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The following cases are referred to in this decision:

*Assethold Limited v Watts* [2014] UKUT 537 (LC)

*Barrett v Robinson* [2014] UKUT 322 (LC)

*Contractreal Limited v Davies* [2001] EWCA Civ 928

*Freeholders of 69 Marina, St Leonard's on Sea v Oram* [2011] EWCA Civ 1258

*Hemmise v London Borough of Tower Hamlets* [2016] UKUT 109 (LC)

*Iperion Investments Corporation v Broadwalk House Residents Limited* (1995) 27 HLR 196

*Sella House Limited v Mears* (1989) 21 HLR 147

*St Mary's Mansions Limited v Limegate Investments Co Limited* [2002] EWCA Civ 1491

*Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46

*Willens v Influential Consultants* [2015] UKUT 262 (LC)

## Introduction

1. This is an appeal by Kensquare Limited, the freeholder of 54/55 Kensington Gardens, from a decision of the first-tier tribunal (“the FTT”) relating to interim service charges and administration costs. The respondent holds a 125-year lease of flat 10, one of 18 flats in the two buildings that comprise the property. She is also a shareholder in the appellant, which is a tenant-owned management company. The proceedings arise from the appellant’s application to the FTT for a determination of the reasonableness and payability of interim service charges for the years 2018-2019 and 2019-2020, under section 27A of the Landlord and Tenant Act 1985, and for a determination under Schedule 11 to the Commonhold and Leasehold Reform Act 2002 as to the respondent’s liability to pay legal costs as an administration charge under the lease.
2. This was the second set of proceedings before the FTT between the parties. In 2017 the appellant applied for a determination of the reasonableness and payability of interim service charges for the years 2011-2017. The FTT determined on 10 July 2017 that they were payable as demanded. The respondent did not pay them and the appellant served a section 146 notice upon the respondent in August 2017. The respondent’s mortgagee then paid the full amount claimed.
3. In the present proceedings the FTT decided that:
  - a. Interim service charges for the years 2018-2019 and 2019-2020 were payable in the sum of £360 for each year rather than the £6,309 demanded, in total, for the year 2018-2019 and the first half of 2019-2020;
  - b. The legal costs recoverable by the appellant as an administration charge under paragraph 5 of the Fourth Schedule to the lease were limited to the £192.50 incurred in preparing and serving a section 146 notice upon her in 2017 and did not include the costs, amounting to around £8,000, that the appellant incurred in the 2017 FTT proceedings.
  - c. The respondent is not liable to pay or contribute to those legal costs, nor the costs of the present application, under the terms of the lease by way of service charge.
  - d. If it had reached the opposite conclusion on issue c, it would not have made an order under section 20C of the Landlord and Tenant Act 1985 in relation to the costs of the 2017 proceedings but would have done so in relation to the present proceedings.
4. The appellant appeals those decisions; it seeks (1) the full amount of service charges demanded for 2018-2020, (2) the full amount of the charges claimed under paragraph 5 of the Fourth Schedule and (3) its costs of both sets of tribunal proceedings by way of service charge under the lease; finally (4) it argues that no section 20C order should be made in relation to the legal costs of either set of FTT proceedings.

5. I shall examine the first three of those issues in turn; because there was insufficient time at the hearing to deal with the question about section 20C it was agreed that I would give directions about that if necessary.

## **The service charges**

### *Liability and the construction of the lease*

6. The application to the FTT was for a determination as to the amount of interim service charges payable by the respondent in respect of the service charge years 2018-19 and 2019-20, pursuant to section 27A of the Landlord and Tenant Act 1985, which reads:

“(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to—

- (a) the person by whom it is payable,
- (b) the person to whom it is payable,
- (c) the amount which is payable,
- (d) the date at or by which it is payable, and
- (e) the manner in which it is payable.”

