the landlord. That expectation is particularly apt in circumstances where the landlord is a company owned by the other lessees in the Building, rather than a commercial enterprise in its own right. Any costs not recovered from a defaulting lessee would have to be met through the service charge by the body of lessees as a whole, including those who were innocent of any breach. The object of the covenant is to minimise the risk to the landlord and therefore to the general body of lessees of their having to pick up costs arising as a result of the default of a particular lessee.

33. Nonetheless, Mr Harrison is clearly correct in his submission that the focus of clause 3(10) is narrow, and (at the very least) relates only to procedures referable to some extent to notices under section 146. No other statutory provision or legal process is referred to. The covenant is not wide enough to encompass expenditure on legal action which did not relate in some way to section 146. Costs incurred in a dispute over unpaid rent (as opposed to service charges reserved as rent), to which section 146 has no application, would not fall within clause 3(10); nor would costs incurred in legal proceedings for the enforcement of covenants by injunction, where the landlord had waived the breach of covenant and was unable to forfeit because of it. The

clause is clearly not intended to provide a general indemnity against all legal costs incurred as a consequence of a breach of covenant by the lessees.

34. In our view, expenditure may be for the purpose of or incidental to the preparation and service of a section 146 notice, if there is a clear connection between the expenditure and the purpose for which the notice is prepared and served. The expression "incidental to" is capable of more than one meaning; in some circumstances it can suggest a relationship where one feature or activity is subordinate or relatively insignificant compared to another, but in other uses the words connote simply an attachment or causal relationship. The Shorter Oxford English Dictionary defines *incidental* as "*liable to happen to, or naturally attaching to*". Here we consider that the expression bears that wider meaning, and requires a natural or causal attachment or connection between the costs which are sought to be recovered and the preparation and service of a notice under section 146.

35. We also bear in mind the general purpose of clause 3(10) of the Lease which seems to us to be reasonably clear. Where costs are incurred in connection with a breach of covenant which results in an order by the Court for relief against forfeiture, the Court has to consider whether to make reimbursement of those costs a condition of relief. The normal principle is that a landlord should be put in the same position as it would have been in if the breach had not been committed, which requires that it be indemnified against its costs reasonably incurred as a result of the breach. In such a case, where relief is obtained by orer of the court, there is no need for a separate contractual obligation for the lessee to meet the landlord's costs. On the other hand, where such costs are incurred, but do not result eventually in an order of the court requiring their reimbursement, the landlord is at risk of being out of pocket in the absence of an appropriate contractual safeguard. In many cases of breach, no court order is required, because the tenant complies with the covenant after a warning and it is either unnecessary for the landlord to commence proceedings, or they are discontinued at an early stage. In such circumstances it would be unjust for the landlord to be left to bear its own costs, and wasteful and inconvenient for it to have to begin or continue proceedings simply to obtain an order for their payment.

36. The object of clause 3(10) is therefore to meet the second situation, namely where costs are incurred but no order is made by any court for their payment because, in the words of the clause "*forfeiture for such breach* [is] *avoided otherwise than by relief granted by the Court*". That purpose would seem to us also to point to a broader, rather than a narrower application of the covenant.

37. Mr Harrison acknowledged that there was no need for costs to have been incurred after service of a section 146 notice for them to be said to be incidental to the notice. The examples he gave of incidental expenditure were of costs incurred in investigating a breach, and we agree that those costs would be incidental to the preparation and service of a notice, whether or not a notice was ultimately served provided only that the lessee was shown to have committed a breach. There would be a sufficient relationship between the costs which had been incurred and the preparation of a notice for those costs to come within clause 3(10).

38. We also take the view that other necessary preliminary steps taken with a view to the service of a section 146 notice are capable of falling within the same clause. We do not accept Mr Harrison's distinction between some preparatory costs and others, and in our judgment any expenditure on legal or practical steps which the law dictates must be taken before a section 146 notice can be served is capable of being expenditure for the purpose of or incidental to such a notice.

39. Nor do we accept that the parties cannot have intended to include preparatory steps which, at the time of the grant of the Lease, they would not have anticipated would be required as a preliminary to service of a section 146 notice. The Lease was granted for a term of almost 102 years, and the parties must be taken to have intended a degree of flexibility in the application of their agreement to changing circumstances, including a changing legal landscape. They are to be taken to have been aware of section 168 of the 2002 Act, which requires Tribunal proceedings before notice can be served under section 146, and they must therefore have contemplated that the landlord might incur such expenditure as a prelude to the preparation and service of such a notice. The understanding of lawyers at the time the Lease was granted that no section 146 notice was required as a prelude to forfeiture for non-payment of service charges reserved as rent is not a sufficient reason to attribute to the parties an intention to differentiate between some section 146 notices and others if the law, or understanding of the law, was to change during the term.

