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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/OOGF/LIS/2017/0003**
County Court	:	**B44YP732 (Birmingham County Court)**
Property	:	**Flat 5, St Mary's, Granville Avenue, Newport Shropshire TF10 7DX**
Claimant/ Applicant	:	**St Mary's and Westfields Property Management Limited**
Representative	:	**Mr CJ Goodier (Company secretary)**
Defendant/ Respondent	:	**Mrs ED Francis**
Representative	:	**Mr P Noble (Bar Direct Access)**
Type of Application	:	**Service charges, ground rent, contractual legal costs and interest**
Judge	:	**Judge D Jackson**
Hearing	:	**20th July 2017 Birmingham Civil and Family Justice Hearing Centre**
Date of Decision	:	**7th August 2017**

DECISION

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1. This matter has been decided, with the consent of both parties and the County Court, by a Tribunal Judge sitting as a Judge of the County Court exercising the jurisdiction of a District Judge (under section 5(2) (t) and (u) of the County Court Act 1984 as amended by Schedule 9 to the Crime and Courts Act 2013) in accordance with the Civil Justice Council pilot scheme set up by the working group on flexible deployment chaired by Mrs Justice Pauffley.

Background

2. In relative terms this appeal concerns a large legal bill (£20,000 plus vat and disbursements) incurred in a dispute about a small service charge (£1,109.84).
3. In 1983 two adjacent Edwardian houses at the junction of Station Road and Granville Avenue in Newport, Shropshire were combined into a single building which was converted into seven flats ("the Building")
4. In 2007 the Respondent purchased Flat 5 ("the Property"). She has sub-let the Property to Mr Paul George who has been in occupation at all times material to the application before me.
5. The Applicant Company was incorporated in November 2013.
6. In December 2013 the Applicant purchased the freehold of the Building.
7. Six out of the seven leaseholders are members of the Applicant Company. The Respondent is not.
8. The Building is not a large, nor indeed particularly luxurious, development. The Applicant does not employ professional managing agents. It appears that 6 out of the 7 leaseholders play a role in running St Mary's and undertake various tasks in relation to the day to day running of the Building. The Respondent does not.
9. In November 2015 the Applicant issued proceedings to recover arrears of ground rent and service charges in the sum of £1109.84 together with interest and contractual legal costs (pages 1-7 of the Bundle). By Orders of District Judge Rich TD made on 19th December 2016 and 9th March 2017 those proceedings were transferred to the First-tier Tribunal
10. The Applicant was ably represented by Mr Colin Goodier, who is the company secretary. Mr Goodier is a retired salaried Employment Judge. The Respondent has made an application that I recuse myself from hearing this case. That application was refused, nevertheless I entirely understand why it was made. It was a perfectly proper application. My Decision on Recusal dated 19th May 2017 is at pages 272-274.
11. On 24th April 2017 I held a Case Management Conference (pages 257-259). At that time Mrs Francis was represented by Mr B Wales of BW Residential. At the CMC I set out the ground rules for the conduct of this matter:

    "The approach that the Tribunal will take to entitlement to contractual Legal Costs is to analyse, for each period for which costs are claimed, whether the Applicant can recover under clause 4(l) (i) of the Lease or whether, as is contended by the Respondent, the Applicant is unable to rely on that clause because the right to forfeit has been waived or the restrictions in s167 (1) and (3) of the 2002 Act apply. The Tribunal will then consider whether the extent of any costs so recoverable is reasonable."

12. This matter was heard at Birmingham on 20th July 2017. Mr Goodier represented the Applicant. Mr Noble of counsel appeared for the Respondent. I received oral evidence from Mr Liam Westaway for the Applicant and from Mrs Francis herself.
13. For the Applicant I have considered Amended Particulars of Claim dated 4th January 2017 (page 226-231), Statement of Applicant's Case dated 22nd May 2017 (page 275--295), Witness Statement of Liam Westaway also dated 22nd May 2017 (page X1-X10) and Applicant's Statement of Costs (page X11-38). I have also considered Skeleton Argument prepared by Mr Goodier and dated 14th July 2017.
14. For the Respondent I have considered Amended Defence dated 25th January 2017 (page 233-238) and Statement of Eileen Francis dated 6th June 2017 (X39-X57). The Respondent exhibits to her Statement her own claim for costs (based on unreasonable behaviour of the Respondent) in relation to both County Court and Tribunal proceedings in the grand total of £8889 (pages x58-61). I have also considered Skeleton Argument prepared by Mr Noble on behalf of the Applicant.
15. I have also considered a Bundle of documents contained within 2 volumes running to 635 pages.

Chronology

10th April 2014	Demands for ground rent (£13) and service charges (£258.92) issued.
September 2014	Further demands issued (£13 ground rent and £258.92 service charges)
8th September 2015	Mr Westaway wrote to the Respondent in relation to arrears of £543.83 pointing out "the possibility that the status of your lease is affected"
March 2015	Further demands issued (£13 ground rent and £270 service charges)
1st July 2015	Further demand issued (£270 service charges)
6th July 2015	Mr Westaway wrote to the Respondent in relation to arrears of £1096.84 again pointing out "the possibility that the status of your lease is affected"
11th September 2015	Emms Gilmore Liberson solicitors ("EGL") sent letter before claim to Respondent in the sum of £1732.31 including costs. referring to further action including forfeiture under clause 8 of the Lease.

