478

HM COURTS AND TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL

Case Number: CHI/23UB/LBC/2012/0023

Re: Camden Lodge, Clarence Road, Cheltenham, GL52 2AU

In the matter of an application under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination that a breach of a covenant or condition in a lease has occurred.

Between:

Camden Lodge (Cheltenham) Limited — Applicant

and

Mrs. Alison Collett Campbell-Black — Respondent

Date of application:	5 September 2012
Date of determination:	29 January 2013
Members of the Tribunal:	Mr. J G Orme (Lawyer chairman) Mr. S J Hodges FRICS (Chartered Surveyor member) Mr. D J Archer (Lawyer member)
Date of decision:	6 February 2013

Decision of the Leasehold Valuation Tribunal

For the reasons set out below, the Tribunal determines that the Respondent, Alison Collett Campbell-Black has breached the terms of her lease dated 11 September 1951 of the Upper Flat, Camden Lodge, Clarence Road, Cheltenham, GL52 2AU in that there has been a breach of clause 2(5) of the lease because the Respondent has failed to keep the demised premises in good and substantial repair. The specific items of disrepair as at November 2011 are listed in a planned maintenance programme prepared by Easton Bevins, Chartered Building Surveyors, dated November 2011 and itemised at items 8, 12, 15, 16, 22 and 42 of the schedule to that report. Items 12, 15, 16, 22 and 42 remained in a state of disrepair as at the date of the hearing.

Reasons

Background

1. The Applicant, Camden Lodge (Cheltenham) Limited, is the freehold owner of a 3 storey detached property known as Camden Lodge, Clarence Road, Cheltenham GL52 2AU ("the Property"). The Property is divided into 3 flats.

2. The Respondent, Mrs. Alison Collett Campbell-Black, is the leasehold owner of the upper flat at the Property ("the Upper Flat"). The leasehold interests in the ground floor and garden flats are owned by Mr. Peter and Mrs. Joan Woods who are directors of the Applicant.

3. On 5 September 2012, the Applicant applied to the Tribunal for a determination under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") that the Respondent had acted in breach of the terms of her lease of the Upper Flat. The application alleged breaches of the following covenants in the lease of the Upper Flat:
   1) Clause 2(1) – To pay rent;
   2) Clause 2(5) – To keep in good and substantial repair;
   3) Clause 2(6) – To paint the exterior every 7th year;
   4) Clause 2(9) - To repair within 3 months of a notice to repair;
   5) Clause 2(13) – Not to suffer annoyance or damage;
   6) Clause 2(16) – To pay costs incidental to a section 146 notice.

   The application was accompanied by a copy of the lease of the Upper Flat, a report prepared by the Applicant's surveyor, Easton Bevins and copy correspondence.

4. The Tribunal issued directions on 26 September 2012. The application was to stand as the Applicant's case. The Respondent was to prepare a statement in reply by 7 November. Directions were given that if any party wished to call any person to give oral evidence at the hearing, they were to send to the other party a witness statement at least 14 days before the hearing. There was a provision for expert evidence by exchange of experts' reports and the production of a joint report.

5. The application was listed for hearing on 30 November 2012. The Applicant prepared a bundle of documents in readiness for that hearing. On 26 November, the Respondent applied for an adjournment of the hearing on the basis that the application had only just come to her attention. By further directions dated 26 November, the Tribunal adjourned the hearing and extended the Respondent's time for serving a statement of case until 7 December.

6. The Respondent served a statement of case on 4 January 2013 to which was annexed a report by her surveyor. The application was listed for hearing on 29 January 2013.

The Law

7. Section 168 of the Act provides:
   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 subsection (2) is satisfied.*
   2) *This subsection is satisfied if-*
      a. *it has been finally determined on an application under subsection (4) that the breach has occurred,*

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

3) *But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.*
4) *A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred.*
5) *But a landlord may not make an application under subsection (4) in respect of a matter which-*
   a. *has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,*
   b. *has been the subject of a determination by a court, or*
   c. *has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.*

The Lease

8. The Tribunal had before it a copy of a lease dated 11 September 1951made between Roger Montgomery Penman as lessor and Florrie Street as lessee ("the Lease").

9. By the Lease, the lessor demised the Upper Flat together with part of the garden of the Property to the lessee for a term of 999 years from 24 June 1951at a yearly rent of seven pounds, ten shillings. The Lease has been subsequently registered at HM Land Registry under title number GR85295.

