UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2018] UKUT 375 (LC)
UTLC Case Number: LRX/13/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – administration charges – costs claimed under a covenant entitling landlord to recover costs incurred in contemplation of forfeiture proceedings – such costs only recoverable in respect of period prior to the right to re-enter being waived – whether First-Tier Tribunal has jurisdiction to decide question of waiver – whether the right to re-enter had been waived and if so when and how

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

(1) SINTY STEMP
(2) TIFFANY STEMP

Appellants

and

6 LADBROKE GARDENS MANAGEMENT LIMITED

Respondent

Re: Third & Fourth Floor Maisonette,
6 Ladbroke Gardens,
London W11 2PT

His Honour Judge Huskinson

Royal Courts of Justice, Strand, London WC2A 2LL

24 October 2018

Nicholas Trompeter instructed by Hughmans Solicitors for the Appellants
James Sandham, instructed by D & S Property Management for the Respondent

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The following cases are referred to in this decision:

Swanston Grange (Luton) Management Limited v Langley-Essen [2008] L&TR 20

Barrett v Robinson [2014] UKUT 322 (LC)

Greenwood Reversions Ltd v World Entertainment Foundation Ltd [2008] HLR 31

Central Estates (Belgravia) Ltd v Woolgar [1972] 1 QB 48

Central Estates (Belgravia) Ltd v Woolgar (No.2) [1972] 1 WLR 1048

R Square Properties Ltd v Reach Learning Ltd [2017] EWHC 2947 (Ch)

Cornillie v Saha [1996] 28 HLR 561 (CA)

Youell & Others v Bland Welch & Co (No.2) [1990] 2 Lloyds Rep 431

Soole v Royal Insurance Co Ltd [1971] 2 Lloyds Rep 332

Yorkshire Metropolitan Properties Ltd v Co-Operative Retail Services Ltd [2001] L&TR 26

Government of Ceylon v Chandris [1965] 3 ALL ER 48

The Panaghia Tinnou [1986] 2 Lloyds Rep 586

Matthews v Smallwood [1910] 1 Ch 777

Freeholders of 69 Marina v Oram [2011] EWCA Civ 1258

Segal v Thoseby [1963] 1 QB 889

Introduction

1. This is an appeal from the decision of the First-tier Tribunal Property Chamber (Residential Property) (the FTT) dated 4 December 2017 whereby the FTT decided that £26,381.98 was payable by the appellants to the respondent by way of an administration charge under a lease upon which the appellants held their maisonette at 6 Ladbroke Gardens, London, W11 2PT from the respondent.

2. The sum which the respondent had claimed from the appellants by way of administration charge represented costs which had arisen from previous litigation between the parties. The history of the matter may be briefly stated as follows.

3. 6 Ladbroke Gardens (the building) is a grade 2 listed mid-Victorian house with stucco frontage. It is divided into five units. Each unit is held on a long lease at a low rent by a lessee. The lessees in respect of the top maisonette within the building are the appellants. The freehold of the building is vested in the respondent which is a management company owned by the lessees – the lessee of each unit in the building owning a share in the respondent.

4. The appellants' lease is dated 10 September 1986 and demises the maisonette for a term of 99 years from 17 September 1973 (the term has subsequently been extended). The lease reserves a ground rent

> "TOGETHER ALSO by way of additional rent the costs expenses and outgoings (as the same are referred to in Clause 3 hereof and the Fourth Schedule hereto)"

The lease contains a covenant by the lessee to pay the rent reserved.

5. Clause 3 of the lease contains a covenant by the lessee in the following terms:

> "The Lessee HEREBY COVENANTS with the Lessor to pay to the Lessor a three twelfth part of the costs and expenses outgoings and matters mentioned in the Fourth Schedule hereto within twenty one days of the account therefor being presented to him in manner following that is to say
>
> (a) to pay to the Lessor the annual sum of Fifty Pounds (£50) or such other annual sum as the Lessor shall consider necessary as a contribution towards the costs and expenses outgoings and matters mentioned in the Fourth Schedule hereto by equal half yearly payments in advance on the First day of April and the First day of October in every year and
>
> (b) to pay to the Lessor a proportion amounting to a three twelfth part of any increase in the total expenditure which shall in any one year exceed the total contribution as aforesaid to the matters set forth in the Fourth

> Schedule hereto during the twelve month period ending on the first day of April in every year such amount to be paid once in every year on the First day of October next after the amount thereof and the proportion thereof payable by the Lessee and the amount of such excess shall have been ascertained and notified to the Lessee by the Lessor"

The Fourth Schedule provides for the expenses in question and includes the expenses of maintaining repairing redecorating and renewing the main structure of the building and decorating the exterior of the building and insuring the building.

6. The lease contains in clause 5 covenants on the part of the lessor in relation to insurance and also (subject contribution and payment as thereinbefore provided) covenants on the part of the lessor to maintain repair redecorate and renew various parts of the building including the main structure and roof and the exterior of the building. Clause 5 also contains in subparagraph (d) the following words by way of a proviso for re-entry:

> "PROVIDED ALWAYS and these presents are upon the expression that if the said rent hereby reserved or the maintenance contribution or any part thereof respectively shall at any time be in arrear and unpaid for 21 days after the same shall have become due (in the case of the rent whether formal or legal demand therefor shall have been made or not) or the Lessee shall at any time fail or neglect to observe any one or more of the covenants conditions or agreements herein contained and on his part to be performed and observed then and in any such case it shall be lawful for the Lessor or any person or persons duly authorised by it in that behalf into and upon the maisonette or any part thereof in the name of the whole to re-enter the maisonette and peaceably to hold and enjoy thenceforth as if these presents had not been made but without prejudice to any right of action or remedy of the Lessor in respect of any antecedent breach of any of the covenants by the Lessee hereinbefore contained."

7. It may be noted that there is no provision in the lease for the lessor to set up any form of sinking fund or reserve fund so as to accumulate funds to use as and when required for major works.

8. The lease also contains in clause 2(vi) a covenant by the lessee which is central to the present case namely a covenant in the following terms:

> "That the Lessee will pay to the Lessor on demand all costs charges and expenses (including legal costs and Surveyor's fees) which may be incurred by the Lessor or which may under the terms of the Lease or otherwise become payable by the Lessor under or in contemplation of any proceedings in respect of the maisonette under section 147 or 147 (sic) of the Law of Property Act

> 1925 or in preparation and service of any Notice thereunder respectively and arising out of any default on the part of the Lessee notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court"

It is common ground between the appellants and the respondent that there is an obvious typographical error in this covenant and that the first reference to section 147 should in fact be a reference to section 146 and that the lease should be read and construed as though this typographical error had not been made.

9. By about 2014/15 (if not before) the building was in a state of substantial disrepair. This is common ground between the parties. The appellants had been complaining about the state of disrepair and especially about the state of the roof. The respondent wished to raise money to carry out the works. Substantial funds were required for the necessary works.

10. There were various causes of argument and dispute between the respondent and the appellants (and their predecessor in title) which appear to have diverted attention temporarily from the carrying out of works. For the purposes of the present proceedings it is merely necessary to note that (putting it at its lowest) each party has criticisms of the conduct of the other party and considers the other party to have acted unreasonably. As a result of this, as is revealed in the following paragraphs, there has unfortunately arisen substantial litigation between the parties thereby involving the expenditure (by each party separately) of more in legal fees than the total amount that was originally sought to be recovered from the appellants as their contribution towards the costs of the necessary works. I was told in the course of the proceedings that there had been attempted mediation proceedings which had not borne fruit. Each party remains critical of the other. Each party stands on whatever may be their legal rights and requires determination of the present dispute.