	EGL also wrote to the respondent's mortgage provider, Mortgage Express on the same day.
22nd September 2015	EGL wrote to the Respondent indicating that if proceedings were issued and judgement obtained they would consider serving a section 146 notice to forfeit the lease.
29th September 2015	Demand for ground rent 29/9/15 -24/3/16 in sum of £13
9th November 2015	Claim issued at Birmingham County Court. Sum claimed £1109.84
30th December 2015	Defence filed
12th January 2016	Defendant (Respondent) makes strike out application
25th March 2016	Further demand for period 25/3/16-28/9/16 (ground rent £13 and service charges £270)
5th May 2016	EGL issue Notice to amend claim and for summary judgement
5th May 2016	Mr Westaway sent demand to Respondent for administration charge in the sum of £8312
11th May 2016	Hearing before DJ Gibson. Claim stayed for negotiations
9th June 2016	Mr Westaway sent demand to Respondent for administration Charge in the sum of £180
12th August 2016	Stay expires
15th September 2016	EGL apply to amend claim.
19th December 2016	Hearing before DJ Rich. Amendment of claim allowed. Defendant awarded costs of any amendments. Matter transferred to FTT
4th January 2017	Amended statement of Case filed
25th January 2017	Amended Defence filed
9th March 2017	Further Order of DJ Rich transferring all outstanding issues to Tribunal for determination in accordance with CJC Pilot (see paragraph 1 above)
24th April 2017	Case Management Conference (Regional Judge Jackson)

Further Demands

16. At my request, prior to the hearing, Mr Westaway has helpfully prepared a Table of Demands and Payments.

17. The principal sum claimed of £1109.84 comprises arrears of rent and service charge from 10th April 2014 to 29th September 2015. The following further demands have been made:

    25/3/16 ground rent (£13) and service charges (£270)
    12/9/16 ground rent (£13) and service charges (£270)
    25/3/17 ground rent (£13) and service charges (£270)

18. The Applicant has also made two demands for administration charges. The first is dated 5th May 2016 in the sum of £8312 (page 392). The second is dated 9th June 2016 and is in the sum of £180 (page 400).

Payments made by the Respondent

19. The Respondent has made the following payments in relation to the principal claim for the sum of £1109.84 representing arrears of ground rent and service charges:

    30/9/15 £60
    18/11/15 £300
    5/12/15 £700
    11/12/15 £60
    11/1/16 £60
    12/5/16 £13
    28/7/16 £300

20. Accordingly by 5th December 2015 arears of ground rent and service charges stood at £49.84. The full amount claimed had been paid by 11th January 2016. Further demands for service charges and rent were made post issue of proceedings in March 2016. Those additional sums (actually including a small overpayment) were paid in full by 28th July 2016. Similarly the demands made in September 2016 and March 2017 have also been paid in full. As at the date of hearing the Respondent's account was in credit by £1.50. The disputed administration charges, however, remain outstanding in full.

Claim for contractual costs

21. The Applicant's claim for costs in relation to work done by EGL, inclusive of vat and disbursements, is as follows:

    20/9/15 to 28/10/15 £1452
    29/10/15 to 19/11/15 £1045
    1/12/15 to 29/01/16 £2220
    1/02/16 to 31/03/16 £960

1/4/16 to 29/4/16	£3300
3/05/16 to 11/05/16	£4878
12/05/16 to 27/07/16	£1020
1/08/16 to 25/11/16	£10320

22. The total of invoiced costs (£25195) is £20,000 plus vat and disbursements.
23. There is no claim for work done by EGL after 26th November 2016. Mr Goodier, as company secretary, has represented the Applicant since that date on the basis that he would make no charge for his services other than payment of disbursements and his expenses. It should be noted that in order to keep down costs that Mr Goodier also represented the Applicant during the period of the stay, May to August 2016, albeit that EGL remained on the record and advised where necessary.

The Lease

24. The Applicant holds the Property under the terms of a lease ("the Lease") made on 13th October 1989 between Christopher Wayne Evans (1) and Ronald Paul George (2) whereby the Property was demised for a term of 125 years from 25th March 1989 at an initial rent of £26 per annum rising to £60 after 30 years and to £100 after 70 years.
25. The Tenant's covenant to pay rent in advance by equal payments on 25th March and 29th September in each year is set out at clauses 3 and 4(a) of the Lease.
26. Clause 4(l)(i) contains the following tenant's covenant:

> "To pay the Landlord all costs charges and expenses (including legal costs and surveyors fees) which may be reasonably incurred by the Landlord incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 by the Landlord or incurred in or in contemplation of proceedings under Section 146 or 147 of that Act notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court."

27. "The Service Charge" is defined in "Definitions" at clause 1(e) of the Lease. The "Tenant's Contribution" means one-seventh of the Service Charge (see clause 1(f)).
28. Further service charge provisions are set out in clauses 5 (ii) and (iii):

> "(ii) The Tenant covenants with the landlord and as a separate Covenant with each of the other tenants of the Building as follows:
>
> On each quarter year to pay to the Landlord by way of advance payments of and on account of the Tenant's Contribution hereinafter mentioned the sum of £48.00 by standing order the first of such payments or a proportionate part thereof being made on the date hereof within twenty eight days of the receipt of a copy of the Certificate of the Landlord's Managing Agents of the total expenditure on Service Obligations incurred by the Landlord for the previous accounting year to pay to the Landlord the Tenant's Contribution less any amounts which the Tenant may already have paid in advance

(iii) Within twenty eight days of demand to pay to the Landlord the same percentage as the Tenant's Contribution of any sum or sums actually expended by the Landlord or which might be urgently necessary to expend in the performance of the Landlord's Obligations under Clause 6 hereof which expenditure the Landlord cannot meet from funds in hand."