10. The Lease is unusual in that the demise includes the external walls of the Upper Flat and the roof above it and the lessee is responsible for the maintenance and repair of the external walls of the Upper Flat and the roof of the Property. The demise includes the right
    "*at all reasonable times and as may be reasonably necessary to enter upon the exterior and subjacent parts of Camden Lodge aforesaid for the purpose of executing repairs to the demised premises including the erection of any necessary scaffolding the Lessee making good to the Lessor and his Lessees and Tenants as owner or occupiers of the exterior and subjacent parts of Camden Lodge aforesaid all damages thereby occasioned.*"

11. The covenants on which the Applicant relies are as follows:

    2(5) Well and substantially to repair and at all times during the said term to keep in good and substantial repair and cleanse the demised premises and the roof chimneys main walls and main

timbers floors floor boards and the joists and timbers belonging thereto and all gutters spouting and water courses thereof and such of the drains sewers pipes and water courses as exclusively serve the demised premises And the external walls gates and fences and to keep the hedges properly trimmed and in good order and to keep the garden and footpaths in good order and condition

2(8) To permit the Lessor and his surveyors or agents with or without workmen and others twice or oftener in every year during the said term at reasonable times in the daytime to enter upon the premises hereby demised and every part thereof to view the state and condition of the same and of all defects decays and wants of reparation there found to give notice in writing by leaving the same at or on the said demised premises to or for the Lessee to repair such defects decays and wants of reparation

2(9) Within three months next after every such notice as aforesaid well and substantially to repair and make good all such defects decays and wants of reparation to the said demised premises at the cost of the Lessee

2(13) Not to do or suffer to be done upon the said demised premises anything which may be to the annoyance or damage of the Lessor or any Lessees or Tenants of the Lessor or the neighbourhood or whereby any insurance for the time being effected on the said demised premises may be rendered void or voidable

2(16) To pay all expenses (including Solicitors costs and Surveyors fees) incurred by the Lessor incidental to the preparation and service of all notices under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court.

Inspection

12. The Tribunal inspected the Property on 29 January 2013. The Applicant was represented at the inspection by Mr. Paton of counsel, Mr. Penna, the Applicant's solicitor, Mr. I R Bell, a senior Chartered Building Surveyor employed by Easton Bevins and by Mr. Woods. The Respondent was represented by Mr. Verduyn of counsel, Mr. J Martin-Harrington, a director of Osmosis Consulting Ltd and by Mr. and Mrs. Campbell-Black.

13. The Tribunal inspected the exterior of the Property from ground level and from the roof of the entrance porch. At the rear of the Property the Tribunal was shown where it is alleged that water flowed out of a drainage hopper, down the rear wall and into the garden flat through the vent of an extractor fan. The Tribunal was unable to see any signs indicating damp or water flowing in that area. The Tribunal was able to observe that the parapet wall around the roof and 3 windows on the

eastern elevation appeared to be in need of repair and decoration. Although the external decorations at first floor level were in poor condition, the Tribunal noted that those faces of the chimneys which could be reached from the roof had been painted. The Tribunal was not able to gain access to the roof and could not observe its condition from ground level.

14. The Tribunal inspected the interior of the Upper Flat and noted some damp staining on the ceilings of the living room, kitchen, bedroom 3 and the study. The Tribunal gained access to the roof of the porch through the French windows in the study and noted that there were areas of rotten wood at the base of the French windows.

15. The Tribunal inspected the bathroom of the garden flat and was shown where it is alleged that water flowed in to the bathroom through the extractor fan. The Tribunal observed no signs of water penetration on the rear wall but noted that the carpet in the bathroom had been removed and that there were signs of water staining on the wooden floor.

The Hearing

16. The hearing took place at the Queen's Hotel, Cheltenham on 29 January 2013. The Applicant was represented by Mr. Paton. The Respondent was represented by Mr. Verduyn.

17. Mr. Paton informed the Tribunal that he was not pursuing the claims for breaches of the covenants not to pay rent (Clause 2(1)) or to decorate the exterior (Clause 2(6)).

18. Neither party had submitted any witness statements. The Applicant did not seek to call any oral evidence. The Respondent applied to call oral evidence from the Respondent and Mr. Martin-Harrington. That application was refused as the Respondent was unable to provide any explanation as to why she had failed to comply with the directions to provide witness statements.