7. The tenant’s position before the FTT was that she put the landlord to proof that the charges were payable.
8. The FTT decided, on the basis of its construction of the lease, that only £360 was payable in each of the two years in issue. It accepted the landlord’s argument that the FTT in 2017 had made a decision inconsistent with that conclusion, and that an issue estoppel had therefore arisen; but it found that exceptional circumstances justified it in overriding that estoppel. I deal first with the construction point; my conclusion on that point is consistent with the decision reached by the FTT in 2017, which means that the estoppel point is irrelevant and so I comment on it only briefly.
9. Clause 4(2) of the lease makes provision for the tenant’s obligation to pay service charges, for interim payments to be made twice a year, and for the certification of the service charges each year, as follows:

“4. The Lessee HEREBY COVENANTS with the Lessor ...that the lessee will:

(2) (i) Pay to the Lessor the Agreed Percentage ... of the expenditure incurred by the Lessor on the matters specified in the Seventh Schedule hereof and in carrying out its obligations under Clause 5 hereof in the respect of the Building (such proportion being hereinafter referred to as the “maintenance charge”)

(ii) Pay the Maintenance Contribution specified in Paragraph 9 of the Particulars or such revised sum as shall be calculated in accordance with the provisions of paragraph (x) of this subclause as a contribution towards the maintenance charge

such sum to be paid to the Lessor by equal half yearly payments in advance on the 1<sup>st</sup> day of April and the 1<sup>st</sup> day of October in each year...

(iii) As soon as practicable after the end of each financial year ... the Lessor shall furnish to the Lessee an account of the maintenance charge payable by the Lessee for that year due credit being give for the advance contribution relevant to that year and amounts carried forward from previous financial years (if any) and upon the furnishing of such account there shall be paid by the Lessee to the Lessor within twenty eight days any balance or difference found to be payable or there shall be carried forward by the Lessor to the next financial year any amount which may have been overpaid by the Lessee as the case may require.

(iv) [provision for the certification of the accounts each year]...

(x) It is further specifically provided that the Lessor may if it thinks fit revise and adjust the Maintenance Contribution for any of the Lessor's financial years to such amount as it shall deem necessary in the light of expenditure reasonably anticipated for that year notice of such revision and adjustment to be served on the Lessee not less than one month prior to the commencement of that financial year and the Maintenance Contribution so revised and adjusted shall be payable by the Lessee in accordance with paragraph (ii) hereof..."

10. Clause 1(a) of the lease states:

"(v) 'The Maintenance Contribution' means the yearly sum specified in Paragraph 9 of the Particulars or such revised sum as shall be calculated in accordance with the provisions of Clause 4(2)(x) hereof."

11. Paragraph 9 of the Particulars of the lease states that the 'Current Maintenance Contribution' is £360. The lease states that the financial year commences on 1 April.

12. The intention of these provisions is clear: on 1 April and 1 October each year the tenant is to pay an interim service charge, of £360 per annum in the first year of the term; and that amount can be revised (in general inevitably upwards, but it could go down) in future years. After the end of each financial year the landlord is to provide service charge accounts and can recoup any under-payment; any over-payment is carried forwards.

13. Clause 4(2)(x) sets out the procedure for revising the service charge. Obviously if the tenant hears nothing she will carry on paying £180 on 1 April and 1 October each year, but if the landlord anticipates that that will not be sufficient for any year it may calculate the appropriate contribution and give the tenant notice of the revised amount, "not less than one month prior to the commencement of that financial year", and the amount so calculated is the interim service charge payable by the tenant.

14. The FTT recorded that on 15 August 2019 the appellant sent to the respondent a demand for "Half yearly estimated service charge due in advance" of £1,623 and a "Half yearly

contribution to reserve fund” of £480, for three periods: 1 April to 30 September 2018, 1 October 2018 to 31 March 2019, and 1 April to 1 October 2019; that is, £2,103 for each half year, £6,309 altogether. Those were the service charges the subject of the application to the FTT.