40. We therefore conclude that, in principle, expenditure incurred in proceedings before this Tribunal under section 27A of the1985 Act to determine the amount of service charges payable by the lessees are capable of falling within clause 3(10). We add one important qualification, namely that to come within clause 3(10) the relevant expenditure must genuinely have been for the purpose of or incidental to the preparation and service of a section 146 notice, in the sense that the service of such a notice must at least have been an option which the landlord had in mind at the time the expenditure was incurred. We do not read the reference to expenditure "*for the purpose of or incidental to*" the preparation and service of a notice as requiring only that the purpose for which the expenditure was incurred (enforcement of the lessees' obligation to pay the service charge) was also a purpose for which a section 146 notice could eventually have been served; rather, we consider that the expenditure must have been for the purpose of serving a notice. Clause 3(10) refers to a notice "*requiring the Lessee to remedy a breach*" and to forfeiture being "*avoided*". If the landlord did not intend to serve a notice requiring the remedy of the breach, and if forfeiture was never in contemplation (and so could not be said to have been avoided) we do not consider that expenditure incurred in procuring payment of the service charge can be said to fall within clause 3(10).

41. We appreciate that the introduction of this qualification might be said to invite an unjustified inquiry into the state of mind of the landlord. Ordinarily the reason why a person chooses to enforce their legal rights is not relevant to the determination of those rights (unless the exercise of an equitable discretion is involved). Why should it matter whether the landlord had forfeiture in mind or not? Our answer to that objection is that it appears to us to be necessary to qualify clause 3(10) in the manner

we suggest in order to respect the emphasis given by the covenant to the specific statutory procedure of serving a notice under section 146. As we have pointed out already, the covenant is not a general indemnity against all legal expenditure arising as a consequence of a breach of covenant. It is specific to the preparation and service of notices under section 146, and cannot be invoked where the landlord is unable to prove that the expenditure it seeks to recover was incurred with the service of such a notice in mind.

42. We would finally add that both parties have made submissions on the proper interpretation of the *69 Marina* case, so far as it relates to the interpretation of the covenant in that case. We have not found it necessary to compare the covenants, which are different in language and scope, and we have preferred to concentrate on the covenant which these parties entered into.

Was the expenditure within the covenant?

43. We find this factual issue much less complex than the previous issues we have considered.

44. As Mr Smith confirmed, no notice under section 146 has ever been served by the Applicant, nor was our attention drawn to any correspondence threatening service of a notice or mentioning it as a possibility. He pointed out that in *69 Marina* there was no suggestion in the judgment of Sir Andrew Morritt C that evidence of an intention to serve notice under section 146 was required before the clause in that case could be relied on by the landlord. That is true, but the clause in the *69 Marina* lease also permitted the recovery of expenditure incurred *"in contemplation of proceedings under section 146"* and the Court of Appeal clearly took the view that the proceedings under section 27A of the 1985 Act were such proceedings.

45. The Respondents, in their points of defence, put the Applicant to proof of the connection between its expenditure and any intention to serve a notice under section 146. The Applicant could have waived privilege and disclosed any relevant legal advice or internal consideration of the option of forfeiture, but it has not done so. Nor has Mr Zuckerman suggested that forfeiture was ever considered as a possible course open to the Applicant. His evidence was unchallenged and we accept it as describing the Applicant's state of mind during the proceedings fairly and openly. Mr Zuckerman's witness statement suggests that forfeiture was never in mind, although he does make clear that the Applicant, and its members, would have been delighted to be rid of the Respondents as lessees. Despite that unconsummated desire, which we entirely understand, the Applicant has taken no active step towards forfeiture, nor considered it as an option at any stage.