The Evidence

19. The evidence submitted by the Applicant included the following:
    1) The application form signed by Mr. Woods which set out the Applicant's allegations as to the breaches of covenant.
    2) A planned maintenance programme prepared by Mr. Bell in November 2011. It recorded that Mr. Bell had inspected the Property *"with a view to providing a Planned Maintenance Programme (PMP) and associated budget costings for the next 10 years."* The PMP relates to the whole of the Property and not just the Upper Flat. Attached to the report is a schedule setting out a condition report listing 63 items, a description of the work required, the time scale within which the work would be required and an estimate of cost. The schedule allocated liability for the

work between the freeholder and the leaseholders of the 3 flats.

3) A copy of a letter dated 13 January 2013 sent by the Applicant's solicitors to the Respondent, addressed to her at the Upper Flat, enclosing a copy of the PMP. The letter said that it was *"formal notice under Paragraph 2(8)"* of the Lease to remedy within 3 months the defects which were her responsibility *"in particular (without limitation) items Nos 8, 9, 11, 12, 15, 16, 22 and 42"*.

4) A letter from Mr. Bell to the Applicant's solicitors dated 2 May 2012 stating that he had inspected the Upper Flat and found that there was still large scale water penetration of the East and West parapet walls.

5) An exchange of emails between the Applicant's solicitors and the Respondent between May and September 2012 pointing out the urgency for work to be carried out. The Respondent claimed not to have received the letter dated 13 January as she did not reside at the Upper Flat.

6) A copy of a letter dated 11 July 2012 sent by the Applicant's solicitors to the Respondent, addressed to her at the Upper Flat but also sent to her by email, demanding payment of £5,622 costs pursuant to clause 2(16) . The letter was accompanied by copies of the relevant invoices showing the costs incurred by the Applicant.

7) A copy of a letter dated 4 September 2012 sent by Mr. Bell to the Respondent enclosing a copy of the PMP *"updated by more recent advice"*. The letter deals with the repairs to the roof. Mr. Bell then sets out terms on which the Applicant would be prepared to allow access for the erection of scaffolding on the part of the garden not belonging to the Respondent. Those included a requirement for the Respondent to pay Mr. Bell's fees in setting out and monitoring the access agreement.

8) A letter dated 22 October 2012 sent by the Applicant's solicitors to the Respondent alleging that water was flowing down the rear wall from the rainwater hopper into the garden flat, causing damage.

9) At the hearing, the Applicant produced a copy of a consent order made in the Gloucester County Court on 4 November 2005 which settled a claim brought by Mr. Woods as leaseholder of the ground floor flat against the Respondent and Peter Lamplough, the Applicant's predecessor in title as freeholder. Mr. Lamplough was not a party to the agreement. The order records an agreement between Mr. Woods and the Respondent that the Respondent would stop using the roof over the porch and that

she would alter the French windows, subject to appropriate approvals, so that they no longer fully opened.

20. The evidence submitted by the Respondent consisted of:
    1) Her statement of case which was supported by a statement of truth signed by her. In her statement she says that:
        a. The PMP does not reflect the current condition of the Property;
        b. That she did not receive a copy of the PMP until she received Mr. Bell's letter dated 4 September;
        c. That the current condition of the Property is set out in the report of Mr. Martin-Harrington and that the schedule to that report sets out the current status of the items of disrepair identified in the PMP;
        d. That 7 items listed in the PMP (5, 7, 8, 10, 11, 49 and 50) have been completed, 6 items (12, 15, 16, 17, 22 and 42) are yet to be completed, 2 items (9 and 30) require clarification and 5 items (4, 6, 43, 44 and 48) relate to future items of work.
        e. That the 6 items of work which are yet to be completed require a combination of scaffolding, listed building consent and favourable weather conditions;
        f. That the Applicant had refused access for the erection of scaffolding;
        g. That she had commissioned a new set of French windows (item 22) which would be fitted following clarification of the Applicant's requirements and that the loose coping stones (item 42) would be completed by her in January 2013.
        h. That she is not liable to pay the Applicant's costs and that they are not reasonable or proportionate.