11. By March 2016 the respondent had decided that it intended to carry out, during the forthcoming service charge year commencing on 1 April 2016, major works to the building so as to remedy the state of disrepair. It was therefore necessary for the respondent to get in money pursuant to the provisions of clause 3 by way of a demand for payment in advance. By a written demand dated 14 March 2016 the respondent's agents D & S Property Management wrote to the appellants enclosing the respondent's request for payment of the on-account maintenance charges due under the terms of the lease on 1 April 2016. The amount demanded was half (because it was the first of two half yearly instalments) of the appellants' three twelfths contribution towards the estimated expenditure required. The amount demanded was £18,971.72. The notice was given in due form and with all the appropriate statutory information.

12. The appellants did not pay this sum of £18,971 .72 (which I will refer to as "the relevant demand") or any part thereof by 1 April 2016 or at any subsequent date, until after a determination by the FTT referred to below.

13. In the light of the proviso for re-entry contained in the lease there arose as a matter of contract a right for the respondent to re-enter and forfeit the lease for non-payment after 21 days had elapsed from 1 April 2016 with the relevant demand still unpaid. However the respondent was not entitled to exercise any such right of re-entry without first complying with certain statutory provisions arising under section 81 of the Housing Act 1996 and section 146 of the Law of Property Act 1925. Only once those steps had been taken (and if the appellants had continued to fail to pay the amount due) would the respondent have been entitled to serve proceedings forfeiting the lease.

14. The respondent decided in the light of the non-payment of the relevant demand to seek to put itself into a position to forfeit the appellants' lease. By a document dated 29 April 2016 the respondent made an application to the FTT for the determination of liability to pay and the reasonableness of service charges. This application sought a determination regarding on-account payments for the year 2016/17 (which was the year in respect of which the relevant demand had been made) and also sought a determination in respect of service charges for 2015/16. The details of the dispute regarding 2015/16 are not presently relevant.

15. In paragraph 13 of the statement of case which formed part of the respondent's application to the FTT the following passage appeared in relation to the respondent's complaint that the appellants had failed to pay money demanded in accordance with clause 3(a) of the lease with regard to proposed expenditure to be incurred in the 2016/17 service charge year – i.e. in relation to the respondent's complaint that the appellants had not paid the relevant demand:

> "13. In light of the above, and given the fact that the Applicant is contemplating forfeiture of the Respondents Lease with regard to their failure to pay the monies demanded on the due date, the Applicant seeks a determination pursuant to Section 27A of the Landlord and Tenant Act 1985 from the Tribunal with regard to the Respondents liability to make the on-account payment demanded and the date on which such monies fell due from Respondents, with this application being submitted as the first preliminary step in the preparation and service of a notice pursuant to Section 146 of the Law of Property Act 1925."

16. After 22 April 2016 there occurred various events which the appellants contend involved a waiver of any right to forfeit the lease for non-payment of the relevant

demand. The nature of those events and the reason why the question of waiver is relevant is explained in due course below. For the moment it is appropriate to move forward to the decision of the FTT in the proceedings which had been commenced by the respondent's application to the FTT dated 29 April 2016.

17. By its decision dated 16 December 2016 the FTT gave certain decisions regarding the service charges for the year 2015/16 the details of which are not at present relevant. The FTT also decided in respect of the estimated budget for the year ending 31 March 2017 that the sum payable by the appellants was £37,943.44 – i.e. the full amount contended for by the respondent, because the relevant demand, which was for a half yearly instalment, was for precisely half of this sum.

18. The appellants contended that they were entitled to an order for costs in respect of some or all of the costs incurred by them in these proceedings before the FTT which had led to the decision dated 16 December 2016. The amount claimed was £67,439.80. There was a further hearing before the FTT in relation to this, but the application for costs was dismissed in a decision of the FTT dated 15 February 2017. Further costs were of course incurred by the parties in dealing with the appellants' application for costs.

19. I am told that after the FTT's decision of 16 December 2016 (which was not appealed) the appellants did pay to the respondent the amount which had been claimed (and which the FTT had found payable) by way of the on-account payments for 2016/17 and that in due course major works were carried out to the building. These facts did not however bring to an end the disputes between the parties regarding costs.

20. After the FTT's decision of 16 December 2016 the respondent had obtained payment of the sum demanded by the relevant demand (and also payment of the second instalment which had become payable on 1 October 2016). Accordingly thereafter there was no further contemplation of forfeiture of the appellants' lease for non-payment of the relevant demand.

21. However the respondent was minded to seek to recover from the appellants, by way of an administration charge pursuant to the covenant in clause 2(vi) of the lease, payment of the costs incurred by the respondent in the proceedings which had led to the decision of 16 December 2016. The respondent calculated these costs as being £43,969.96 and by a demand dated 6 March 2017 claimed payment thereof by way of administration charge from the appellants. Payment was not forthcoming. Accordingly the respondent on 1 June 2017 made an application to the FTT for determination as to the appellants' liability to pay this sum by way of an

administration charge. (At the hearing I was told by Mr Sandham that the respondent made this application to the FTT as a necessary step in contemplation of forfeiting the appellants' lease for breach of covenant by reason of non-payment of sums due under clause 2(vi) of the lease. It appears to be the respondent's intention, after the conclusion of the present proceedings and supposing that there is no forfeiture of the appellants' lease, to make a fresh claim for the costs of the present proceedings under clause 2(vi) which may in turn lead to further litigation.)

22. This application of 1 June 2017 to the FTT by the respondent led to further substantial litigation between the parties and resulted in a further hearing before the FTT. The appellants advanced 14 separate points of objection or issues in relation to the respondent's claim for payment of this administration charge in relation to costs. The FTT dealt with this matter in a decision dated 4 December 2017. In the result the FTT decided that, pursuant to clause 2(vi) of the lease, there was payable by the appellants to the respondent by way of reasonable administration charge (for legal costs and fees) the sum of £26,381.98.

23. The appellants sought to challenge this decision of the FTT and advanced numerous grounds of appeal. Permission to appeal was granted by the Upper Tribunal but only upon two related points, namely (i) whether the FTT had jurisdiction to decide whether the respondent's right to forfeit for non-payment of the relevant demand was waived and (ii) (if the FTT had jurisdiction) whether the respondent's right to forfeit for non-payment of the relevant demand was in fact waived (and if waived then when was it waived).