15. As I said above, the respondent in the FTT put the landlord to proof that the interim service charges were payable. One of the appellant’s directors, Mr Robertson, made a witness statement but was unable to attend the hearing, and the appellant’s solicitor gave evidence and was cross-examined. At the hearing Mr Blakeney argued that only £180 was payable for each of the three half-yearly charges in question because clause 4(2)(x) had not been complied with.
16. Mr Peachey, for the appellant, had no notice of that argument; the point had not been addressed in Mr Robertson’s evidence. The respondent herself did not attend the hearing and so could not be asked in cross-examination whether she had received notice of the revised interim charges at least a month before the start of the financial year.
17. The FTT found, in the absence of any evidence that such notices had been served by the time specified in clause 4(2)(x), that no such notices had been served and therefore that only £360 per annum was payable by way of interim charges for the year and half year in question. It also found that £180 would be payable for the second half of the year 2019-2020, the opportunity to serve a notice complying with clause 4(2)(x) having already been lost. The FTT added at paragraph 63 that its decision did not affect the amount of final service charges for the two years in question, nor the ability of either party to apply to the tribunal to determine the reasonableness or payability of those final charges.
18. The appellant appeals the FTT’s finding about the interim service charges on the basis that clause 4(2)(x) does not require a separate notice each year.
19. I do not understand the argument made in favour of that construction, nor why Mr Peachey relies upon the argument that the words “revise” and “adjust” having different meanings. I agree with Mr Blakeney that they do not; they are simply an example of the regrettable habit of the torrential use of two words where one will do. Mr Peachey also argued that as regards any demand for an interim charge, the previous demand for an interim charge amounts to a revision for each subsequent year, which, again, does not seem to be correct because a demand for an interim payment does not tell the tenant what the next demand is going to be.
20. However, I remain puzzled by the FTT’s construction of clause 4(2)(x) and its conclusion that the requirement had not been complied with. At paragraph 43 of its decision it said:

“The tribunal was not taken to any document or case statement from the Applicant which referred to the service of any such notice as occurring or being needed. The strong impression created was that the Applicant has overlooked this notice requirement for many years, and possibly has just been serving interim service charge demands, based on its budgets.”

21. It appears that the FTT thought that clause 4(2)(x) required a notice of adjustment in addition to the interim service charge demands such as the one sent on 15 August 2019. What was not discussed, therefore, before or by the FTT, was whether the demand of 15 August 2019 was the notice required by clause 4(2)(x), albeit served later than that clause requires.
22. I take the view that the words “notice of such revision and adjustment” are an elaborate way of referring to a demand for an interim service charge. There is no other reference to an interim service charge demand; the tenant is to pay £180 for each instalment unless notified that the landlord has “revised and adjusted” the interim charge; the demand of 15 August 2019, and similar demands no doubt made on previous occasions, does exactly that.
23. At the hearing of the appeal Mr Blakeney agreed with that construction, conceding that the only reason why the demand made on 15 August 2019 does not comply with clause 4(2)(x) is that it was given late.
24. Yet no consideration was given by the FTT, nor by the parties in their arguments to the FTT or on the appeal, as to why the clause 4(2)(x) should be construed as if time was of the essence. Why should it be the case that if notice of the revised amount of the interim service charge was not given no less than a month before the commencement of the financial year, it could not be given at all?
25. Mr Blakeney’s response to my suggestion that there is no indication that time is of the essence was to point to the words “specifically provided” and the words “so revised and adjusted.” In my judgment those words go nowhere near to indicating that time was of the essence (it is well-established that clear words, or a necessary implication, are required, see for example *United Scientific Holdings Limited v Burnley Borough Council* [1978] AC 904). The draftsman obviously envisaged that interim charges would be calculated early, before the year started, but there is no indication at all that the parties intended the interim charge to revert to its initial (and now wholly inadequate) amount if the demand was sent late. Obviously if the tenant suffered any loss by the late service of the notice she would have a potential claim in damages, but that should be the only consequence of late notice.
26. Accordingly there is no basis for the construction that the FTT put on clause 4(2)(x) or for its conclusion that the clause had not been complied with. That aspect of its decision is set aside and I substitute the Tribunal’s decision that clause 4(2)(x) was complied with. The FTT made no other finding about the interim service charges; submissions were made, it said at paragraph 65 of its decision, as to whether some of the items in the budgets for the interim service charges fell within the Seventh Schedule to the lease (see paragraph 4(2)(i) of the lease, set out at paragraph 9 above), but made no decision on them because it had reduced the charges to £360. There was no cross-appeal about the failure to decide those points and I take it they are not pursued; if there is any substance in them they will have to be taken up as a challenge to the final service charges in any event. Accordingly the interim service charges that were the subject of the application to the FTT are payable as demanded.