    2) An unsigned report prepared by Mr. Martin-Harrington dated December 2012. At paragraph 3.1 of the report, it says *"Quite clearly the property is in need of significant repair. This not only extends to the first floor flat but also other areas of the building and this is acknowledged in the PMP written by Easton Bevins."* At paragraph 3.2 *"The first floor flat is in the worst condition externally and Mrs. Campbell-Black has acknowledged this and wants to put things right. However, this needs scaffolding and the associated Landlord approval to erect and this appears to be the stumbling block."* The report goes on to deal with a method for completing the outstanding work. Attached to the report is a schedule which, by reference to the items listed in the PMP, comments on whether the work is required or has been completed.

The submissions

21. Both counsel provided written skeleton arguments setting out their submissions and made further oral submissions at the hearing.

22. At the outset, Mr. Verduyn confirmed that, although he submitted in his written submission that the Applicant had waived its right to rely on past breaches of covenant by acceptance of rent, he accepted that this Tribunal has no jurisdiction to determine whether or not a breach has been waived. He had made the submission to protect his client against any suggestion of issue estoppel.

23. Both counsel accepted that the Tribunal's jurisdiction is as set out in *Swanston Grange (Luton) Management Ltd v Langley-Essen [2008] L&TR 20* and *GHM (Trustees) Ltd v Glass LRX/153/2007* namely that the Tribunal has jurisdiction to determine whether the landlord has waived, or is estopped from claiming, the right to assert a breach of covenant but it has no jurisdiction to consider the separate question of waiver which arises when it is necessary to decide whether a landlord has waived the right to forfeit a lease on the basis of a breach of covenant.

24. Mr. Verduyn did not submit that the Applicant had waived its right to rely on the repairing covenant but he submitted that the Applicant could not allege a breach of the repairing covenant when the Applicant had refused access for the erection of scaffolding which was necessary for effecting the repairs. So long as the Applicant was refusing such access, it was estopped from relying on the covenant. Mr. Paton submitted that for there to be such an estoppel, there must be some reliance on some fact or statement which was clear and unambiguous.

25. Furthermore, Mr. Verduyn submitted that the Tribunal should look at the condition of the Property at the date of the hearing and that if a defect had been remedied, then the Tribunal should not find there to have been a breach.

Conclusions

16. **Breach of the repairing covenant (Clause 2(5)).** The Tribunal notes that the covenant is to repair and at all times *"to keep in good and substantial repair"*. There is no dispute that the Respondent is responsible for repairing the roof and the exterior parts of the Upper Flat.

17. Mr. Paton said that the Applicant relied on items 5 to 9, 12, 15, 16, 17, 22, 30 and 42 in the PMP. In relation to items 5 to 7, Mr. Paton acknowledged at the hearing that they were long term items and he was not pushing for compliance. Mr. Verduyn said that the Tribunal should look at the current condition of the Upper Flat and that the Tribunal should not rely on the evidence of the PMP. The Tribunal does not accept that submission. The question which the Tribunal must determine is whether a breach of covenant *"has occurred"*. If work has been carried out to remedy a breach, it may affect the ability of the Applicant to take enforcement action in relation to that breach but it does not change the fact that a breach has occurred.

18. The Tribunal accepts the PMP as evidence of the condition of the Property in November 2011. That evidence was not contradicted by the Respondent. In fact, her surveyor appears to accept it as a true record of the condition in November 2011. The Tribunal accepts the report of Mr. Martin-Harrington as evidence of the condition of the Property in December 2012. There was no evidence to the contrary. That evidence is reinforced by the evidence of the Tribunal's own inspection.

19. The PMP clearly shows that items 5, 6 and 7 relate to work programmed for future years. There is no evidence that those items relate to an existing state of disrepair. In the circumstances, those items cannot be relied upon to show that a breach of covenant has occurred.

20. Items 8 and 9 relate to repairs to the East parapet gutter on the main roof. Item 9 refers to the same state of disrepair as item 8 but is inserted as a provisional sum in case further work is required on inspection. The PMP details the state of disrepair. The Respondent does not deny that there was a state of disrepair and says that the required work has been completed. The Tribunal finds that as at November 2011, there was a state of disrepair as set out at item 8 in the PMP and, to that extent, there a breach of covenant has occurred.