24. It was ordered by the Upper Tribunal that the appeal should proceed first by way of review (i.e. upon the question of whether the FTT was wrong in concluding it had no jurisdiction to consider the waiver point) and that, if the upper Tribunal concluded the FTT was wrong upon this point, then the matter should proceed by way of a rehearing upon the waiver point. This is how the matter proceeded before me. At the hearing it was common ground between the parties (and I also agreed) that the FTT was wrong in concluding that, in the litigation before it in the present case, it had no jurisdiction to decide whether there had been a waiver by the respondent of the right to forfeit the lease for non-payment of the relevant demand. The decision in the Lands Tribunal (a decision of mine) in *Swanston Grange (Luton) Management Limited v Langley-Essen* [2008] L & T R 20 is a decision under section 168 of the Commonhold and Leasehold Reform Act 2002 and was to the effect that the leasehold valuation tribunal did have jurisdiction to decide whether the right to rely on a covenant at all had been waived (because without reaching such a conclusion the leasehold valuation tribunal could not decide the question which was before it). In that case no question of whether there had been some right to waive an accrued right of forfeiture arose. In the present case, having regard to the decision in *Barrett v Robinson* [2014] UKUT 322 (LC) referred to below, the FTT can only decide the

matter before it (namely the amount payable by way of a reasonable administration charge under clause 2(vi)) if it reaches a conclusion upon the question of whether (and if so when) the right to re-enter for non-payment of the relevant demand was waived. Therefore the FTT has jurisdiction to decide this matter. In the light of the foregoing this case therefore did proceed by way of rehearing upon the question of whether there had been a waiver. It was agreed by both parties that the matter could properly proceed upon the documents and without any oral evidence being called.

25. The reason why the question of waiver of any right to forfeit for non-payment of the relevant demand was agreed to be a relevant question is as follows. The Upper Tribunal (Martin Roger QC, Deputy President) considered a clause very similar to clause 2(vi) in *Barrett v Robinson* [2014]. It was there held that a clause such as clause 2(vi)

> "….. 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 cl.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 cl.4(14) would oblige a tenant to pay the costs incurred by their landlord in taking steps preparatory to the service of a s. 146 notice." (emphasis added)

26. In the present case the FTT held that the respondent did incur costs in contemplation of forfeiture and that the amount of these costs was less than the total amount which had been claimed by the respondent (£43,969.96) and was instead £26,381.98. The FTT held that this sum was recoverable as a reasonable administration charge upon the basis that there had been no waiver at any stage of the right to forfeit for non-payment of the relevant demand (the FTT had concluded it had no jurisdiction to consider the question of waiver). Having regard to the extent of the permission to appeal granted to the appellants they are not able to challenge (and have not sought before me to challenge) the conclusion that, supposing that there was no waiver of the right to forfeit at any stage, the sum of £26,381.98 would be recoverable under clause 2(vi).

27. However the parties recognise that the question of whether there was any waiver by the respondent of the right to re-enter for non-payment of the relevant demand (and if so when this waiver occurred) is of importance for the resolution of the present dispute having regard to the decision of *Barrett v Robinson*.

28. In summary the arguments advanced by Mr Trompeter on behalf of the appellants are to the following effect:

(1) It is accepted that the respondent could not have waived the right to forfeit the appellants' lease for non-payment of the relevant demand prior to 22 April 2016, which is the date when the right to re-enter arose as a matter of contract.

(2) It is submitted that the right to forfeit was waived as early as 26 April 2016 – and therefore before any or any significant costs could have been incurred by the respondent relevant for the purposes of clause 2(vi) because the respondent's application to the FTT was not even made until about 29 April 2016.

(3) If that is wrong, then numerous separate subsequent acts are relied upon as amounting to waiver of the right to forfeit the lease. Mr Trompeter submits that each of them separately was sufficient to constitute a waiver, but he invites the Tribunal to consider the matter in the following way. He refers to the various separate acts of alleged waiver taking them in time sequence. He submits that the earliest such act (act A) amounted to a waiver such that the date of the waiver is the date of act A. If this is wrong he relies on the next act (act B) and contends that act B either by itself or when viewed in the light of what had happened before (namely act A) amounted to a waiver and the date of the waiver is the date of act B. If this is wrong he goes on to the next act (act C) and contends that act C either by itself or when viewed in the light of what had happened before (namely acts A and B) amounted to a waiver and that the date of the waiver is the date of act C. Et cetera.

(4) Once it is established that the respondent did, prior to the conclusion of the previous proceedings (which resulted in the FTT's decision dated 16 December 2016), waive the right to forfeit the appellants' lease for non-payment of the relevant demand, it then necessarily follows that the respondent is not entitled to recover under clause 2(vi) costs in the sum of £26,381.81, which was the sum awarded by the FTT on the basis that there had not at any stage been a waiver.

(5) In these circumstances the respondent would only be entitled to recover under clause 2(vi) the amount of costs which had reasonably been incurred in contemplation of the forfeiture prior to the date of the waiver of the forfeiture (whenever that may have been).

(6) However upon the evidence submitted by the respondent it is impossible to say what were the costs reasonably incurred by the respondent in contemplation of the forfeiture prior to this waiver. The respondent has therefore failed to prove its case and therefore should be awarded nothing by way of administration charge under clause 2(vi).

29. In summary the arguments advanced by Mr Sandham on behalf of the respondent are to the following effect:

(1) Having regard to the statutory fetters placed upon the respondent's ability to enforce a right of re-entry for non-payment of the relevant demand, the respondent was not at any material time capable of exercising the right to re-enter. In consequence it was not possible to waive the right to re-enter. Therefore there could not have been and was not any waiver of the right to re-enter for non-payment of the relevant demand.

(2) If the foregoing is wrong and it was possible for the respondent to waive the right to re-enter, then upon the facts of the present case the respondent made it clear from the outset (see its statement of case in support of the application to the FTT in a document dated 29 April 2016 and see also subsequent documents) that it was proceeding with litigation with a view to forfeiting the lease. Its attitude was made clear namely: the respondent intends to forfeit the lease. Viewed in this context nothing that the respondent did amounted to a waiver of the right to forfeit.

(3) Accordingly there was no waiver and the respondent remains entitled to payment by way of reasonable administration charge of the sum awarded by the FTT namely £26,381 .98.

(4) If the Tribunal finds that, contrary to the foregoing, there was a waiver at some date prior to the conclusion of the proceedings before the FTT and the payment by the appellants of the relevant demand, then it is clear that significant costs were incurred in contemplation of the forfeiture (and therefore within clause 2(vi)) prior to the date of the waiver. The respondent is entitled under clause 2(vi) to payment of such amount by way of a reasonable administration charge. In the absence of evidence as to how much of the £26,381.98 awarded by the FTT had been incurred prior to the date of the waiver (whenever that may have been) the Upper Tribunal should either adopt a broad brush approach and itself decide what proportion of the £26,381.98 was recoverable alternatively should invite the submission of further evidence from the parties so that the Upper Tribunal, having decided upon the date of the waiver, can reach a conclusion as to the amount of the reasonable administration charge incurred prior to the date of the waiver.

Statutory restrictions on the forfeiture of residential leases

30. 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 is helpful to have the terms of that section in mind, together with other more recent statutory restrictions on the forfeiture of residential leases. I set out below a helpful citation dealing with these matters taken from paragraphs 12 to 18 of *Barrett v Robinson*.

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 –

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

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

Acts relied upon as waiving the forfeiture

31. The relevant acts of waiver relied upon by the appellants are summarised in Mr Trompeter's skeleton argument and are as follows:

(1) On 26 April 2016 the respondent's agents (D & S Property Management) sent an email to the appellants in response to a communication from them complaining about leaks. The email was addressed "Dear Leaseholders" and stated that the appellants' email had been referred to the directors of the respondent whose position remained as previously stated. Attention is drawn by Mr Trompeter to the use of the expression "leaseholders".

(2) On 16 June 2016 the respondent's agents sent an email to the appellants again referring to them as "Dear Leaseholders".