29. Clause 5(iv) makes provision in relation to interest:

"To pay interest at the rate of four per centum per annum above the base lending rate of Lloyds Bank Plc current from time to time on all sums payable to the Landlord pursuant to this Clause which have not been paid within twenty one days of becoming due such interest to be calculated on a day to day basis from the date of the same becoming due down to date of payment."

30. Clause 6 of the Lease contains Landlord's covenants relating to the Service Obligations.
31. Clause 8 of the Lease makes provision for forfeiture:

"(a) If at any time the whole or any part of the rent shall be unpaid for twenty eight days after becoming due (whether legally demanded or not) or if there shall be any breach of the Tenant's covenants the Landlord shall be entitled (in addition to any other right) to repossess the Flat and the Lease shall then immediately terminate but without affecting the Landlord's rights to sue the Tenant for any prior breach of covenant
(b) The payment of the Tenant's Contribution shall be recoverable by the Landlord as though it were rent in arrears."

Issues for determination

32. The following matters fall for determination:

1. Do the demands for service charges comply with the terms of the Lease?
2. Are the statutory requirements for the form of the demands for service charges under section 21B of the 1985 Act satisfied?
3. Section 21 of the 1985 Act
4. The claim for interest.
5. Have costs been incurred in contemplation of proceedings under section 146 of the 1925 Act?
6. Do the restrictions contained in section 167 of the 2002 Act apply?
7. Has the right to forfeit the Lease been waived at any time by the Respondent?
8. Reasonableness of contractual legal costs: the right to contractual costs under CPR 44.5, proportionality under CPR 44.3 and CPR 44.4 and reasonableness under Schedule 11 of the 2002 Act.
9. The Respondents claim for costs under the Order of District Judge Rich TD made on 19th December 2016.
10. The Respondent's claim for costs for unreasonable behaviour.

Issue 1: Do the demands comply with the terms of the Lease?

33. Mr Westaway told me that ground rent was demanded twice yearly in the spring and in September. In relation to service charge a meeting was held in each January and a budget set for the year. Demands would then be sent, based on the budget, for two equal half yearly payments issued at the same time as the demands for ground rent. This was done for administrative convenience as being much simpler than the quarterly demands envisaged by the Lease.
34. Mr Westaway explained to me that the Building was in a sorry state when a Rescue Committee was set up to purchase the freehold. The Applicant has had to tackle long standing neglect. The Building had to be insured and the roof had holes in it.
35. I find that the demands for ground rent comply with clause 3 of the lease which provides for payment in advance by equal payments in March and September.
36. I also find that having regard to the state of the Building that demands for service charge have properly been made under clause 5(iii) to fund sums "urgently necessary to expend in the performance of the Landlords Obligations" in relation to Repair and insurance (see clauses 6 (b) and (c) of the Lease)
37. In any event Mr Noble's point is a bad one. At the Case Management Conference I considered a Statement by Mrs Francis's then representative Mr Wales. That Statement contains an admission "The Defendant/Respondent has admitted her liability to pay Ground Rent and Service Charges" (page 252). That admission binds the Applicant and she cannot now seek to argue that she is not liable for ground rent and service charges. Section 27A(5) of the 1985 Act is of no assistance to her as that provision relates solely to the jurisdiction of the Tribunal and provides "But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment". Here there is a clear and unequivocal admission.

Issue 2: Are the demands defective?

38. Mr Goodier concedes that the demands for service charges were defective and were reserved in April 2017 (see Mr Westaway's Statement at paragraph 5, paragraph 6.5.3 of Statement of Applicant's Case and paragraph 4 of Mr Goodier's Skeleton Argument).
39. However the effect of section 21B (3) of the 1985 Act is suspensory only. A tenant may withhold payment of service charges where the summary of rights and obligations which should accompany any demand for payment of service charges is defective. Under section 21B (4) any provisions relating to non-payment in the Lease do not have effect "in relation to the period for which he so withholds it".
40. The difficulty for the Respondent is that she has not withheld payment because the summary of rights and obligations did not comply with the amended Regulations in force at the time. I asked Mrs Francis about this specifically at the hearing. Her evidence was that she did not withhold payment because of any failure to comply with section 21B (1). As set out in her emails to EGL at pages 349 and 352 Mrs Francis told me that she failed to pay because "I cannot see how and where I signed for service charges when at the time of purchase there was only a ground rent payable". She did not raise the issue of any defectives in the summary of rights and demands either with EGL or with the Applicant at any time prior to issue of proceedings. Once proceedings were issue she took advice from the Leasehold Advisory Service. On their advice she paid off the arrears. The section 21B point was only taken by her for the first time in her Defence by which time she had already made payment. The Respondent did not withhold payment and therefore cannot rely on sub-sections 21B (3) and (4).

41. In any event the Respondents case also fails on this issue because she is bound by the admission as to liability to pay as set out at paragraph 37 above.

Issue 3: Section 21 of the 1985 Act

42. The Respondent has made much of the repeated requests she has made for a summary of relevant costs under section 21 of the 1985 Act. The Applicant seeks to recover substantial costs in relation to the efforts it has made to comply with the Respondent's requests. However I find that section 21 is not relevant to the issues before me. There is no civil remedy for breach of section 21 (although there are criminal sanctions). The outstanding service charge has been paid and admitted and no application has been made by the Respondent under section 27A of the 1985 Act to determine reasonableness and payability. Accordingly any alleged failures to comply with section 21 do not assist the Respondent in relation to the claim for contractual legal costs.
43. On 5th May 2016 the Applicant raised an administration charge in the sum of £180 in relation to the section 21 request made by the Respondent during the course of these proceedings. The charge specifically relates to the costs of certification by a qualified accountant under section 21(6).
44. Pages 384 contains an email from EGL to the Respondent indicating that a fee of £150 plus vat is payable. The authority for payment is given as the 2002 Act. That is incorrect. The 2002 Act provides that administration charges are only payable to the extent that such charges are reasonable. It is not a freestanding authority to make charges not authorised by the Lease or by statute. Mr Goodier himself wrote on 13th June 2016 (page 399) indicating that payment of the fee was a condition precedent to provision of the accountant's certificate. Again that is incorrect. There is no such precondition in section 21(6) (contrast section 22(5) (b) where a reasonable charge may be made).
45. I find that the administration charge of £180 (£150 plus vat) dated 5th May 2016 in relation to the provision of a summary of relevant costs certified by a qualified accountant under section 21(6) of the 1985 Act is not payable by the Respondent.

