UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2014] UKUT 0322 (LC)
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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – administration charges – covenant to pay costs of proceedings – whether costs incurred "in or in contemplation of" proceedings under s.146, Law of Property Act 1925 - Freeholders of 69 Marina v Oram considered – s.81, Housing Act 1996 – ss.167-169, Commonhold and Leasehold Reform Act 2002 - appeal allowed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF A LEASEHOLD VALUATION TRIBUNAL OF THE SOUTHERN RENT ASSESSMENT PANEL

BETWEEN:

HILARY ANN BARRETT **Appellant**

and

MRS ANNE ROBINSON **Respondent**

Re: 14 Heather Ridge Arcade,
Camberley
Surrey GU15 1AX

Determination on written representations

The following cases are referred to in this decision:

Christoforou v Standard Apartments Limited [2013] UKUT 0586 (LC)

Egerton v Jones [1939] 2 KB 702

Escalus Properties Ltd v Robinson [1996] 2 QB 231

Freeholders of 69 Marina v Oram [2011] EWCA Civ 1258; [2012] L&TR 4

Khar v Delmounty Limited (1998) 75 P&CR 232

Mohammadi v Anston Investments Ltd [2003] EWCA Civ 981

DECISION

Introduction

1. In relative terms this appeal concerns a large legal bill incurred in a dispute about a small service charge.

2. The appellant is the long leaseholder of a flat above a shop in the Heather Ridge Arcade in Camberley. In February 2012 she queried the sum which she was asked to pay by her landlord, the respondent, as insurance rent under her lease. The insurance rent was £324, which was half of the premium payable under a single policy of insurance taken out by the respondent to cover both the shop and the flat. The appellant considered that the sum was too high and that it was unreasonable for her to be expected to pay half of the premium for the two units since the risks associated with the shop were greater than those referable to her flat.

3. By a decision given on 3 August 2012 a leasehold valuation tribunal of the Southern Rent Assessment Panel ("the first LVT") decided that the manner in which the insurance premium had been apportioned was reasonable, although the total amount payable by the appellant was less than had originally been claimed by the respondent.

4. By a decision given on 19 April 2013 a second leasehold valuation tribunal ("the second LVT") found that the appellant was bound by the terms of her lease to pay £6,250 to the respondent as costs incurred in connection with the first LVT proceedings.

5. This appeal (which is brought with the permission of the Tribunal) is against the decision of the second LVT.

The Lease

6. The appellant's lease was granted on 26 April 1991 for a term of 999 years from 1990 at a ground rent of £50 per annum. The appellant acquired the lease in September 2006.

7. By clause 4(1) of the lease the tenant covenanted with the landlord:

> "To pay the rent and the insurance rent herein reserved on the days and in the manner aforesaid."

The insurance rent referred to had been defined in clause 1(j) as "the sums which the Lessor [the landlord] shall from time to time pay by way of premium for insuring the premises in accordance with his obligations contained in this lease." The obligation referred to in that definition was at clause 8(a) which required the landlord to keep the appellant's flat insured at all times during the term.

8. Although clause 4(1) refers to "the rent and the insurance rent herein reserved", the insurance rent was not reserved as rent at all. The part of the lease by which rent was reserved, clause 2, reserved only the ground rent of £50 per annum. Nor did the lease state that the insurance rent was to be treated as if it had been reserved as rent. Accordingly, although it was described as "insurance rent" the sum which the tenant is obliged to pay towards the cost of insuring the flat is not strictly a rent at all. The insurance rent is a variable service charge, and indeed is the only sum which the landlord is entitled to collect as a service charge because, unusually, the lease places the obligation to repair and maintain the premises on the tenant.

9. The other critical covenant in the lease is at clause 4(14), by which the tenant covenanted:

> "To pay all reasonable costs charges and expenses (including solicitors' costs and surveyors' fees) incurred by the Lessor in or in contemplation of any proceedings or the preparation of any notice under section 146 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court."

10. The lease also contains a forfeiture clause (clause 9(1)) entitling the landlord to re-enter the demised premises and terminate the lease "if the said yearly or other rents or sums of money hereby reserved" are in arrear for more than 21 days.

Statutory restrictions on the forfeiture of residential leases

11. As this appeal concerns the entitlement of a landlord to rely on a tenant's covenant to pay costs incurred in or in contemplation of any proceedings or the preparation of any notice under section 146 of the Law of Property Act 1925, it will be helpful to have the terms of that section in mind, together with other more recent statutory restrictions on the forfeiture of residential leases.