21. Items 12, 15, 16 and 17 relate to the valley gutter on the main roof and the stucco on the external walls. Again, item 17 is a provisional allowance for further work which may be required. It does not add anything to the state of disrepair. The PMP records the condition in November 2011. The Respondent does not deny that the work is required and says that it is to be completed. The Tribunal accepts that there existed a state of disrepair at that time. The Respondent says that she cannot do the work because the Applicant has refused access for scaffolding. She relies on Mr. Bell's letter dated 4 September as evidence of refusal. There was no evidence of any response to that letter. The Tribunal does not accept the Respondent's submissions on this point. The letter dated 4 September does not refuse access for scaffolding, it merely sets out the Applicant's requirements. The Respondent was perfectly entitled to ignore those requirements as she has a clear right of access, without payment, under the terms of the Lease. There is no evidence that the Applicant has waived its right to rely on the covenant by refusing access for scaffolding. The Respondent accepts that the state of disrepair still exists. The Tribunal has confirmed that fact from its inspection. The Tribunal finds that there was a state of disrepair as set out in the PMP in relation to these items in November 2011 and that it remained at the date of the hearing. To that extent a breach of covenant has occurred.

22. Item 22 relates to the French windows. The PMP records that they are rotten at their base. The Respondent accepts that a repair is needed

but says that the PMP is requiring an improvement by changing the doors so that they cannot open. Mr. Verduyn relied on the court order dated 4 November 2005 to say that the Applicant had waived its ability to rely on the covenant. Further, he says that it is a minor repair and the Tribunal should give time for the repair to be carried out. He relied on *Beaufort Park Residents Management Ltd v Sabahipour [2011] UKUT 436 (LC)* as authority for that proposition.

23. The Tribunal finds that the French windows were in a state of disrepair in November 2011 and remained in a state of disrepair at the date of the hearing. The consent order was not capable of waiving the ability of the Applicant to rely on the covenant as the freeholder was not a party to that order. The Tribunal does not accept that it should allow further time for the work to be completed before determining that a breach has occurred. The Respondent has been aware of the need for repair for a considerable time. To the extent that the PMP requires improvements rather than repair, it cannot be enforced. The Tribunal is satisfied that a breach of covenant has occurred.

24. Item 30 relates to the front door to the hall of the Property. The PMP records that it is missing. The Respondent accepted that she had removed the door following advice from the Police. She still has it and is willing to replace it. Mr. Verduyn submitted that this could not be a breach of Clause 2(5) as the door is not part of the demise. Mr. Paton then submitted that it was a breach of Clause 2(13) to which Mr. Verduyn submitted that the Respondent had not done or suffered to be done anything *"upon the said demised premises"*. The Tribunal accepts the submissions of Mr. Verduyn on this issue. The Applicant may have some other cause of action against the Respondent in respect of the door but the Tribunal finds that the Respondent has not acted in breach of either clauses 2(5) or 2(13) in this respect.

25. Item 42 relates to loose coping stones at ground level. The PMP records that they were loose in November 2011. The Respondent accepts that they remain defective. The Respondent does not require access over the Applicant's property in order to effect a repair. The Tribunal finds that a breach of covenant has occurred in this respect.

26. In summary, the Tribunal finds that there has been a breach of Clause 2(5) of the Lease in that the Respondent has not kept the Upper Flat in good and substantial repair in that defects existed in November 2011 as noted at items 8, 12, 15, 16, 22 and 42 of the PMP and that items 12, 15, 16, 22 and 42 remained in a state of disrepair at the date of the hearing.

27. **Failure to comply with notice to repair (Clause 2(9)).** The first issue to determine is whether a notice has been properly served under Clause 2(8). The Applicant says that notice was given by the letter dated 13 January 2012 which was posted to the Respondent at the Upper Flat. The Applicant says that was good service because Clause

2(8) requires it to be served at the demised premises, that is the address for service given by the Respondent on the register of title and the Respondent had refused to disclose any other address to the Applicant. It does not matter that the notice did not come to the Respondent's attention. It was for her to make arrangements for any post for her at the Upper Flat to be sent on to her. In any event, she became aware of the contents of the PMP by September 2012 and she has still failed to comply. Mr. Verduyn submitted that posting to the Upper Flat was not sufficient and that the notice should have been left at the demised property. He says that strict compliance with the terms of the Lease is required, particularly as this could give rise to the draconian remedy of forfeiture.