Issue 4: Interest

46. Mr Goodier asks for interest on late payment of £43.07 under clause 5(iv) of the Lease. Mr Noble argues that as the demands are defective no interest should be paid.
47. For the reasons given in relation to Issues 1 and 2 Mr Noble's arguments fail.
48. I found the Respondent's reasons for failure to pay to be particularly unconvincing. Mrs Francis claimed that she had not received the demands because, although they were properly addressed, she was suffering from marital difficulties and her husband had a "mail redirect" on letters addressed to him. It would have been open to the Respondent to produce a Witness Statement in relation to these claims. She has not done so and I do not accept her evidence on this point. Her evidence was inconsistent. She received some letters but not others. Generally those letters not

received were those that were most inconvenient to her. I note that she did not at any time raise the issue of non-receipt with EGL prior to issue of proceedings.

49. In addition the Respondent claims that she "cannot see how and where I signed for service charges". The Respondent has been an astute litigator. She has had ready access to expert advice. She and her husband have a property portfolio of 4 other buy to let properties. Mr Goodier argues that the Respondent was simply "playing for time". I agree.
50. I find that the Respondent is liable to pay interest of £43.07 under the terms of the Lease.

Issue 5: Contemplation of s146 Proceedings

51. The applicant is only entitled to contractual costs under the terms of clause 4(l) (i) of the Lease.
52. It should be noted that although clause 8(b) of the Lease provides for the Tenant's Contribution (i.e. the service charge) to be recoverable "as though it were rent in arrears" the Lease does not reserve the service charge as rent.
53. The decision of the Court of Appeal in **Freeholders of 69 Marina, St leonards-on-sea** [2011] EWCA Civ 1258 establishes that a determination by a Tribunal or County Court in relation to service charges and rent is a pre-condition to the service of a notice under section 146 and therefore the Respondent's costs of these proceedings potentially fall within the terms of clause 4(l) (i).
54. In **Barrett v Robinson** [2014] UKUT 0322 (LC) at paragraph 52 the Deputy President gave guidance on what is meant by contemplation:

> "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 4(14) as providing a contractual right to recover its costs."

55. The Applicant relies on:

    a) Letter from Mr Westaway to the Respondent of 8th September 2014 (page 336) indicating that that "defaulting on your responsibility to pay ground rent and service charges will lead to legal recourse with the possibility that the status of your lease is affected".
    b) Letter from Mr Westaway to the Respondent of 6th July 2015 (page 338) in similar terms.
    c) Letter from EGL to the Respondent of 22nd September 2015 (pages 356-7) indicating "Obtaining a judgement for the outstanding sums will enable us to then consider serving a section 146 notice upon you to forfeit the lease"

56. I find that the Applicant has demonstrated that it did contemplate service of a statutory notice. However that contemplation must always be subject to the provisions of section 167 of the 2002 Act and the doctrine of waiver.

Issue 6: Section 167 of the 2002 Act

57. Section 167 (1) provides that a Landlord "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) ("the unpaid amount") unless the unpaid amount –(a) exceeds the prescribed sum." The sum prescribed is currently £350.
58. Section 167(3) provides:

> "If the unpaid amount includes a default charge, it is to be treated for the purposes of subsection (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"

59. Section 167(5) provides that "administration charge" has the same meaning as in Part 1 of Schedule 11. However section 167(5) does not specify which of the sub-paragraphs 1(1) (a)-(d) of Part 1 of Schedule 11 (which contains four alternate meanings of administration charge) is to apply for the purposes of section 167(5).
60. Clearly the administration charge raised on 5th May 2016 in the sum of £8312 is an amount to which subparagraph 1(1) (d) of Part 1 of Schedule 11 applies being an amount "in connection with a breach (or alleged breach) of a covenant or condition in his lease". However the sum of £8312 is also payable, directly or indirectly, because the Respondent has failed to pay her ground rent and service charge when it fell due. Accordingly I find that subparagraph 1(1) (c) also applies to the administration charge of 5th May 2016 as it is an amount payable, directly or indirectly "in respect of a failure by the tenant to make a payment by the due date to the landlord...."
61. On that basis the administration charge of 5th May 2016 is "an administration charge payable in respect of the tenant's failure to pay any part of the unpaid amount" and therefore the unpaid amount is to be treated as reduced by the sum of £8312.
62. In **Barrett v Robinson** the Upper Tribunal held at paragraph 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."