12. Section 146(1) provides that:

> "A right of re-entry or forfeiture … shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice –
>
> (a) specifying the particular breach complained of;
>
> (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
>
> (c) in any case, requiring the lessee to make compensation in money for the breach;
>
> and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

13. Section 146 does not apply to all forfeitures. In particular section 146(11) provides that:

> "This section does not, save as otherwise mentioned, affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent."

14. Additional statutory restrictions apply to the forfeiture of leases of residential premises. The first of these is contained in section 81 of the Housing Act 1996, and applies only to forfeiture for non-payment of service charges or administration charges. It provides:

> "81(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 or administration charge unless –
>
> (a) it is finally determined by (or on appeal from) a leasehold valuation tribunal or by a court, that the amount of the service charge or administration charge is payable by him, or
>
> (b) the tenant has admitted that it is so payable."

Section 81(4A) makes it clear that the reference in this section to the exercise of a right of re-entry or forfeiture includes the service of a notice under section 146(1) of the 1925 Act.

15. Section 167 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), restricts the right of forfeiture for failure to pay small sums for a short period as follows:

> "167(1) A landlord under a long lease of a dwelling may not exercise a right of re-entry or forfeiture for failure by a tenant to pay an amount consisting of rent, service charges or administration charges (or a combination of them) unless the unpaid amount –
>
> (a) exceeds the prescribed sum, or
>
> (b) consists of or includes an amount which has been payable for more than a prescribed period.
>
> (2) The sum prescribed under sub-section (1)(a) must not exceed £500.
>
> (3) If the unpaid amount includes a default charge, it is to be treated for the purposes of sub-section (1)(a) as reduced by the amount of the charge; and for this purpose "default charge" means an administration charge payable in respect of the tenant's failure to pay any part of the unpaid amount."

16. Section 81 of the 1996 Act applies to forfeiture for failure to make payments of service charges or administration charges; section 167 of the 2002 Act relates additionally to forfeiture for non-payment of rent. Further protection for residential tenants against the service of a notice under section 146 is provided by section 168 of the 2002 Act, which applies to the service of such notices for breaches of other obligations. At the time relevant to this appeal section 168 provided as follows:

> "168(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 (c20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless sub-section (2) is satisfied.
>
> (2) This sub-section is satisfied if –

(a) It has been finally determined on an application under sub-section (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.

….

(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."

17. The reference in section 168(4) to a leasehold valuation tribunal has been replaced, since 1 July 2013, with a reference to the "appropriate tribunal" which, in England, means the First-tier Tribunal (Property Chamber).

18. Section 169 contains supplementary provisions of which section 169(7) is relevant; it provides that:

"(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 the 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).

The first LVT proceedings

19. On 13 March 2012 the appellant applied to the first LVT under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination of the sums she ought to have paid in insurance rent over the previous six years. She also applied under section 20C of the 1985 Act for an order protecting her against liability to contribute through a service charge to any costs incurred by her landlord in the proceedings.

20. Before the application was heard the respondent discovered two discrepancies in the insurance arrangements for the building which meant that the appellant had been paying too much. It emerged that the insurers had treated the premises as if they were two separate buildings insured under a single policy, rather than the ground and upper floors of the same building; moreover, part of the premium was found to cover the risk that the tenant of the shop might default in paying its rent, which was not a risk to which the appellant was obliged to contribute. Adjustments made by the respondent to take account of these discrepancies reduced the insurance rent for the year 2012-13 from the £324 originally demanded to £205. On the day before the first LVT hearing the respondent recalculated

the insurance rents for the preceding six years to take similar adjustments into account and concluded that the appellant had overpaid by £65.

21. The dispute did not end with the respondent's acknowledgement that there had been an overpayment; the appellant was still concerned to establish that the 50:50 split of the premium adopted by the respondent was unreasonable. The first LVT hearing therefore went ahead. The respondent was represented by counsel, as she was entitled to be, despite the modest sums involved. In a decision given on 3 August 2012 the first LVT found that the 50:50 apportionment was reasonable; it also accepted the respondent's adjusted figures for the insurance rents in each of the years from 2006 to 2013.