*The issue estoppel point*

27. The appellant argued before the FTT that its decision about the interim service charges from 2011 to 2017, on 10 July 2017 (see paragraph 2 above) created an issue estoppel; no point had been taken in 2017 about clause 4(2)(x) of the lease, and the FTT had decided that the service charges for 2011 – 2017 were payable. It must therefore have decided that the clause had been complied with, and that should preclude any other finding in later years. The FTT agreed that an estoppel had arisen (and there is no cross-appeal from that finding) but said that there were special circumstances that enabled it to override it and decide the point afresh.
28. In view of what I have decided above, the arguments about issue estoppel are unnecessary. But it may be helpful to explain them and to say why I take the view that no estoppel on this point could have arisen from the decision in 2017.
29. The FTT's decision in 2017 was so brief that I can set it out in full here:

***“Decisions of the Tribunal***

- (1) *The Tribunal determines that the service charges claimed by the Applicant in respect of the years 2011-2017 are reasonable and payable by the Respondent.*
- (2) *There is no order for costs.*

**REASONS**

1. *The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) as to the amount of service charges payable by the Respondent in respect of the years 2011-2017.*
2. *The relevant legal provisions are set out in the Appendix to this decision.*
3. *The application has a procedural history (it is neither helpful nor relevant to refer to it in detail), but it was made clear to the parties that the hearing would go ahead on 10 July to determine the reasonableness of the claimed service charges.*
4. *The Respondent has no case to make or defend on this point. Her representative made that clear at the hearing. The real thrust of her position is that she wishes to make a counterclaim for damages/ a set-off which has yet to be made in the county court. In the circumstances the order made at (1) above is entirely appropriate. It is regrettable that her position was not clarified until the hearing.*
5. *The Applicant made no application for costs.*



30. It is apparent that the respondent made no case at all and did not put the appellant to proof about payability. The appellant was not required to make any arguments; the FTT simply gave a decision in its favour in the absence of any challenge by the respondent.
31. It is said that if the appellant's practice fell short of the requirements of clause 4(2)(x) the respondent should have said so in 2017; the FTT decided that the service charges were payable and therefore must be taken to have decided that clause 4(2)(x) had been complied with. Because the respondent could have raised the point and did not, an issue estoppel arose in the appellant's favour.
32. In my judgment no issue estoppel could have arisen from the FTT's decision in 2017 about anything other than the interim service charges for 2011 to 2017. There is no evidence as to what was the appellant's practice with regard to demanding interim service charges during those years, and no evidence that it was the same as or different from what it did for the period in question in the present appeal. There is nothing to indicate that any of its demands did not comply to the letter with the terms of clause 4(2)(x), timing included even though time is not expressed to be of the essence. For all that anyone knows, it might be that tenant did not raise an issue about clause 4(2)(x) because she knew that it had been complied with.
33. The issue estoppel for which the appellant argues, and that the FTT found, cannot possibly have arisen from the decision of 2017.
34. The FTT found that although an issue estoppel had arisen there were exceptional circumstances that justified departing from it. It relied upon the decision of the Tribunal in *Hemmise v London Borough of Tower Hamlets* [2016] UKUT 109 (LC), which in turn rested upon the authority of *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46. The first of the exceptional circumstances found by the FTT was that an interpretation of clause 4(2)(x) that differed from its own would clearly be wrong. That is unsustainable, and I need go no further into a discussion of exceptional circumstances; any such discussion would rest on the counterfactual premises both that the FTT actually decided something about clause 4(2)(x) in 2017 and that its interpretation of that clause in 2020 was correct. Any such discussion would be hypothetical, therefore, on two bases and too far removed from reality to be useful.

### **The claim for costs under the Fourth Schedule**

*The legal background to this ground of appeal.*

35. Section 146(1) of the Law of Property Act 1925 requires the service of a notice before a landlord can forfeit a lease for breach of covenant:

“(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease 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; and
- (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.”

36. Section 146(11) adds:

“(11) 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.”

37. Accordingly a landlord can forfeit for non-payment of rent without serving a section 146 notice. For that reason service charges have generally been reserved, in leases, as “further and additional rent”; but in *Freeholders of 69 Marina, St Leonard’s on Sea v Oram* [2011] EWCA 1258 the Court of Appeal made the surprising decision that a section 146 notice is required before a landlord can forfeit for non-payment of service charges.