63. Looking at the Table of Demands and Payments prepared by Mr Westaway (and deducting the default charge of £8312) the following picture emerges:

5/12/15- 10/1/16	amount outstanding less than £350
11/1/16-24/3/16	Respondent in credit
25/3/16-27/7/16	amount outstanding less than £350
28/7/16-11/9/16	Respondent in credit
12/9/16 -29/1/17	amount outstanding less than £350
30/1/17 -24/3/17	Respondent in credit
25/3/17 – 17/4/17	amount outstanding less than £350
18/4/17 to date	Respondent in credit

64. The Applicant could not legitimately have contemplated the service of a notice under section 146 whilst the amount outstanding was less than £350 nor could it have done so whilst the Respondent was in credit. Put simply by 5th December 2015 the Respondent had paid off all but £49.84 of the "unpaid amount". Ignoring the default charge of £8312 the sum involved was simply too small for forfeiture to have been an option nor realistically could the Applicant have contemplated that a Court would grant forfeiture for such a small sum regardless of section 167.
65. Mr Goodier, rather ingeniously, sought to argue that there was a separate and distinct right to forfeiture in relation to the default/administration charge. However the loss of the right to forfeit for a once for all breach (none payment of rent and service charge) will also preclude the landlord from forfeiting for breaches of covenant (failure to pay the default/administration charge) integrally bound up with the covenant which has been broken (see Woodfall, paragraph 17.105)
66. Accordingly I find that the Applicant cannot, by reason of section 167 of the 2002 Act recover any of its contractual legal costs under clause 4(l) (i) of the Lease from 5th December 2015 onwards.

Issue 7: Waiver

67. The Deputy President in **Barrett v Robinson** at paragraph 49 specifically recognised that waiver could prevent a landlord from recovering contractual legal costs under a clause similar to that in the present Lease:

> "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."

68. It is well settled that acceptance of rent which accrued due after the date on which the right to forfeit arose will waive the right to forfeit for any breach of which the landlord was aware on the date on which the rent fell due. Whether an unqualified demand for rent has the same effect as the acceptance of rent is not certain. At first instance it has been held that a demand for rent has the same effect as the acceptance

of rent. However, although this was assumed to be correct in the Court of Appeal, it was not enthusiastically endorsed (see Woodfall, paragraph 17-089).

69. The occurrence of a breach of covenant or other event giving rise to a right to forfeit puts the landlord to his election. He may either choose to enforce his right of forfeiture, and to treat the lease as being at an end; or he may choose not to enforce his right of forfeiture and to treat the lease as continuing to exist. In this respect the landlord is in no different position from that of a party to a contract who, faced with a repudiatory breach of contract, may choose either to accept the repudiation or to affirm the contract. "Waiver" of forfeiture takes place where the landlord chooses to treat the lease as continuing to exist or, in other words, where the landlord affirms the contract. It is based on the doctrine of election (Woodfall, paragraph 17.092).
70. Failure to pay ground rent and service charges are "once for all" breaches and I do not have to consider the line of authorities which are concerned with continuing breaches. I also remind myself, as set out at paragraph 52 above, that the service charge is not reserved as rent.
71. The doctrine of election was considered by Lord Diplock in **Kammins Ballrooms Co v Zenith Investments (Torquay)** [1971] AC 850 at page 882:

> "So it becomes necessary to consider whether the respondents did waive this requirement. "Waiver" is a word which is sometimes used loosely to describe a number of different legal grounds on which a person may be debarred from asserting a substantive right which he once possessed or from raising a particular defence to a claim against him which would otherwise be available to him. We are not concerned in the instant appeal with the first type of waiver. This arises in a situation where a person is entitled to alternative rights inconsistent with one another. If he has knowledge of the facts which give rise in law to these alternative rights and acts in a manner which is consistent only with his having chosen to rely on one of them, the law holds him to his choice even though he was unaware that this would be the legal ensconce of what he did. He is sometimes said to nave "waived" the alternative right, as for instance a right to forfeit a lease or to rescind a contract of sale for wrongful repudiation or breach of condition; but this is better categorised as "election" rather than as "waiver." It was this type of "waiver" that Parker J. was discussing in *Matthews v. Smallwood* [1910] 1 Ch 777."

72. There remains some considerable uncertainty as to waiver in circumstances where statutory restrictions on the exercise of a right to re-entry still apply (see "Commercial and Residential Service Charges" Rosenthal, Fitzgerald et al at paragraphs 45.28-33).
73. Section 146(1) of the Law of Property Act provides that a right of forfeiture "shall not be enforceable". Section 81(1) of the Housing Act 1981 provides that a landlord may not exercise a right of forfeiture in certain circumstances. Similarly section 167 (1) of the 2002 Act restricts exercise of the right to forfeiture.
74. Accordingly whilst there are statutory restrictions on enforcement or exercise all three statutory provisions are implicit in accepting that the right to forfeiture has arisen.
75. Having regard to the dicta of Lord Diplock in **Kammins** I find that a landlord is put to his election once the right to forfeit arises irrespective of any statutory moratorium that may be applicable. I so find because the Respondent in seeking to recover contractual legal costs is relying on clause 4(l)(i) of the Lease and is therefore seeking to exercise a right which is inextricably linked to the exercise the right to forfeiture i.e. costs incidental to, incurred in or in contemplation of forfeiture proceedings. I

find that the Respondent cannot both enforce its rights to costs inextricably linked to forfeiture whilst at the same time continuing to demand and accept rent. Those rights are wholly inconsistent and the Respondent must be put to its election.