22. The first LVT next considered the appellant's application under section 20C of the 1985 Act. It reminded the parties that its jurisdiction under that section was limited to ordering that costs incurred in connection with the proceedings could not be added to a *service charge* payable by the appellant. The respondent's counsel made it clear that the respondent wished to recoup the whole of the costs of the proceedings from the appellant under clause 4(14) of the lease.

23. The first LVT concluded that clause 4(14) did not provide for the respondent to recover a service charge within the meaning of section 18(1) and section 20C of the 1985 Act. It followed that a demand for payment under clause 4(14) was not a claim from which an order under section 20C would shield the appellant. For that reason the first LVT made no order under section 20C. In case it was wrong about the extent of its jurisdiction the first LVT said that it would not in any event have made an order under section 20C.

24. In paragraph 34 of its decision the first LVT added that if the respondent wished to rely on clause 4(14) to recover the legal costs she had incurred in connection with the insurance rent proceedings, her entitlement to do so would be a matter for another tribunal in future. That tribunal would have to consider whether the costs fell within the scope of clause 4(14) and whether the sum claimed was reasonable (as it would be a variable administration charge, and so subject to the requirement of reasonableness in paragraph 2 of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the " 2002 Act")).

25. There was no appeal against the decision of the first LVT.

The second LVT proceedings

26. In due course the respondent did indeed present the appellant with a demand under clause 4(14) of the lease requiring that she reimburse the costs incurred by the respondent in dealing with the proceedings before the first LVT. That demand led to an application by the respondent to the second LVT brought under paragraph 5 of Schedule 11 to the 2002 Act, which sought a determination of the appellant's liability to pay the costs as a variable administration charge. As defined in paragraph 1(1) of Schedule 11 an administration charge includes an amount payable by a tenant as part of or in addition to the rent which is payable, directly or indirectly in respect of a failure

by the tenant to make a payment by the due date to the landlord, or in connection with a breach (or alleged breach) of a covenant or condition in her lease.

27. The parties were able to agree that the sum of £6,250 represented the costs reasonably incurred by the respondent in the insurance rent proceedings but the appellant disputed her liability to pay that sum. The dispute came before the second LVT which concluded, by its decision given on 19 April 2013, that the costs of £6,250 were payable by the appellant under clause 4(14).

28. In her statement for the hearing before the second LVT the appellant drew attention to the fact that clause 4(14) related only to the costs of forfeiture proceedings. The first LVT proceedings had been initiated by the appellant to establish the amount of the insurance rent she was liable to pay. The appellant submitted that the first proceedings did not relate to forfeiture and that therefore clause 4(14) did not allow the respondent to recover her costs.

29. The second LVT considered two contrary arguments advanced on behalf of the respondent. The first, which it rejected, was that clause 4(14) obliged the appellant to pay all reasonable costs incurred by the respondent in or in contemplation of *any* proceedings and that the obligation was not limited to costs incurred in contemplation of proceedings under section 146 of the 1925 Act. The LVT held that clause 4(14) only allowed the recovery of costs incurred in connection with proceedings in which a notice under section 146 was required or in prospect.

30. The respondent's second argument was that the proceedings before the first LVT were in contemplation of the service of notice under section 146, and reliance was placed on the decision of the Court of Appeal in *Freeholders of 69 Marina, St Leonards–on-Sea v Oram* [2012] L&TR 4.

31. *69 Marina* was a second appeal to the Court of Appeal from the county court in which the leading judgment was given by Sir Andrew Morritt C. The issue was whether the costs incurred by a landlord in obtaining a determination of a leasehold valuation tribunal under section 27A of the 1985 Act of the amount of the service charge payable by a tenant were recoverable under a covenant that the tenant would pay the legal expenses 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…". The lease stipulated that the service charges were to be paid "by way of further or additional rent". The tenant argued that the covenant to pay costs incurred in contemplation of proceedings under section 146 was not relevant, since section 146 does not apply to the forfeiture of a lease on the grounds of non-payment of rent (see section 146(11)) and that the same rule applied to a service charge reserved as rent. It followed, the argument went, that no proceedings under section 146 could properly have been in contemplation when the landlord asked the LVT to determine the amount of the service charge payable by the tenant.

32. The Chancellor rejected the tenant's argument and, after considering the restriction on forfeiture imposed by section 81(1) of the 1996 Act and the restriction on service of a section 146 notice imposed by section 168 of the 2002 Act, concluded (at paragraph 12) that:

"Sub-section (2) and (4A) [of section 81] plainly recognise that the section 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 section 146 procedure, as modified, is to be applicable in cases of non-payment of a service charge even where such charge is recoverable as part of the rent."