(3) On 17 June 2016 the respondent's agents wrote to the appellants again referring to them as "Dear Leaseholders" and stating why fire extinguishers had been removed and referring to the advice of fire risk assessors. The appellants were asked to confirm that, if they would like new fire extinguishers, they would pay their relevant contributions and would be prepared to act as fire marshals.

(4) On 5 July 2016 the respondent's agents wrote once again "Dear Leaseholders" to the appellants enclosing a copy of the fire risk assessment and stating that some works required to the communal parts, which fell within the respondent's repairing covenant, were contained within the consultation documents and would be undertaken and charged for through the service charge. The letter pointed out that some of the required works did not fall within the landlord's repairing covenant and the letter continued:

> "It is stated in the report that all of the flat doors which are in the communal parts need to be replaced with fire doors. As you will be aware from your leases the said doors fall within the leaseholders' demise and are the leaseholders responsibility.
>
> Please confirm when you will be replacing your flat door and provide us with the certificate confirming the replacement door is compliant with the current fire regulations and are resistant to 30 minutes, with said replacement to be undertaken within 21 days of the date of this email making the compliance date by the 26 July 2016."

(5) By documents dated 5 July 2016 the respondent's agents served upon all leaseholders in the building a formal notice of intention to carry out works by way of

consultation under the provisions of the Landlord and Tenant Act 1985. The notice was stated to be given by the duly authorised agent of "your Landlord".

(6) On 11 July 2016 the respondent's agents sent a further email to the appellants regarding the doors which included the passage: "For the avoidance of all doubt leaseholders were sent the same email as everyone in the building is treated the same by the company". On 13 July 2016 the respondent's agents sent an email to the appellants by way of further communication regarding the doors. The email contained the following passages:

> "In light of the above we are of the opinion that the door either forms part of the demise or constitutes a fixture and fitting within the demise and thus in accordance with clause 2(v) of the Lease you are obliged to maintain the same. By virtue of Clause 2(xiii) the leaseholders are obliged to undertaken (sic) all required repairs within 3 months of receipt of the notice of wants of repair unless in the case of emergency. In the light of the fact that Fire Safety Enforcement Notice expires on 01/08/16 the Company is of the opinion that this constitutes an emergency."

(7) On 27 July 2016 the respondent's agents wrote to the appellants as "leaseholders" in relation to the fire risk assessment for the building.

(8) On 8 August 2016 the respondent's agents sent to the appellants' solicitors an email reciting clause 2(xiii) of the lease and stating that the email was "the Landlords request for access to your clients flat for the purposes set out in the clause above on 16/08/16 at 10 AM".

(9) On 17 August 2016 the respondent's solicitors sent an email to the appellants' solicitors making a second request pursuant to clause 2(xiii) of the lease for access to the appellants' flat.

(10) On 23 August 2016 the respondent's solicitors sent to the appellants a statement of estimates in relation to the proposed works. The document is addressed to all leaseholders in the building and contains a response to the observations made by the leaseholders of the third and fourth floor flat (i.e. to the observations of the appellants).

(11) On 3 September 2016 the respondent's agents sent to the appellants a request for payment by way of maintenance charge demand. The document demanded £18,971 .72 by way of half yearly three twelfths contribution towards the estimated expenditure for the maintenance charge year 1 April 2016 to 31 March 2017 as set out in an attached budget. The notice set out the provisions of clause 3(a) of the lease and stated that payment was due on 1 October 2016.

Acts relied upon as pointing away from waiver

32. On behalf of the respondent Mr Sandham drew attention to certain acts which he contended were important as setting the context in which there occurred the acts relied upon by the appellants as allegedly constituting waiver:

(1) Mr Sandham drew attention to paragraph 13 of the respondent's statement of case attached to its application to the FTT dated 29 April 2016 (see paragraph 15 above).

(2) on 3 May 2016 the respondent's agents sent an email to the appellants referring to the fact that the service charge remained outstanding and that the respondent was contemplating forfeiture proceedings and that an application had been submitted to the FTT.

(3) On 12 May 2016 the respondent's agents wrote to the appellants' solicitors referring to a transfer of a sum of £1447.64 to the respondent's account. The letter stated that as the respondent intended to seek forfeiture of the appellants' lease for failure to pay the on account service charges due on 1 April 2016 and the payment made did not represent those monies, a cheque for £1447.64 was sent (i.e. by way of repayment of the money which had been transferred).

(4) As regards any acts by the respondent or its agents directed towards fire precautions it was necessary to view these acts in the light of the steps that have been taken by the relevant fire authority in February 2016 (see the document at tab 79 at page 1143 of the bundle).

Appellants' submissions

33. In the light of the foregoing facts Mr Trompeter advanced the following arguments.

34. He pointed out that it is important at all times to bear in mind that the only breach by the appellants which is relied upon by the respondent as justifying a forfeiture is the failure to pay within 21 days of 1 April 2016 the half yearly contribution towards the estimate of service charges for the forthcoming year – i.e. the failure to pay the relevant demand.

35. He accepted that no act by the respondent prior to 22 April 2016 could amount to a waiver of the right to forfeit for this failure to pay the relevant demand because no such right had yet arisen – it only arose on 22 April 2016.

36. I have already set out above the various acts upon which Mr Trompeter relies as constituting acts of waiver, which he submits should be analysed in accordance with the approach summarised in paragraph 28 above.

37. Mr Trompeter drew attention to the thread running through all the correspondence, namely that the respondent (by its agent) persisted in treating the appellants as lessees and referring to them as leaseholders.

38. Quite apart from the phraseology used in communications, the respondent persisted in asserting the terms of the lease against the appellants. This is clear from the communications regarding the fire requirements and the state of the doors. The respondent was citing the terms of the lease to the appellants and demanding that they comply with the terms of the lease. The respondent also made clear that all lessees were being treated in the same way. The respondent continued to assert its rights of entry into the maisonette pursuant to the terms of the lease.

39. As regards the consultation documents regarding proposed major works, Mr Trompeter pointed out that the respondent was not compelled to include the appellants within the consultation round. It is true that if they were not consulted then there was the potential risk that the respondent would only be entitled to recover the statutory limit of £250 towards the cost of the major works. However if the respondent's case was that the lease should be forfeited then the respondent could have omitted the appellants from the consultation and could have relied upon appropriate terms of relief from forfeiture (once the respondent had asserted its claimed right to forfeiture) – i.e. could have relied upon the court only granting relief from forfeiture on the basis that any unpaid contributions towards the full share of the cost of the major works should be paid. Mr Trompeter also pointed out that the respondent could have borrowed money (perhaps from the other directors) to make good any shortfall in money available for the major works.

40. If, contrary to his submissions, the right to forfeit had not been waived prior to the demand of 3 September 2016 for the payment of the instalment of service charge payable on 1 October 2016, then Mr Trompeter submitted that it was clear that the sending of this demand for payment of money which was reserved as an additional rent constituted a waiver of the forfeiture.

41. As regards the return by the respondent of £1,447.64 which the appellants had paid to the respondent, this was irrelevant. This payment was in respect of money which was owed by the appellants to the respondent in respect of the previous year. It had fallen due prior to any right to forfeit for non-payment of the relevant demand had arisen. The acceptance by the respondent of the sum could not have waived such right

of forfeiture. The unnecessary return by the respondent of the sum could not amount to any relevant proclamation of intention to forfeit the lease in respect of the unpaid relevant demand.