76. Mr Westaway has "primary responsibility for financial and general administration throughout the life of the company". In response to my questioning at the hearing Mr Westaway described forfeiture as the "ultimate sanction". He told me that "forfeiture was on the table" and "that is where we could end up to resolve the matter". I then asked Mr Westaway why he had continued to demand rent and service charges in advance. He told me that "as per the lease. Mrs Francis was still required to pay it. The lease has not changed. The landlord still has to uphold his responsibilities". He told me that he had not been advised to stop issuing demands and that as far as he was concerned it was "business as usual".
77. There are two inconsistent rights here. If forfeiture is "on the table" the Respondent cannot at the same time assert that it is "business as usual".
78. Under clause 3 of the Lease rent is payable in advance. The following demands for rent in advance (i.e. for a future period) have been made since the letter before action sent by EGL to the Respondent on 22nd September 2015 (pages 356-7) indicating "Obtaining a judgement for the outstanding sums will enable us to then consider serving a section 146 notice upon you to forfeit the lease":

    29th September 2015
    25th March 2016
    12th September 2016
    25th March 2017

79. I find that the demand (and subsequent acceptance) of ground rent amounts to a waiver of the right to forfeit the Lease for non-payment of existing arrears of ground rent and service charges. Following **Barrattt v Robinson** the right to forfeit has been waived and therefore the Respondent is not entitled to recover its costs under clause 4(l) (i) of the Lease.
80. I find that the waiver operates from the date of the demand for ground rent on 29th September 2015. Accordingly the Applicant is only entitled to its contractual costs up to that date.

Issue 8: Reasonableness of the claim for contractual legal costs

81. I have found that the Applicant is only entitled to its contractual costs up to 29th September 2015. However at the hearing I also conducted a detailed assessment of costs. I have recorded my findings on assessment because although, for the reasons given above, those costs are not recoverable those findings may be of assistance the parties should either of them seek to permission to appeal in relation to my determination section 167 and/or waiver.
82. In **Chaplair v Kumari** [2015] EWCA Civ 798 the Court of Appeal confirmed that a contractual claim for a costs indemnity should ordinarily be given effect through the machinery of CPR 44.5. The court will enforce a contractual entitlement subject to its equitable power to disallow unreasonable expenses.
83. Clause 4(l) (i) of the Lease is, however, different from the clause in **Chaplair** in one crucial respect. Under clause 4(l) (i) the Applicant can only recover costs "which may be reasonably incurred".

84. The presumption as to indemnity costs is rebuttable (CPR 44.5(2)). Mr Goodier conceded at the hearing that the wording of clause 4(l)(i) has the effect that assessment should be on the standard basis.
85. The standard basis under Rule 44.3(2) provides:

"Where the amount of costs is to be assessed on the standard basis, the court will—

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party."

86. Rule 44.4(3) provides:

The court will also have regard to—
(a) the conduct of all the parties, including in particular—
(i) 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;
(g) the place where and the circumstances in which work or any part of it was done; and
(h) the receiving party's last approved or agreed budget

87. As regards the administration charge of 5th May 2016 in the sum of £8312 the Tribunal has to apply the reasonableness test set out in paragraph 2 of Schedule 11 to the 2002 Act. The Deputy President of the Upper Tribunal in **Christoforou and another v Standard Apartments Ltd** [2013] UKUT 0586 (LC) at paragraph 44 observes that "the suggestion that proportionality had nothing to do with reasonableness would seem unreal or counterintuitive". A Tribunal should examine "closely the work undertaken, the result achieved and the magnitude and importance of the object to which the work was directed."
88. There is no unreasonable conduct by either party. Despite the lengthy stay imposed by District Judge Gibson both parties have become entrenched in their positions and neither side has made any significant efforts to resolve this dispute. The amount involved is little more than trifling. The non-payment of small amounts of service charge and ground rent cannot be described as of significant importance to either party. The case was quite properly handled by a junior Grade C fee earner; it was not complicated (although both parties contrived to make it so) nor did it involve any specialised knowledge. The time spent on this case by EGL was, on any view, grossly disproportionate. No sensible freeholder would spend £20,000 plus vat and disbursements to seek to recover a debt of a little over £1100. The costs incurred by the Applicant (£25195) are in excess of 20 times the amount in dispute (£1109.84).

89. Before turning to the specific periods to which the EGL invoices relate I wish to deal with one point. The work was carried out by a junior Grade C fee earner at £175 per hour. Mr Noble has not disputed that hourly rate. He was right not to do so as it is clearly reasonable. It is accepted that partners in a firm of solicitors have supervisory duties and are entitled to be remunerated for the work involved. However what appears to have happened here is that senior fee earners, especially "ML", appear to have recorded large amount of time on this file. That work is duplication and not supervision. The work done by ML has not been reasonably incurred for the purposes of clause 4(l)(i) of the Lease.

Period 1: 2/9/15 to 28/10/15

90. I disallow duplication by AA on 3/9/15, 17/9/15 and 1/10/15. However as costs have already been discounted to £1200 I make no reduction in relation to that figure subject to what I have to say later in relation to proportionality.
91. I have to assess the contractual legal costs to which I find the Applicant is entitled up to 29th September 2015. The narrative on EGL's bill of costs at page X27 indicates "£250 – agreed fee for preparing the Letter Before Action". A further £450 has been charged up to 22nd September 2015 and £500 for "ongoing fee". I allow £250 for letter before action together with a further one hour at £175 to cover any further work up to 29th September 2015. Total allowed is £425 plus vat making a total of £510.

Period 2: 29/10/15 to 19/11/15

92. The claim for drafting the claim form covering the period 3/11/15 to 10/11/15 including duplication by ML is disallowed. The amount of time claimed is not reasonable. I allow 2 hours for preparing a claim form for the very modest amount in dispute.
93. Total amount billed was £1317.50. I disallow £1160, but allow 2 hours at £175 (£350).
94. Total allowed is £507.50 plus vat and disbursements.