28. The Tribunal finds that the notice was not properly served at the Upper Flat in accordance with the terms of Clause 2(8). The Lease requires the notice to be left at the demised premises. The notice was not left at the demised premises. It was posted to the demised premises. There is no evidence that the notice, so posted, reached the demised premises. If the Applicant seeks to rely on service of the notice, it is incumbent on it to prove that the notice was served in accordance with the terms of the Lease. The Applicant has failed to do so. The subsequent communications between the parties in May to September do not affect the position as, although the Respondent became aware of the PMP in September, there is no evidence that any notice was served on her at that time.

29. It follows that the Respondent has not acted in breach of Clause 2(9) of the Lease as the notice has not been properly served on her.

30. **Breach of the covenant against annoyance or damage (Clause 2(13)).** In the application, the Applicant alleges that the Respondent acted in breach of Clause 2(13) because, by failing to repair the roof and parapet walls, she allowed water to run down the internal walls of the building including the internal walls of the ground floor flat. At the hearing, the Applicant appeared to be relying on the letter dated 22 October 2012 which said that water was flowing down the exterior wall and entering into the garden flat via the extractor fan. The Tribunal accepts Mr. Verduyn's submission that there was no evidence to support these allegations. The letter is no more than an allegation. There was no evidence to support it. There was no evidence of ingress of water visible at the inspection. There was no evidence to show that any such water had come from a blocked hopper or was otherwise caused by a defect on the roof as opposed to being water naturally flowing down an exterior wall in rainy conditions.

31. The Tribunal finds that there has not been a breach of Clause 2(13).

32. **Breach of covenant to pay costs (Clause 2(16).** The Applicant relies on the demand made by letter dated 11 July. It is accepted that the Respondent has made no payment. Mr. Paton submitted that the

Respondent's obligation was a continuing one and that the Applicant could seek payment as soon as any costs were incurred incidental to the preparation of a section 146 notice. He accepted that not all of the costs claimed might be recoverable under the clause but if the Tribunal was satisfied that any part of the costs was recoverable then it should find that there has been a breach of the clause. The costs of inspecting the Property were necessarily incurred in order to establish whether or not there had been a breach. Mr. Verduyn accepted that some small amount of costs might be justifiable and recoverable but the issue to be determined was whether the sums claimed were payable at the time that the demand was made. He submitted that the wording of the clause relates to the time after a section 146 notice has been served and that the clause does not create a running account. He also submitted that none of the accounts sent with the letter positively demonstrated that the costs incurred related to work incidental to the preparation of a section 146 notice.

33. The Tribunal finds that Clause 2(16) allows the Applicant to recover costs which are incurred prior to service of a section 146 notice provided that it is established that the costs were incurred incidental to the preparation and service of such a notice. However, there is no evidence before the Tribunal to show that the costs incurred by the Applicant were incurred incidental to the preparation and service of such a notice. The Tribunal notes that all the costs were incurred prior to 11 July 2012. There is no evidence that the Applicant was contemplating the service of a section 146 notice during that time other than the terms of the letter itself. The invoices supporting the demand do not give any indication that a section 146 notice was contemplated. Approximately half of the costs relate to the preparation of the PMP and the subsequent inspection by Mr. Bell. As the PMP states, Mr. Bell's instructions were to prepare a planned maintenance programme. There is no suggestion that he was instructed to prepare a schedule of disrepair as a precursor to taking enforcement action. The PMP deals with the state of repair of the whole Property and not just the Upper Flat and it considers repairs which might be required over a 10 year period. The remaining costs are solicitor's costs. The supporting invoices refer to work from January 2011 in connection with the leases of the Property, advising in connection with repair obligations and ground rent collections. There is no reference to any suggestion of enforcement action against the Respondent or preparation of a section 146 notice.

34. Even if some of the costs might be recoverable under Clause 2(16), the Tribunal considers that the demand dated 11 July 2012 was premature. The wording of the clause *"incidental to the preparation and service of all notices under section 146"* clearly anticipates the service of such a notice. The demand was made long before the service of any section 146 notice and 2 months before the application to this Tribunal. The Tribunal accepts Mr. Verduyn's submission that no sum is payable until a section 146 notice has been prepared and served. For the clause to

require payment on a continuing basis as preparation work is taking place would require clear wording to that effect. No such notice has been served and no sums are yet payable.

35. The Tribunal finds that a breach of Clause 2(16) has not occurred.

Mr. J G Orme
Chairman
Dated 6 February 2013