33. The second LVT relied on *69 Marina* in reaching the following conclusions at paragraphs 16-18 of its decision:

"16. In the tribunal's judgment, clause 4(14) … envisages a number of steps that the landlord can take regarding forfeiting the lease. These are:

(a) contemplate forfeiture proceedings (when a cause of action exists); or

(b) prepare and serve a section 146 notice; or

(c) commence forfeiture proceedings.

All of the costs incurred in relation to one or more of these matters are expressly recoverable under clause 4(14).

17. However, before a landlord can do any of these things he must now first apply to a leasehold valuation tribunal and obtain a finding that a tenant is in breach of one or more covenants and/or conditions in a lease. In the matter of *Oram* the Court of Appeal held that the costs of doing so fell within the ambit of an almost identical clause as clause 4(14). The case is a binding authority on the Tribunal, which it is obliged to follow and [counsel for the respondent's] second submission succeeds.

18. The Tribunal did not accept the submission made by [the solicitor for the appellant] that *Oram* can be distinguished here because the [appellant's] service charge account was in credit at the time of the hearing as a result of an insurance rebate. It did not necessarily mean that the [respondent's] cause of action to forfeit had been extinguished until the apportionment point had been decided in the earlier proceedings. Indeed, the Tribunal largely upheld the [respondent]."

The appeal

34. The appellant was granted permission to appeal to the Tribunal to argue that the second LVT had been wrong to dismiss her primary submission that the first LVT proceedings had had nothing to do with forfeiture so that the costs incurred in them could not properly be recovered under clause 4(14) of the lease.

35. In her statement of case in response to the appeal the respondent took the same two points she had relied on before the LVT. First she submitted that the costs of the first LVT proceedings were incurred "in or in contemplation of any proceedings or the preparation of any notice under section 146 of the Law of Property Act 1925" and that the second LVT had therefore been correct in allowing their recovery under clause 4(14) of the lease. It could make no difference whether the

proceedings were commenced by the landlord or by the tenant since, in either case, by reason of section 168(1) of the 2002 Act a determination of the first LVT had been necessary before a notice could be served under section 146. Whenever a tenant challenged her liability to pay a service charges all that was required to bring costs incurred in proceedings within the scope of a covenant such as clause 4(14) was that the proceedings should be a necessary preliminary step before a section 146 notice could be served.

36. Alternatively the respondent submitted that clause 4(14) should be construed as covering the costs of two distinct matters, namely (1) costs incurred by the landlord in or in contemplation of *any* proceedings; and (2) costs incurred by the landlord in or in contemplation of the preparation of any notice under section 146. Since the costs were undoubtedly incurred in proceedings, they fell within the first limb of clause 4(14) whether or not those proceedings had anything to do with section 146 of the 1925 Act.

Discussion

37. Although the appellant failed to persuade the first LVT that the costs of insuring the building should not be divided equally between the owner of the flat and the tenant of the shop, she succeeded in establishing that she had been paying too much for insurance and was entitled to a credit. The effect of the credit was to satisfy her liability for the sum in issue when she made her application to the LVT. The sum originally in issue was a very modest one yet, despite that sum having been reduced by a third during the course of the proceedings and the resulting credit to which the appellant was entitled having been identified, the appellant is now faced with a bill for costs which is almost 20 times as great as the insurance rent demanded by the respondent in February 2012. A liability to pay that sum is said by the respondent to be the result of the contract between the parties and has nothing to do with any judicial discretion to award costs.

38. Although on one view this appeal raises a short and relatively simple issue of fact, it touches upon a question of general significance to tenants seeking access to justice through the tribunal system. In what circumstances does a covenant for the reimbursement of costs of proceedings under section 146 render a tenant liable for costs incurred by their landlord in tribunal proceedings to determine the amount of a service charge or administration charge?

39. The LVT's own power to order the payment of costs was very limited. Paragraph 10 of Schedule 12 to the 2002 Act (which ceased to apply in England, but not in Wales, when the LVT was replaced by the First-tier Tribunal (Property Chamber) on 1 July 2013) provided that:

> "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."