42. Apart from this irrelevant return of the cheque and apart from one paragraph in the lengthy statement of case which accompanied the application to the FTT dated 29 April 2016, at all times the respondent had acted towards the appellants unequivocally on the basis that the lease was continuing.

43. As regards the legal principles concerning waiver of the forfeiture Mr Trompeter drew attention to the following matters.

44. The right approach to waiver is for the Upper Tribunal "to consider objectively whether in all the circumstances the act relied on as constituting waiver is so unequivocal that when considered objectively it could only be regarded as being consistent with the lease continuing", per Thomas LJ in *Greenwood Reversions Ltd v World Entertainment Foundation* Ltd [2008] HLR 31 at paragraph 30.

45. Ultimately, whether or not there has been a waiver turns entirely on the "quality of the act" in question, in respect of which the motive or intention of the landlord is irrelevant, see per Buckley LJ in *Central Estates (Belgravia) Ltd v Woolgar (No 2)* [1972] 1 WLR 1048. The respondent's arguments in the present case place too much emphasis on context and too little emphasis on the crucial concept of the "quality of the act".

46. If with knowledge of the right to forfeit a landlord accepts rent due after the right to forfeit accrued then this will be a waiver. A demand for such rent has been held also to give rise to such a waiver (anyhow this has been held at first instance – see the discussion in *Greenwood Reversions* at paragraph 26 and see also the decision of Master Teverson in *R Square Properties Ltd V Reach Learning Ltd* [2017] EWHC 2947 (Ch)).

47. Mr Trompeter referred to *Cornillie v Saha* [1996] 28 HLR 561 (CA) where a question arose as to whether a landlord, who had on 2 March 1993 served a section 146 notice complaining of various breaches of covenant including a breach of covenant against subletting, had waived the forfeiture by commencing proceedings on 8 March 1993 against the tenant for an order to permit the landlord to have access to the flat (and claiming damages arising from the failure to give access which had delayed repair works). The case proceeded on the agreed basis that the service of the access proceedings and the claim for damages did constitute an unequivocal act

recognising the subsistence of the lease – the case thereafter turned on the question of whether the landlord had sufficient knowledge of the relevant subletting for there to have been a waiver. In the present case Mr Trompeter recognises that no actual proceedings were commenced by the respondent to obtain access to the maisonette, but demands for access were made in reliance upon the terms of the lease.

48. Mr Trompeter sought to distinguish certain cases relied upon by Mr Sandham in paragraphs 24 to 26 of his skeleton argument. He submitted that *Youell & Others v Bland Welch& Co ("The Superhulls Cover Case") (No. 2)* [1990] 2 Lloyds Rep 431 was a case dealing with estoppel and not waiver of forfeiture. The same was so in relation to *Soole v Royal Insurance Co Ltd* [1971] 2 Lloyd's Rep 332.

49. Mr Trompeter addressed an argument which he understood that Mr Sandham was making, namely the argument that during the period prior to a landlord being in the position actually to effect a forfeiture (for instance by serving a writ claiming possession on the basis of the forfeiture) there cannot be a waiver of the forfeiture. He submitted that there was no authority to support this proposition and that if this was the law then various cases would have been decided otherwise. He also submitted that if this was a good point then it would have been a live point in the decision of Neuberger J, as he then was, in *Yorkshire Metropolitan Properties Ltd v Co-Operative Retail Services Ltd* [2001] L & TR 26. He further submitted that any such argument on behalf of the respondent amounted to the eliding of two concepts, namely (i) the concept of the landlord having a choice of route down which to proceed (i.e. of forfeiting the lease by reason of a breach of covenant or of recognising the continued existence of the lease) and (ii) the concept of the landlord having a presently exercisable right actually to forfeit the lease. A landlord is in a position to make the choice referred to in (i) above as soon as the landlord is aware of the breach, but the landlord only possesses a presently exercisable right actually to forfeit the lease once the various statutory protections have been worked through such as section 81 of the Housing act 1996 or section 146 of the Law of Property Act 1925. Also if Mr Sandham's argument was correct and if the respondent did not know, until after the FTT's decision, as to whether any (and if so how much) money was owing by way of on-account service charge pursuant to the relevant demand, then it was not possible to say that any of the costs expended by the respondent in pursuing the application to the FTT were costs incurred in contemplation of forfeiture – on Mr Sandham's argument there was no question yet of any forfeiture because it was not known what if anything was owing.

50. Mr Trompeter advanced arguments in relation to the *Yorkshire Metropolitan Properties*. He stressed the particular facts of that case. That was a case where various matters arose including the question of whether the landlord had waived a right to re-enter (by reason of an unauthorised subletting) through the service of a demand by the landlord's agents for the payment of an insurance premium for the forthcoming year.

The insurance premium was not reserved as rent but was stated to be recoverable "in the same way as rent". It was held that the insurance premium was not rent. The court held that there were two arguments to be resolved, the first being whether an insurance demand, although not a demand for rent, should be treated in the same way as a demand for rent. The second question (which only arose if it should not be treated in the same way as a demand for rent) was whether the demand of 13 September 1989 for payment of the insurance premium operated as a waiver in all the circumstances. The court held that the demand for the payment of the insurance premium should not be treated in the same way as a demand for rent. The court further held that in all circumstances of that case there had not been a waiver.

51. In the light of the foregoing analysis Mr Trompeter stressed the importance of the fact that the present lease did expressly provide that the payment of the monies due in respect of service charge under clause 3 was reserved as an additional rent (in contrast to the position in the *Yorkshire Metropolitan Properties* case). The court in that case recognised that, anyhow at first instance, it should be regarded as settled that a demand for rent would serve to waive a forfeiture (see at paragraph 82 of that decision). Accordingly even if, contrary to Mr Trompeter's submissions, the right to forfeit had not already been waived by 3 September 2016 there was a waiver when the respondent's agents on that date demanded the payment of on account service charges (i.e. additional rent) due on 1 October 2016.

52. If the foregoing were wrong and it was necessary, notwithstanding that the demand of 3 September 2016 was for payment of money expressly reserved as an additional rent, to examine all the circumstances of the case to see whether there had been a waiver, Mr Trompeter drew attention to the particular facts of the *Yorkshire Metropolitan Properties* case. Having regard to what the judge described as "more unusual factors" which are set out in paragraph 94 of the judgement it was clear how the demand of the insurance premium (described as bearing the hallmarks of a routine administrative act) did not constitute a waiver. The facts of the present case were different and the demand of 3 September 2016 did constitute an act so unequivocal that, when considered objectively, it could only be regarded as having been done consistently with the continued existence of a lease as the date of the act in question.

53. As regards the quantum of any recovery by the respondent of an administration charge under clause 2 (vi) of the lease Mr Trompeter submitted that for a sum to be recoverable it must:

(1) be referable to steps taken in contemplation of forfeiture for non-payment of the relevant demand; and

(2) be incurred before waiver of such right to forfeiture.

54. Mr Trompeter submitted that the respondent could recover only a nominal amount (or nothing). The respondent has not attempted (or anyhow not attempted in any meaningful way) to extract from the overall amount claimed, or from the overall amount awarded by the FTT, the element of costs which is in principle recoverable as an administration charge by reason of having been incurred in contemplation of forfeiture for the non-payment of the relevant demand and having been incurred before the date of waiver. He referred to *Government of Ceylon v Chandris* [1965] 3 All ER 48 and to *The Panaghia Tinnou* [1986] 2 Lloyd's Rep 586.