38. Moreover, section 81 of the Housing Act 1996 reads:

“(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) the appropriate tribunal ... 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.

(4A) References in this section to the exercise of a right of re-entry or forfeiture include the service of a notice under section 146(1) of the Law of Property Act 1925 (restriction on re-entry or forfeiture).”

39. Accordingly the landlord cannot forfeit a lease for non-payment of service charges until the FTT has determined that the service charges are payable, nor even serve a section 146 notice in preparation for forfeiture proceedings.

*Paragraph 5, the appellant’s claim and the FTT’s decision.*

40. Paragraph 5 of the Fourth Schedule requires the respondent tenant to:

“pay all costs charges and expenses (including Solicitors’ costs and Surveyors’ fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a Notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court...”

41. In its demand of 15 August 2019 the appellant required the respondent to pay administration charges in the sum of £8,213.70 under this clause, being its legal costs of the 2017 FTT proceedings and the costs of preparing and serving the subsequent section 146 Notice.

42. There are two disputes: first, whether the costs actually claimed, in the sum of a little over £8,000, were all incurred in the 2017 FTT proceedings and, second, whether the costs of those proceedings are payable by the respondent under clause 5 of the Fourth Schedule. Mr Peachey for the appellant conceded at the hearing that some of the costs claimed – set out in invoices from the appellant’s solicitors – may fall outside the costs of those proceedings. He suggested, and Mr Blakeney helpfully agreed, that if the appellant succeeds on its construction of paragraph 5 of the Fourth Schedule the matter should be remitted to the FTT for it to determine the scope of the costs of the 2017 FTT proceedings if the parties are unable to agree them. Therefore I do not need to carry out any assessment of costs under this ground of appeal.

43. The appellant argues that the 2017 FTT costs were incurred “for the purpose of or incidental to the preparation and service of a Notice under Section 146.”

44. The hearing bundle includes a copy of a letter sent by the appellant’s solicitors to the respondent’s on 3 December 2014 about the arrears of service charges. It says:

“... if payment is not being offered or we fail to receive a reasonable response with regard to payment then our client would be left with no alternative other than to issue proceedings for the recovery of those arrears which is a pre-requisite to our client serving a Section 146 Notice again being a prerequisite to our client issuing proceedings pursuant to Section 146 of the Law [of] Property Act 1925.”

45. The respondent argues that paragraph 5 of the Fourth Schedule did not permit the landlord to recover any more than literally the cost of preparation and service of the section 146 notice (agreed to be £192.50) and that the costs of the prior FTT proceedings are not recoverable.

46. The FTT agreed. It referred to the decision of the Court of Appeal in *Contractreal Limited v Davies* [2001] EWCA Civ 928 in which it was held that “incidental to” denoted a lesser or subordinate sum, so that the FTT costs could not be incidental to the preparation and service of the notice. As to costs incurred “for the purpose of” the preparation and service of the notice, the FTT referred to *Willens v Influential Consultants* [2015] UKUT 262 (LC) and to *Barrett v Robinson* [2014] UKUT 322 (LC) where the relevant words were “in

contemplation of’; the FTT considered that the words “for the purpose of” are narrower than “in contemplation of” and so again did not regard the costs as recoverable.

47. The FTT made no finding of fact as to whether the appellant in making the 2017 application intended to serve a section 146 notice.

*The appellant’s arguments on appeal*

48. On appeal, the appellant argues that the 2017 FTT proceedings were brought “for the purpose of” and “incidental to” the preparation and service of a section 146 notice. Mr Peachey relies on the Court of Appeal’s decision in *69 Marina*. That decision was in the bundle before the FTT; whether it was referred to in argument is not known, but it was not referred to by the FTT.
49. *69 Marina* concerned a building divided into six flats held on long leases. Two of the leaseholders failed to pay service charges relating to their share of the cost of works done in 2005 following substantial water penetration in the building; the freeholder applied to the leasehold valuation tribunal (“the LVT”, the precursor of the FTT) for a determination that the sums were reasonable and payable under section 27A of the Landlord and Tenant Act 1985. The LVT determined the sum that was payable. The freeholder then brought an action in the county court claiming payment of that sum and also its costs of the LVT proceedings pursuant to the tenant’s covenant at clause 3(12):

“To pay all expenses including solicitors' costs and surveyors' fees incurred by the Landlord incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under Section 146 or 147 of the Act notwithstanding in any such case forfeiture is avoided otherwise than by relief granted by the Court...”