The reference to "a determination under this paragraph" was to the LVT's power under paragraphs 10(1)-(3) to make a limited award of costs against a party whose application had been dismissed summarily or who had acted unreasonably in connection with the proceedings.

40. As the Tribunal explained in *Christoforou v Standard Apartments Limited* [2013] UKUT 0586 (LC), at paragraphs 45-65, the protection against liability for costs conferred by paragraph 10(4) of Schedule 12 to the 2002 Act did not prevent the recovery of costs by way of a contractual indemnity covenant in a lease. In *Christoforou* tenants had covenanted to pay to their landlord any costs and expenses arising directly or indirectly out of any breach by them of a covenant in their lease. When the tenants failed to pay service charges the landlord applied to the LVT under section 27A of the Landlord and Tenant Act 1985 for a determination of the tenant's liability to pay the disputed sums. The tenants were found to be liable for almost the whole amount in dispute. The landlord then sought to recover the costs of the LVT proceedings under the contractual indemnity covenant and the Tribunal held that it was be entitled to do so because, amongst other reasons, paragraph 10(4) did not apply to costs which a tenant had covenanted to pay.

41. The covenant relied on by the respondent in this case is rather narrower than the general indemnity covenant considered in *Christoforou* which was for costs and expenses arising directly or indirectly out of any breach. Clause 4(14) is concerned solely with costs incurred in contemplation of proceedings or in the preparation of any notice under section 146 of the Law of Property Act 1925.

42. In this appeal the respondent has relied on section 168 of the 2002 Act as making it necessary for the landlord to await a determination by the first LVT of the amount of the insurance rent which the appellant was liable to pay before proceedings for the forfeiture of the lease could be commenced. For that reason it is said by the respondent that the costs incurred before the LVT were incurred in or in contemplation of proceedings or the preparation of a notice under section 146 of the 1925 Act and so are recoverable under clause 4(14).

43. The respondent's reliance on section 168 of the 2002 Act is misplaced because that section does not affect the service of a notice under section 146 of the 1925 Act in respect of the failure to pay a service charge (see section 169(7), referred to in paragraph 18 above). Additionally, when it does apply, the restriction in section 168(1) on the service of a notice under section 146 is only lifted if one of the three conditions in section 168(2) is satisfied. The first of those conditions is that there has been a final determination on an application under sub-section (4), which entitles *a landlord* under a long lease to apply for a determination that a breach of covenant has occurred. An application made by a tenant for a determination of the extent of her liability to pay an administration charge under paragraph 5 of Schedule 11 to the 2002 Act is not an application under sub-section (4) of section 168 and so cannot satisfy sub-section 168(2).

44. Section 81 of the 1996 Act is potentially relevant. Because of section 81 the respondent could not have served a section 146 notice in relation to a failure by the appellant to pay the insurance rent (which is a service charge) unless and until the amount of the service charge payable had finally been determined by the LVT that.

45. Although a determination under section 81 would have been a necessary prelude to service of a section 146 notice, and although a determination under section 27A of the 1985 Act of the amount of the service charge would equally have satisfied the requirements of section 81, there are two reasons why the costs incurred by the respondent in the first LVT proceedings cannot be recovered under

clause 4(14) as costs incurred in or in contemplation of proceedings or the preparation of any notice under section 146 of the 1925 Act.

46. The first reason depends on the proper construction of clause 4(14) itself. Clause 4(14) does not provide a general indemnity against all legal costs which may be incurred by the lessor. It is restricted to costs incurred in proceedings under section 146 of the 1925 Act, in contemplation of such proceedings, in the preparation of any notice under section 146, or in contemplation of the preparation of any such notice.

47. I reject the respondent's argument that the clause is wide enough to cover the landlord's costs of *any* proceedings, whether connected to section 146 or not. The clear sense of the clause is that all of the costs which it covers are costs incurred in taking steps preparatory to forfeiture such as are envisaged by section 146. Both parties are likely to have regarded it as fair that costs incurred by the landlord in dealing with a breach of the tenant's covenants in the lease should fall on the tenant and not on the landlord. Neither party could have considered it fair for the tenant to be liable to pay the landlord's costs of any proceedings, whatever their subject matter or outcome. If the reference to "any proceedings" in clause 4(14) is not narrowed in its scope by the reference to section 146, the parties would have given the landlord an improbably generous indemnity against the costs of even speculative and unmeritorious proceedings.