Respondent's submissions

55. On behalf of the respondent Mr Sandham advanced the following arguments.

56. He referred to *Matthews v Smallwood* [1910] 1 Ch 777 and the well-established principle that waiver of a right of re-entry can only occur where the landlord, with knowledge of the facts upon which his right to re-enter arises, does some unequivocal act recognising the continued existence of the lease.

57. It is of importance in the present case to note that the lease is of residential premises and that any right to re-enter can only be exercised once two separate steps have both been taken, namely first there must be compliance with section 81 of the Housing Act 1996 and secondly, if after the determination of the FTT under section 81 the landlord still seeks to forfeit the lease, with the provisions of section 146, see *Freeholders of 69 Marina v Oram* [2011] EWCA Civ 1258.

58. Until it is finally determined by the appropriate tribunal that the amount of the service charge is payable by the tenant (or the tenant has admitted that it is so payable) the landlord does not know whether the amount of the service charge claimed (or any part thereof) is in fact due and payable by the tenants. Accordingly the landlord does not have "knowledge of the facts upon which his right to re-enter arises" and is therefore incapable of waiving any right to forfeit for non-payment of the relevant instalment of service charge which the landlord has demanded.

59. It was not until the FTT had given its decision dated 16 December 2016 that it was known by the respondent that in fact the whole amount of the relevant demand (£18,971.72) was properly payable and had fallen due on 1 April 2016. Nothing the respondent did before the FTT's decision was capable in law of amounting to a waiver of the right to re-enter for non-payment on 1 April 2016 of the relevant demand. A waiver involves making a choice between two things – no such choice can be made prior to the respondent knowing what one of those things is (or more precisely no such choice can be made before the respondent knew, through a decision

of the FTT, whether the appellants owed anything by way of service charge and if so how much).

60. If the foregoing were wrong, then upon the facts of the present case the respondent did not at any stage waive the right to forfeit the non-payment of the relevant demand. This is because of the matters next mentioned.

61. The facts of the case must be seen in the light of the fire order which had been made in February 2016. There was a necessity for the respondent, as a responsible landlord, to take appropriate steps in relation to this. It could not be ignored.

62. Also the respondent as landlord was bound by a covenant to repair the building. Even if the covenant with the appellants was expressed to be subject to the appellants paying their relevant contribution, the respondent remained bound by the covenant with all the other lessees. The respondent had to repair the building. The respondent had no money to do so unless it was able to get in service charges. There was no reserve fund. The works required were major works which required consultation. The respondent therefore had to conduct the appropriate consultation, because otherwise the respondent would be limited to recovering £250 from any lessee who had not been properly consulted. The appellants remained lessees throughout all relevant periods. The respondent therefore had no alternative but to consult them on the basis that they were lessees. Mr Sandham drew attention to the Service Charges (Consultation Requirements) (England) Regulations 2003 at schedule 4 Part 2 paragraph 1 which provides "the landlord shall give notice in writing of his intention to carry out qualifying works – (a) to each tenant...".

63. Accordingly it was of no significance that the respondent, through its agents, continued to treat the appellants as lessees including for the purpose of obtaining access and seeking to secure the necessary fire precaution works (including installation of new doors) and for the purpose of consulting them regarding major works. The appellants were lessees. They could not be treated as anything other than lessees for the foregoing purposes. Also the respondent's conduct in relation to these matters must be viewed in the light of the following considerations.

64. The respondent had made clear from a very early date, namely from service on the appellants of the application dated 29 April 2016, that it was pursuing its right to forfeit the lease. The statement of case made that clear. This was emphasised by the return of a payment which the appellants had made. Viewed in the light of these circumstances the actions of the respondent could not be said to be so unequivocal that, when considered objectively, the actions could only be regarded as having been done consistently with the continued existence of the lease.

65. The only potentially relevant document regarding waiver relied on by the appellants was the single document which was issued prior to the respondent making clear its intention to forfeit the lease through the application to the FTT dated 29 April 2016. This was an email dated 26 April 2016 and clearly could not constitute a waiver of the right to forfeit. It merely used the phraseology of referring to the appellants as leaseholders (which is what they were) and did not constitute the form of unequivocal conduct required to demonstrate a waiver.

66. Everything which the respondent did after 29 April 2016 was done in the context of an ongoing application to the FTT in contemplation of enforcing a right to forfeit. In those proceedings the FTT gave directions for the service of documents including witness statements. A document served by the respondent dated 4 August 2016 (in paragraphs 49 and 50) again rehearses the intention to forfeit the lease. Overall the respondent could not have made its intention clearer, namely to enforce the right to forfeit.

67. As regards the demand dated 3 September 2016 for the second instalment of service charge which was due on 1 October 2016, Mr Sandham first repeated his submission that it was not possible to waive the right to forfeit for non-payment of the relevant demand until after the FTT had given its decision as to what if anything was payable in respect of the relevant demand. If the foregoing were wrong, then the issuing of this demand was just such an administrative act had occurred in the *Yorkshire Metropolitan Properties* case and was equivocal, especially when viewed in the light of all that had gone before including the respondent's clearly stated intention to pursue a forfeiture.

68. If, contrary to the respondent's submissions, the Upper Tribunal should decide that there had at some date been a waiver of the forfeiture, then the respondent remained entitled to recover in accordance with clause 2 (vi) of the lease the reasonable administration charges (by way of costs) incurred in contemplation of the forfeiture prior to the date of this waiver. As the date of this waiver will not have been known until after the Upper Tribunal has reached its decision, it is not proper to criticise the respondent for having failed to prove precisely how much by way of costs in contemplation of the forfeiture proceedings the respondent had incurred prior to this hitherto unknown date. In the circumstances Mr Sandham invited the Upper Tribunal to take a broad brush approach in relation to the evidence which did exist regarding how much costs were incurred and when they were incurred and to reach a conclusion upon the amount recoverable. Alternatively the Upper Tribunal could invite further submissions upon the point. It would be wrong for the respondent to be awarded nothing because plainly some significant costs were incurred in contemplation of the forfeiture prior to the date of any waiver.

Discussion

69. I consider first Mr Sandham's argument that it was not possible for the respondent to waive any right to forfeit the lease prior to the respondent being in a position to exercise a right to forfeit, such that it was necessary to await the finding of the FTT as to what if anything was properly payable on 1 April 2016, pursuant to the relevant demand, prior to there being any possibility to waive a right to forfeit for non-payment of this instalment.

70. I am unable to accept this argument. I consider it is possible to make an unequivocal choice between two inconsistent rights prior to being in a position immediately to exercise each of them. Mr Sandham's argument appears to involve the contrary proposition namely that no such unequivocal choice can be made until the respondent was actually in a position to exercise a right to forfeit.