Period 3: 1/12/15 to 29/1/16

95. I have discussed the section 21 request at paragraphs 42-45 above. The Respondent is entitled to make certain statutory requests. However the Applicant is not entitled to recover the costs of complying with its statutory obligations in relation to section 21 under clause 4(l) (i) of the Lease. I therefore disallow attendance on Applicant 11/1/16 and 13/1/16 as well as "discuss LTA" in two entries on 11/1/16 under attendances on others. I disallow £493.50.
96. I reduce drafting without prejudice letter and ML duplicate time on 6/1/16 and 7/1/17 (attendance on others) to 1 hour at £175. I therefore disallow £230. I further disallow discussions on 27/1/16 and 28/1/16 totalling £87.50.
97. The total billed for this period is reduced from £2046.50 by £811. Subject to proportionality I allow £1235.50

Period 4: 1/2/16 to 31/3/16

98. I disallow section 21 attendances on Applicant on 15/2/16 and 16/2/16 in the sum of £70.
99. I reduce costs billed of £798 by £70 and allow, subject to proportionality £728 plus vat.

Period 5: 1/4/16 to 29/4/16

100. In relation to meeting on 7/4/16 I disallow ML duplicated time for attendance, preparation and noting (£385 disallowed in total). I disallow AW file note claim of 1 hour 30 minutes (£262.50) which appears to have taken longer than the meeting itself. I allow 3 units (£52.50). Total disallowed £595.
101. Thereafter the Applicants solicitors set about preparing an application for summary judgement and an application for amending particulars of claim. In support of both applications a Witness Statement was prepared for Mr Westaway. However Mr Goodier told me that neither application was pursued.
102. I find the claim for costs in relation to an application for summary judgement and for amendment which were never pursued to be wholly unreasonable. I therefore disallow attendance on others from 25/4/16 to 28/4/16 as not reasonable. Those costs were entirely wasted. The Respondent should not bear costs thrown away. I disallow £1811.
103. Total costs were £3011. I deduct £2406 and allow, subject to proportionality £605.

Period 6: 3/5/16 to 11/5/16

104. This work covers what was essentially a short appointment before a District Judge. Listed for 30 minutes in relation to the Respondents application for strike out part of the claim relating to Legal Costs/Administration charges totalling £2024 (see Notice of Hearing of Application at page 83).
105. On 5th May 2016 EGL contacted the Court enclosing the Applicants application to (i) amend Particulars of Claim and (ii) Summary Judgement/Strike out of Defence (page 394-5). EGL asked for the 30 minute hearing to be vacated to allow their application to be heard at the same time as the Respondent's strike out application (page 396).
106. Unfortunately the listing was not vacated. Having heard from both parties District Judge Gibson stayed the claim until August 2016 (see Order at page 168).
107. I disallow entirely attendance on others 3/5/16 to 12/5/16. I allow 3 hours or amending Witness Statement of Mr Westaway to address the Strike out application made by the Respondent and 2 hours to instruct counsel. An allowance of 5 hours seems to me to be very generous for what was a 30 minute appointment.
108. I have disallowed all other items claimed for the following reasons:
    a) I have disallowed duplication by HB, ML and AA.
    b) I have disallowed all costs in connection with the Applicant's strike out and amendment application as those were not proceeded with.
    c) I fail to see how any solicitor can take half an hour to decide to instruct counsel.
    d) An additional hour on 10/5/16 to instruct counsel is not reasonable.
    e) There was no need for attendance upon counsel at a 30 minute appointment especially when Mr Goodier himself attended.
    f) I disallow purely administrative tasks such as calculating bill and reviewing notes.
109. I therefore disallow £3534 and allow 5 hours at £175 (£875).

110. Total costs were £3936.5. I allow, subject to proportionality, £1277.50.

Period 7: 12/5/16 to 27/7/16

111. This period is entirely covered by the stay ordered by District Judge Gibson. As set out at paragraph 23 above Mr Goodier represented the Applicant albeit that EGL remained on the record.
112. I disallow the duplication for ML which, on this occasion appears to have been accepted in the discounted figure.
113. I allow £850, subject to proportionality.

Period 8: 1/8/16 to 25/11/16

114. Very little happened during this period. The stay expired in August. On 5th September 2016 the Applicant applied to amend Particulars of Claim (pages 170-219). Notice of hearing was issued on 4th October 2016 (page 220). However EGL had ceased to act by the date of the hearing on 19th December 2016.
115. The amendment to the Particulars of Claim (p173- 176) is simply to indicate that service charges and rent arrears had been paid in full and that costs had increased to £14875. I am simply at a loss to understand why costs were incurred in relation to such unnecessary amendments. As the principal sum had been paid in full all that the Applicant needed to do was to apply for assessment of contractual costs under CPR44.5.
116. I disallow duplication of ML and AA. I disallow £998. (Note I have allowed AA attendance on 4/11/16. This should in fact be 24/11/16. It appears AW was absent and AA stood in for her).
117. There is considerable duplication in relation to draft Directions. Attendance on applicant 16/8/16 (12 units), attendance on Respondent 17/8/16 (17 units) and attendance on others 16/8/16 and 31/8/16 (15 and 10 units). I allow 1 hour at £175. I disallow £945.
118. In relation to the very minor amendments to the Particulars of Claim I allow 30 minutes at £175. I disallow attendance on others on 16/8/16, 31/8/16/ 1/9/16 and 4/9/16. I allow £87.50 and disallow £490.
119. Part 36 is irrelevant where the Applicant claims contractual legal costs. The Applicant is not concerned with Part 36 offers to protect itself in relation to costs. The Applicant is not seeking an order for costs from the Court. I disallow entirely costs 1/8/16 and 2/8/16 totalling £700.
120. It is not reasonable for EGL to charge £297.50 for handing over papers when it ceased to act (16/11/16). I disallow those costs in full.
121. Costs incurred were £8682 (not £6682 as set out at page X24). I disallow £3430.5 and allow £262.50. I allow, subject to proportionality £5514.