48. The real purpose of a clause in the form of clause 4(14) can be seen from its concluding words: "notwithstanding forfeiture is avoided otherwise than by relief granted by the Court." Where a forfeiture is avoided by relief granted by the court, the terms of relief reflect the principle that the landlord should be put in the position it would have been in but for the forfeiture (i.e. if the tenant had not committed the breach of covenant on which the forfeiture was based)(see *Woodfall: Landlord and Tenant*, para 17.169; *Egerton v Jones* [1939] 2 KB 702). That principle will normally require that the tenant reimburse any costs incurred by the landlord in serving the required section 146 notice and in bringing the proceedings. However, the purpose of a notice under section 146(1) is to allow a tenant who is in breach of covenant the opportunity to remedy the breach. Where a breach has been remedied within a reasonable time, the notice will have been complied with and the landlord will have no continuing cause of action, nor any reason to commence proceedings to forfeit the lease. The same landlord may nonetheless have incurred significant costs in the preparation of the notice itself. The object of a clause such as clause 4(14) is to give the landlord the contractual right to recoup the costs incurred in taking those preparatory steps, even where no proceedings eventuate in which the payment of the landlord's costs could be made a condition of relief against forfeiture.

49. Clause 4(14) must therefore be understood as applying only to costs incurred in proceedings for the forfeiture of a lease, or in steps taken in contemplation of such proceedings. Moreover, even where a landlord takes steps with the intention of forfeiting a lease, a clause such as clause 4(14) will only be engaged (so as to give the landlord the right to recover its costs) if a forfeiture has truly been *avoided*. If the tenant was not in breach, or if the right to forfeit had previously been waived by the landlord, it would not be possible to say that forfeiture had been avoided – there would never have been an opportunity to forfeit, or that opportunity would have been lost before the relevant costs were incurred. In those circumstances I do not consider that a clause such as clause 4(14) would

oblige a tenant to pay the costs incurred by their landlord in taking steps preparatory to the service of a section 146 notice.

50. In principle such a clause is obviously capable of giving a landlord a contractual right to recover costs incurred in proceedings before the LVT or the First-tier Tribunal, but whether in any particular case such an entitlement exists will depend on the language of the particular clause, on the existence of a breach of covenant and on the nature and circumstances of the proceedings.

51. For costs to be recoverable under clause 4(14) a landlord must show that they were incurred in or in contemplation of proceedings, or the preparation of a notice, under section 146. Sometimes it will be obvious that such expense has been incurred, as when proceedings claiming the forfeiture of a lease are commenced, or a notice under section 146 is served. In other circumstances it will be less obvious. The statutory protection afforded by section 81 of the 1996 Act requires that an application be made to the first-tier tribunal for a determination of the amount of arrears of a service charge or administration charges which are payable before a section 146 notice may be served, but proceedings before the First-tier Tribunal for the determination of the amount of a service or administration charge need not be a prelude to forfeiture proceedings at all. The First-tier Tribunal's jurisdiction under section 27A of the 1985 Act covers the same territory, and proceedings are often commenced in the County Court for the recovery of service charges without a claim for forfeiture being included. A landlord may or may not commence proceedings before the first-tier tribunal with a view to forfeiture; a landlord may simply wish to receive payment of the sum due, without any desire to terminate the tenant's lease, or may not have thought far enough ahead to have reached the stage of considering what steps to take if the tenant fails to pay after a tribunal determination has been obtained.

52. Costs will only be incurred in contemplation of proceedings, or the service of a notice under section 146 if, at the time the expenditure is incurred, the landlord has such proceedings or notice in mind as part of the reason for the expenditure. A landlord which does not *in fact* contemplate the service of a statutory notice when expenditure is incurred, will not be able to rely on a clause such as clause 4(14) as providing a contractual right to recover its costs.

53. In this case there is no evidence whatsoever that the respondent contemplated proceedings for the forfeiture of the appellant's lease or the service of a notice under section 146 as a preliminary to such proceedings. The first LVT proceedings were commenced by the appellant under section 27A of the 1985 Act for a determination of the extent of her liability to pay the insurance rent. Nothing in the respondent's own statement submitted to the first LVT suggested that she had any intention of forfeiting the lease, none of the correspondence from her solicitors suggested that that such a course of action was in her mind, even before it was discovered that the appellant was entitled to a net credit for overpayments in previous years, and there was no mention of forfeiture, or of section 81 of the 1996 Act, in the skeleton argument prepared by her counsel. As a matter of fact, therefore, there was no justification for the second LVT's assumption that costs of £6,250 had been incurred in or in contemplation of proceedings, or the preparation of a notice, under section 146.