71. There are various statutory fetters upon a landlord's right immediately to forfeit a lease for breach of covenant. Where a landlord knows of the facts upon which a right to re-enter arises, I see no difference in kind between the position of such a landlord if the right immediately to exercise a right to re-enter is constrained by need to comply with section 146, or by need to comply with section 81 of the Housing Act 1996, or by need to comply with section 168 of the Commonhold and Leasehold Reform Act 2002, or by need to comply with a fetter arising under the Leasehold Reform Act 1967 where a tenant has served a notice seeking to exercise a right to enfranchise. In each case the landlord knows of facts upon which a right to re-enter arises and in each case the landlord is not yet in a position to exercise that right because the statutory procedures have not yet been worked through. Where the breach of covenant is irremediable it is not the law that a landlord is unable to waive a right to re-enter because a section 146 notice has not yet been served or has not yet expired. By parity of reasoning I reject the submission that a landlord is unable to waive a right to re-enter because some other fetter upon exercising a right of re-entry, for an irremediable breach, has not yet been worked through. The position of course may be different where the breach is remediable because in such a case until the section 146 notice has expired the right to forfeit has not arisen and an acceptance of rent due during the currency of the section 146 notice would not waive the right to forfeit for the breach if the breach continued thereafter and continued after the expiry of the section 146 notice, see Woodfall Landlord and Tenant para 17.098.1 and *Segal v Thoseby* [1963] 1 QB 889.

72. I accept Mr Trompeter's argument that many cases would have been differently decided if Mr Sandham's argument was correct. Looking solely at two cases in the bundle of authorities before me in the present case the following can be noted. In *Central Estates (Belgravia) v Woolgar (No.2)* the act of waiver relied upon was the sending out in September 1970 of a demand for £10 being the quarter's rent due on September 29. However the tenant had given a notice to the landlord that he wanted to buy the freehold under the Leasehold Reform Act 1967. As the tenant had applied to buy the freehold the landlord could not seek to forfeit without leave of the court. That leave was granted by the county court judge on 26 November 1970 and confirmed on appeal on 28 July 1971, see the earlier case of *Central Estates (Belgravia) Ltd v Woolgar* [1972] 1 QB 48. Accordingly prior to 26 November 1970 the landlord was unable to forfeit because it did not yet have the leave of the court to do so. The notice under section 146 had been served on 23 July 1970. If Mr Sandham's argument was correct then, as the landlord had no right to forfeit until after obtaining the leave of the court (26 November 1970) the landlord could not have waived the right to forfeit by demanding rent payable in advance on 29 September 1970. However no such argument was raised or dealt with or mentioned in this Court of Appeal decision. Similarly in the *Yorkshire Metropolitan Properties* case the alleged waiver was the demanding on 30 September 1989 of an insurance premium payable for the year commencing on that date. However a section 146 notice in relation to the alleged breach of covenant (an irremediable breach by reason of subletting without consent) was served on 15 September 1989 giving a formal 28 days to remedy the breach. This 28 day period had not yet expired by the date of the demand for the insurance premium. If Mr Sandham's argument was right then it would have been impossible for the making of this insurance demand to waive the claimed right to forfeiture because as at the date of the demand the right to forfeiture could not be exercised because the 28 day period given in the section 146 notice had not yet expired. However no such argument was raised or dealt with or mentioned in this decision before Neuberger J.

73. I am also unable to accept Mr Sandham's argument that there could be no waiver of the right to re-enter based upon non-payment of the relevant demand until it had been established, through decision of the FTT, what if anything was actually owing. It may often happen that a landlord alleges a breach of covenant and serves a section 146 notice based upon that alleged breach and may find that the tenant disputes that what has happened actually amounts to a breach of covenant. In such circumstances it remains possible for the landlord, who knows of the relevant facts but not of the eventual decision a court may in due course reach, to waive the right to re-enter. For instance in the *Yorkshire Metropolitan Properties* case there was a dispute as to whether what had happened did in fact amount to a breach of the covenant against alienation. It was decided by the learned judge that there had been a breach, but that judgement was not available to the landlord prior to the date when judgement was given. If it was the law that the landlord could not have waived the right to forfeit until it had been established by the court that there had been a breach then once again this point surely would have been noticed and considered in that case.

In the present case the respondent knew that the relevant demand had been made and that nothing had been paid (not even the £25 being a half yearly instalment of the basic £50 per annum payable under clause 3(a)).

74. So far as the decision in the present case is concerned there is a further answer to Mr Sandham's argument. Supposing, contrary to my view, Mr Sandham were correct and that there could be no waiver of any forfeiture because, prior to the decision of the FTT given in December 2016, it was not known what if anything the appellants owed upon the relevant demand, the position then would be as follows. In those circumstances, it not yet being known whether the appellants owed anything upon the relevant demand, I do not see how the costs of the actions taken by the respondent in the proceedings before the FTT could be said to be costs incurred under or in contemplation of any proceedings under section 146 or in preparation and service of any notice thereunder. In those circumstances none of the costs of the FTT proceedings could be recoverable under clause 2(vi) of the lease on its proper construction – the costs would have been incurred prior to the respondent being entitled to contemplate any proceedings under section 146.

75. I therefore conclude that it was possible for the respondent to waive the right to re-enter for non-payment of the relevant demand. The respondent could not waive this right prior to 22 April 2016 because the right to re-enter did not arise until that date. But thereafter the respondent was capable in law of waiving the right to re-enter. The question is whether the respondent did so and if so when the respondent did so.

76. I adopt the test for waiver set out in *Greenwood Reversions* (see paragraph 44 above) namely that the right approach is to consider objectively whether in all the circumstances the act relied on as constituting waiver is so unequivocal that when considered objectively it could only be regarded as being consistent with the lease continuing.

77. I go first to the demand for payment of the second instalment of service charge in advance. The demand was made on 3 September 2016 for a payment due in advance on 1 October 2016. It was a demand for a substantial sum namely £18,971.72. Any such payment due by way of service charge was expressly reserved by the lease as being rent.

78. I conclude from the authorities cited above that, where a landlord knows of the facts giving rise to a right to re-enter, a demand for rent falling due after the landlord has such knowledge constitutes a waiver of the right to re-enter. There is a distinction between waiver based upon a demand or acceptance of rent on the one hand and a waiver based upon some other action on the other hand, see paragraph 46 above. In

the present case the respondent on 3 September 2016 did, through its agent, demand the further instalment of on-account service charge payment which was reserved as additional rent. I therefore conclude that this amounted to a waiver of the right to forfeit for non-payment of the relevant demand.

79. If the foregoing is wrong and it is necessary (despite the act of waiver relied upon being a demand for payment of rent) to look at all of the circumstances and to consider whether the demand dated 3 September 2016 was an act so unequivocal that when considered objectively it could only be regarded as being consistent with the lease continuing, then on this basis also I conclude that the making of this demand did amount to a waiver of the right to forfeit for non-payment of the relevant demand. This is because the respondent was demanding payment of a large sum which was reserved as rent and payable on 1 October 2016 being a sum which was to provide funds to carry out major works so as to put the building into a proper state of repair for the future. I conclude that making a demand for payment of such a sum is clearly inconsistent with the contention that the lease is forfeit and that the appellants shall in the future have no enjoyment of the building under the lease. Instead it is an act which is so unequivocal that when considered objectively it could only be regarded as being consistent with the lease continuing and with the appellants continuing to enjoy the building in respect of which they were being required to pay so large a sum for repairs.

80. As regards the earlier acts of waiver relied upon by the appellants, it must be remembered that throughout all relevant times the appellants were in fact lessees of the maisonette. The lease had not been forfeited albeit that the respondent was proceeding in accordance with statutory procedures to put itself into a position to forfeit the lease, if it could do so, for non-payment of the relevant demand.