Disbursements

122. I allow in full disbursements claimed at page x25 of £1387.77 including Mr Goodier's claim for £312.77. I allow a further £475 for photocopying and posting the bundles.
123. Total disbursements allowed are £1862.77.

Proportionality

124. I have assessed costs subject to proportionality at £11917.50.
125. In assessing proportionality I have regard to the fact that the sum in dispute was only £1109.84. I then look at the work actually carried out by EGL. In summary EGL sent a letter before action and issued proceedings. They attended one District Judge appointment and prepared for another which took place after their retainer was terminated. EGL acted from September 2015 until November 2016. That is a period of 14 months. However the claim was stayed May-August 2016 during which time Mr Goodier acted for the Applicant.
126. The claim for costs by EGL is, in my judgement, grossly disproportionate to the amount claimed and the amount of work reasonably necessary. I therefore reduce costs by 50% to £5958.75
127. Vat amounts to £1191.75 and disbursements are to be added in the sum of £1862.77.
128. Had I not determined that the claim for contractual legal costs fails because of waiver and section 167 of the 2002 Act I would have found that reasonable costs under clause 4(l) (i) of the Lease amounted to £9013.27.

Issue 9: Respondent's Costs under Order of District Judge Rich TD

129. On 19th December 2016 District Judge Rich TD made an Order for the costs of amendments (including costs thrown away) to be paid by the Claimant to the Defendant.
130. At the hearing the parties agreed those costs in the sum of £100 and I make a Order in that sum.

Issue 10: The Respondent's claim for costs for unreasonable behaviour

131. The Respondent applies under CPR 27.14(g) and Rule 13 of the Tribunal Procedure Rules.
132. The Respondent has been the author of her own misfortunes. Ground rent and service charges were due and owing as at date of issue of proceedings. The Applicant acted perfectly reasonably in issuing proceedings. What else could the Applicant do when faced with a debtor who, to use the words of Mr Westaway, was "kicking the can down the road"? I find that the Applicant did not act unreasonably in bringing these proceedings.
133. At paragraph 6(m) of her Witness Statement Mrs Francis describes Mr Goodier as "overbearing and unreasonable". At paragraph 22 she expresses her belief that the Applicant's conduct "is vindictive and motivated by an intention to maximise costs to enable it to forfeit my lease".
134. I have considerable sympathy for the Applicant. The Building is a small leaseholder managed and owned property. It is clear that the Applicant has rescued the Building from a pretty sorry state under the previous freeholder. Mrs Francis has chosen not to participate and has enjoyed the contributions and efforts of others without making any efforts herself. She has failed to pay rent and service charge when due. I have no doubt that this has caused very considerable cost and expense to the other leaseholders.
135. I found Mrs Francis to be an astute litigator with ready access to top notch legal advice. She and her husband have a number of other buy to let properties. I find that Mrs Francis has a far greater understanding of property matters than she cares

to admit. She has been forceful in her assertion of her rights throughout the interlocutory stages of this case.

136. Mr Goodier has been meticulous in his submissions. He has been scrupulous in disclosing matters which do not assist his case. He is a skilled and courteous advocate. He has not acted other than in accordance with the highest standards throughout these proceedings.

137. The Applicant has lost. That does not mean that it has acted unreasonably. The legal issues, especially in relation to section 167 and waiver, are complicated and by no means settled law. The Applicant has spent very considerable sums on legal advice. The Applicant has followed that advice and has not acted unreasonably in doing so.

138. I find that the Applicant has not acted unreasonably in the conduct of these proceedings.

139. The Respondent's claim for costs under CPR 24.14(g) and Rule 13 is refused.

Decision

140. The Respondent shall pay forthwith to the Applicant the sum of £510 by way of contractual legal costs.

141. The Respondent shall pay forthwith to the Applicant the sum of £43.07 by way of interest.

142. The Applicant shall pay forthwith to the Respondent the sum of £100 by way of costs in accordance with paragraph 5 of the Order of District Judge Rich TD dated 19th December 2016.

143. The administration charge issued on 9th June 2016 in the sum of £150 plus vat is not payable by the Respondent.

144. I make no order for costs.

D Jackson
Judge of the First-tier Tribunal.

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) or to a Circuit Judge at the County Court, as appropriate, then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time

limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.
The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.
If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber), or to the County Court, as appropriate.

General Form of Judgment or Order

In the County Court at Birmingham	
Claim Number	**B44YP732**
Date	

St Mary's and Westfields Property Management Limited	**Claimant**
Mrs ED Francis	**Defendant**

BEFORE Judge David Jackson (exercising the jurisdiction of a District Judge), at Birmingham Civil and Family Justice Hearing Centre, Priory Court, 33 Bull Street, Birmingham B4 6DS.

UPON hearing Mr C Goodier (Company Secretary) for the Claimant and Mr P Noble (counsel) for the Defendant.

IT IS ORDERED THAT:

1. The Defendant shall pay forthwith to the Claimant the sum of £510 by way of contractual legal costs.
2. The Defendant shall pay forthwith to the Claimant the sum of £43.07 by way of interest.
3. The Claimant shall pay forthwith to the Defendant the sum of £100 by way of costs in accordance with paragraph 5 of the Order of District Judge Rich TD dated 19th December 2016.
4. The administration charge issued on 9th June 2016 in the sum of £150 plus vat is not payable by the Defendant.
5. I make no order for costs.
6. The reasons for the making of this Order are set out in the combined decision of the Court and the First-tier Tribunal (Property Chamber) dated 7th August 2017 under case ref. BIR/OOGF/LIS/2017/0003.

Dated: 7th August 2017