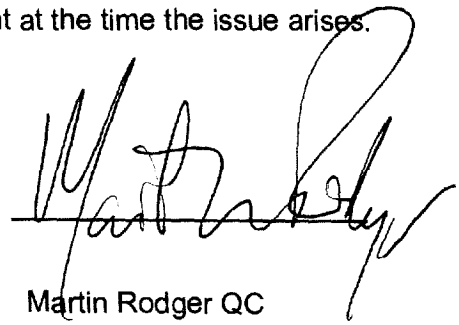
46. Such correspondence as we were shown was relied on by the Respondents, and supported their contention that the only legal action which the Applicant had in mind at any stage was proceedings for the recovery of the service charge as a debt, without any reliance on section 146 or threat of forfeiture. The letters before action

written by Benson Mazure LLP made no mention of forfeiture, although they always pointed out that any proceedings which were necessary would include claims for interest and costs as well as the service charge due. Two of the letters, of 4 June 2010 and 14 May 2012, refer specifically to the Applicant's intention to commence proceedings "*without further notice*" if the sums determined by the Tribunal were not paid promptly, (as they then were). That threat is inconsistent with any intention to rely on section 146 which would have necessitated the service of a preliminary notice allowing another opportunity for payment.

47. We therefore conclude that the costs claimed by the Applicants in these proceedings were not incurred for the purpose of or incidental to the service of notices under section 146 requiring the remedy of breaches of covenant by the Respondents. Accordingly the costs do not fall within the scope of clause 3(10) of the Lease and are irrecoverable.

48. Having reached that conclusion it is unnecessary for us to express a conclusion on the status of the Court of Appeal's decision in *69 Marina* and we decline to do so. That issue may arise again between the same parties but on different facts if, for example, the Applicant threatens forfeiture as a means of enforcing the Respondents obligation to pay future service charge demands. It would be very much more satisfactory for the issue to be resolved on the basis of the understanding of the law current at the time the issue arises.

Chairman:



Martin Rodger QC

Date: 22 May 2013

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;

(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Housing Act 1996

Section 81 Restriction on termination of tenancy for failure to pay service charge.

(1) A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure by a tenant to pay a service charge unless

(a) it is finally determined by (or on appeal from) a leasehold valuation tribunal...that the amount of the service charge...is payable by him, or

(b) the tenant has admitted that it is so payable.

(2) Where the amount is the subject of determination, the landlord may not exercise any such right of re-entry or forfeiture until after the end of the period of 14 days beginning with the day after that on which the decision of the court or arbitral tribunal is given.

(3) For the purposes of this section the amount of a service charge shall be taken to be determined when the decision of the court or arbitral tribunal is given, notwithstanding the possibility of an appeal or other legal challenge to the decision.

(4) The reference in subsection (1) to premises let as a dwelling does not include premises let on—

(a) a tenancy to which Part II of the Landlord and Tenant Act 1954 applies (business tenancies),

(b) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 in relation to which that Act applies, or

(c) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995.

(5) In this section "service charge" means a service charge within the meaning of section 18(1) of the Landlord and Tenant Act 1985, other than one excluded from that section by section 27 of that Act (rent of dwelling registered and not entered as variable).

(6) Nothing in this section affects the exercise of a right of re-entry or forfeiture on other grounds.

Section 82

(1) Nothing in section 81 (restriction on termination of tenancy for failure to pay service charge) affects the power of a landlord to serve a notice under section 146(1) of the Law of Property Act 1925 (restrictions on and relief against forfeiture: notice of breach of covenant or condition).

(2) But such a notice in respect of premises let as a dwelling and failure to pay a service charge is ineffective unless it complies with the following requirements.

(3) It must state that section 81 applies and set out the effect of subsection (1) of that section.

The Secretary of State may by regulations prescribe a form of words to be used for that purpose.

(4) The information or words required must be in characters not less conspicuous than those used in the notice—

(a) to indicate that the tenancy may be forfeited, or

(b) to specify the breach complained of,

whichever is the more conspicuous.

(5) In this section "premises let as a dwelling" and "service charge" have the same meaning as in section 81.

Commonhold and Leasehold Reform Act 2002

Section 168 No forfeiture notice before determination of breach

(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2) This subsection is satisfied if—

(a) it has been finally determined on an application under subsection (4) that the breach has occurred,

(b) the tenant has admitted the breach, or

(c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

(3) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(4) A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred.

(5) But a landlord may not make an application under subsection (4) in respect of a matter which—

(a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(b) has been the subject of determination by a court, or

(c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

169 Section 168: supplementary

(7) Nothing in section 168 affects the service of a notice under section 146(1) of the Law of Property Act 1925 in respect of a failure to pay—

(a) a service charge (within the meaning of section 18(1) of the 1985 Act), or

(b) an administration charge (within the meaning of Part 1 of Schedule 11 to this Act).

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to a leasehold valuation tribunal for a determination whether an administration charge is payable and, if it is, as to—

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).

Schedule 12, paragraph 10

(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—

(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—

(a) £500, or

(b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.