81. Bearing this in mind I do not consider that communications which used the expression "leaseholders" can constitute an unequivocal act of waiver as contemplated in paragraph 44 above. The appellants were in fact leaseholders and this was a convenient phraseology for the respondent's agents to use.

82. Mr Trompeter relied upon the documents whereby the appellants were consulted about the proposed major works – documents which once again treated the appellants as leaseholders. However it is difficult to see what option the respondent had but to proceed in this manner. The respondent was bound by the landlord's repairing covenants under the lease. The respondent was therefore bound to repair the building. In my view it is no answer for the appellants to say that the respondent should have excluded the appellants from any consultation (and in effect treated them as not being leaseholders at all) and should have relied upon getting payment towards the major works by way of terms imposed by the court in granting relief from

forfeiture. The respondent faced the following difficulty. If immediately after the FTT had ruled upon how much was payable pursuant to the relevant demand the appellants had paid the appropriate sum, then there would no longer have been any right to forfeit and no question of terms being imposed for relief from forfeiture. On that basis the respondent would be able only to recover £250 from the appellants towards major works where the proper amount to be paid by the appellants was in fact almost £38,000. The respondent had made clear from its application to the FTT dated 29 April 2016 (and from other communications and from the repayment of some monies paid by the appellants) that it was contemplating forfeiture of the lease and intending to do so if it could. The respondent could not be expected to treat this ongoing dispute between itself and the appellants, regarding what if anything was payable pursuant to the relevant demand, as a factor which required it either to postpone any major works (thereby continuing in breach of repairing covenants) or to proceed on a basis where it might become insolvent for want of any substantial contribution from the appellants. In the circumstances which pertained I do not consider that the respondent's action in including the appellants within the consultation process on the basis of the appellants being leaseholders (which is what they in fact still were) is an action so unequivocal that when considered objectively it could only be regarded as being consistent with the lease continuing.

83. As regards the insistence by the respondent upon the covenants in the lease regarding works to the doors and regarding allowing entry, once again the respondent was in an impossible position if Mr Trompeter's argument is correct. As a matter of fact the appellants continued to be leaseholders. However the respondent continued to have responsibilities regarding the state of the building including regarding the requirements of the fire authority. Where a landlord has proclaimed that it is proceeding towards forfeiture of a lease for an identified breach and where the landlord in the meantime performs its responsibilities (which it could not properly omit) regarding the building I once again do not consider that reliance by the landlord upon the terms of the lease for the purpose of performing these responsibilities amounts to an action so unequivocal that when considered objectively it could only be regarded as being consistent with the lease continuing. I consider that the case of *Cornillie v Saha* is distinguishable in that there the landlord actually launched legal proceedings asserting the terms of the lease against the tenant – and also it appears to have been conceded, upon the facts of that case, that by commencing these proceedings there was an unequivocal act recognising the subsistence of the lease. It may be noted that under the documents served by the fire authority the respondent had been informed of the possibility of criminal proceedings if proper steps were not taken in relation to the fire notice which included requiring certain works to the doors.

84. In the result I conclude that there was no waiver of the right to forfeit for non-payment of the relevant demand prior to the making of the demand dated 3 September 2016 for the payment of the further sum of £18,971.72 which was reserved as additional rent. I conclude that the making of this demand, when received by the

appellants, did constitute a waiver. There have been no submissions made to me that I should treat the date of receipt of this demand as being at some date later than the date of the document namely 3 September 2016.

85. In these circumstances I conclude that pursuant to clause 2(vi) of the lease the respondent is entitled to recover by way of administration charge the amount of the reasonable costs incurred by the respondent prior to 3 September 2016 in contemplation of the forfeiture, but that the respondent is not entitled to recover costs incurred on and after that date.

86. The respondent included as part of the evidence it had used to the FTT documents setting out the expenditures incurred by the respondent in relation to the application to the FTT. These documents collected the costs into six categories, namely emails, telephone attendances, letters, documents, attendances and disbursements. Each separate cost was then set out with the date upon which it was incurred in relation to each of these separate headings.

87. It is true that the respondent has not presented detailed evidence directed to showing precisely how much was expended by the respondent in contemplation of the forfeiture (and not in contemplation of any other aspect of the litigation) prior to 3 September 2016 which I have just decided was the relevant date. However until the disputed question regarding waiver was decided the respondent did not know that it was necessary to have detailed evidence regarding expenditure prior to this specific date.

88. I do not consider that the cases referred to by Mr Trompeter and referred to at paragraph 54 above assist the appellants. They appear to be dealing with a topic entirely different from that which is before me. It is clear on the evidence which is before me that prior to 3 September 2016 the respondent did incur costs in relation to the proceedings before the FTT. It is also clear from the finding of the FTT that only part of the total costs incurred by the respondent is properly attributable to costs in contemplation of the forfeiture and that 60% is the appropriate proportion to take of the total costs in order to obtain the costs incurred in contemplation of the forfeiture. The adoption of this 60% may have been somewhat broadbrush, but in the circumstances of this case I do not in any way criticise the FTT for this. Also it is notable that it is no part of the appeal before me that the FTT was wrong in adopting this 60% as being the appropriate proportion of the total costs to attribute to the costs incurred in contemplation of the forfeiture. It is also possible from the material which is before me to establish how much by way of costs had been incurred by the respondent prior to 3 September 2016. In these circumstances I conclude I have all the material needed to make a finding as to how much is recoverable by way of

reasonable administration charge incurred in contemplation of the forfeiture prior to 3 September 2016.

89. The costs are as follows:

(1) Emails. The total included for emails was £7425. If one stops at 2 September 2016 and does not include any emails on or after 3 September 2016 then the amount of costs incurred is £4025.

(2) Telephone attendances. Taking these attendances up to and including that on 22 August 2016 (there was nothing thereafter until 16 September 2016) the amount of costs incurred is £800.

(3) Letters. For letters prior to 3 September 2016 the amount of costs incurred is £550.

(4) Attendance on documents. For this category prior to 3 September 2016 the amount of costs incurred is £10,475.

(5) Personal attendances. For this category prior to 3 September 2016 the amount of costs incurred is £250.

(6) Disbursements. For this category prior to 3 September 2016 the amount of costs incurred is £1844.96.

90. The total of these costs incurred before 3 September 2016 is £17,944.96. Taking 60% of this sum and ignoring pence the amount of the costs incurred therefore prior to 3 September 2016 in contemplation of the forfeiture is £10,766. This is the sum which I conclude is recoverable by the respondent from the appellants as a reasonable administration charge pursuant to clause 2(vi) of the lease.

Disposal

91. In the result I therefore allow the appellants' appeal but only to the following extent. I conclude as follows:

(1) The FTT did have jurisdiction to decide whether or not the right to forfeit for non-payment of the relevant demand had been waived and if so when it was waived.

(2) The respondent did waive the right to forfeit for non-payment of the relevant demand. This waiver occurred on 3 September 2016.

(3) The respondent is entitled to recover by way of reasonable administration charge the amount of costs incurred in contemplation of the forfeiture prior to 3 September 2016.

(4) The amount of this reasonable administration charge is £10,766.

92. As regards the costs of this appeal to the Upper Tribunal, if it is contended that paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002 is of relevance the parties should make submissions in relation thereto (with copies to the other party) no later than seven days from the date of this decision.

His Honour Judge Huskinson

5 December 2018