54. The second LVT relied on the decision of the Court of Appeal in *69 Marina* and considered that it was bound by that decision to find in the respondent's favour. In my judgment the second LVT gave insufficient weight to the facts of this case and to the particular contractual provision, clause 4(14), under which the costs were claimed.

55. *69 Marina* is high authority that sections 81 of the 1996 Act requires that the enforcement by forfeiture of a tenant's obligation to pay a service charge is subject to the provisions of section 146 of the 1925 Act, even if the lease treats the service charge as an additional rent recoverable as such. That conclusion came as a surprise to landlord and tenant practitioners. Earlier decisions of the Court of Appeal, in particular *Escalus Properties Ltd v Robinson* [1996] 2 QB 231, were not cited to the Court of Appeal in *69 Marina*. In *Escalus* Nourse LJ explained that where a lease provides that a service charge is or is deemed to be additional rent, that service charge acquired "all the attributes of rent". On that basis it had previously been understood that it was not necessary to serve a section 146 notice as a prelude to proceedings to forfeit a lease for non-payment of a service charge reserved as rent. It followed that the costs of proceedings under section 81 of the 1996 Act or section 27A of the 1985 Act could not properly be regarded as being incidental to or in contemplation of the service of a notice under section 146.

56. That reasoning was overturned by the Court of Appeal in *69 Marina*, but without referring to *Escalus,* or to *Khar v Delmounty Limited* (1998) 75 P&CR 232, another decision of the Court of Appeal which confirmed that the jurisdiction to grant relief from forfeiture under section 146(2) could not be exercised where a service charge was reserved as rent. *Escalus* was also followed by the Court of Appeal in *Mohammadi v Anston Investments Ltd* [2003] EWCA Civ 981, a case decided after the enactment of the 1996 Act. The tension between these relatively recent authorities and the decision in *69 Marina* has been the subject of cogent criticism: see, for example the case note at [2012] 76 Conv 498 and the extended discussion in Rosenthal: *Commercial and Residential Service Charges* (2013) at paragraphs 45-38 to 45-40.

57. Clauses such as clause 4(14) are regularly resorted to for the recovery of costs incurred in proceedings before the First-tier Tribunal where that tribunal has made no order of its own for the payment of such costs. The costs claimed often substantially exceed the service charge originally in issue in the proceedings in which they were incurred. Where a First-tier Tribunal has to determine whether such costs are recoverable as an administration charge it is important that it consider carefully whether the costs come within the language of the particular clause. If a service charge or administration charge is reserved as rent the decision of the Court of Appeal in *69 Marina* is binding authority that a determination by the First-tier Tribunal is nonetheless a pre-condition to the service of a notice under section 146. But the decision does not require that whenever a lease includes such a clause the landlord will necessarily be entitled to recover its costs of any proceedings before the First-tier Tribunal to establish the amount of a service charge or administration charge. It is always necessary to consider the terms of the particular indemnity covenant and whether any relevant contemplation or anticipation existed in fact in the circumstances of an individual case. In this case it did not, so clause 4(14) provided no route to recovery by the respondent.

58. The second reason why the respondent's costs of the first LVT proceedings cannot be recovered under clause 4(14) is equally fundamental. By their letter of 24 February 2012 the

respondent's solicitors informed the appellant's solicitors that the appellant was liable to pay the sum of £301.91. Section 167(1) of the 2002 Act prohibits a landlord from exercising a right of forfeiture in respect of rent, service charges or administration charges unless the unpaid amount exceeds the prescribed sum. The sum currently prescribed is £350 (under the Rights of Re-entry and Forfeiture (Prescribed Sum and Period) (England) Regulations 2004). The insurance rent which the respondent claimed to be entitled to recover from the appellant was therefore below the statutory threshold created by section 167(1) and could not in any event provide grounds for forfeiture. In those circumstances the respondent could not legitimately have contemplated the service of a notice under section 146, nor could the first LVT proceedings ever have been a prelude to forfeiture. The sum involved was simply too small for forfeiture to have been an option.

59. For these reasons the appeal is allowed and the appellant is not liable to pay the sum of £6,250.

Martin Rodger QC
Deputy President

21 July 2014