50. The freeholder succeeded before a district judge, and the tenants appealed to a circuit judge, first on the basis that a section 146 notice is not required for forfeiture for non-payment of rent (so that the LVT proceedings could not have been brought with a view to a section 146 notice) and, second, on the basis that in any event clause 3(12) did not cover the LVT costs. The tenants were unsuccessful on that appeal. The freeholder then served a section 146 notice. The tenants then appealed to the Court of Appeal.
51. The Court of Appeal’s decision was surprising for its answer to whether a section 146 notice was required to recover a service charge reserved as rent, as I noted above. But the appellant relies upon the other aspect of the decision, which is that the tribunal costs were recoverable under clause 3(12). As Sir Andrew Morritt (C) put it at paragraph 20:

“... the enforcement of the liability of the tenants [to pay the service charge] required first the determination of the tribunal and second a s.146 notice.”

52. Two decisions of this Tribunal followed that decision. In *Barrett v Robinson* [2014] UKUT 322 (LC) the landlord sought to recover its costs of proceedings before the LVT

brought by the tenant for the determination of the payability of service charges under the following covenant:

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

53. The Tribunal acknowledged the authority of *69 Marina*, but pointed out that in order to recover costs under this covenant a landlord must show that it intended to serve a section 146 notice and could have done so. But in *Barrett* the LVT proceedings were brought by the tenant, not by the landlord; moreover, the sum was below the limit in respect of which forfeiture would have been possible. Accordingly the landlord failed, but because of the Tribunal's reasoning Mr Peachey argues that that decision does not stand in his way; he also argues that “in contemplation of” is no wider than “for the purpose of”, contrary to the FTT's conclusion.
54. In *Willens v Influential Consultants Limited* [2015] UKUT 362 (LC) the Tribunal followed the decision in *69 Marina* and found that FTT costs incurred by the landlord could be recovered under a covenant in very similar terms to the one in *Barrett*, including the words “in or in contemplation of proceedings under sections 146 or 147...”. Again, Mr Peachey argues that the clause in the present appeal has the same scope; to do A for the purpose of doing B is the same as doing A in contemplation of doing B.
55. Mr Peachey acknowledges that the FTT in the present case relied upon *Contractreal*, and that that decision was not cited to the Court of Appeal in *69 Marina*. However, he argues that I should follow the later decision. He also points out that *Contractreal* predated the enactment of section 81(4A) of the Housing Act 1996 (see paragraph 38 above), which was referred to in *69 Marina*. I examine *Contractreal* and *69 Marina* in more detail in the context of Mr Blakeney's arguments below.

#### *The respondent's arguments on appeal*

56. Mr Blakeney argues that the appellant seeks to put far too wide a construction on the clause in question. All that can be recovered are the costs, literally, of preparing the section 146 notice, and perhaps the postage. He argues that the FTT was right to follow *Contractreal*.
57. It will be useful at this point to look more closely at the Court of Appeal's 2001 decision in *Contractreal*, which was an appeal by a landlord from a costs order made in its favour in the county court against a tenant in an action brought under section 81 of the Housing Act 1996 for a determination of the amount of service charges, at a time before the FTT acquired jurisdiction to make such determinations. The county court judge had summarily assessed costs at £1,500; the landlord sought indemnity costs, and a detailed assessment, or alternatively a higher sum on summary assessment. Although the appeal was from a costs

order made under the Civil Procedure Rules, the landlord sought indemnity costs because the lease contained the following covenant by the tenant at clause 2(7):

“To pay all costs (including solicitors' costs and surveyors' fees) incurred by the landlord of and incidental to the preparation and service of: —

(i) a notice under section 146 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by order of the court

(ii) a schedule of dilapidations recording the breaches of the tenant's covenant to yield up the flat in repair of the termination of the term hereby granted or

(iii) proceedings for the recovery of any of the rents reserved.”

58. Therefore the county court judge, and then the Court of Appeal, had to decide whether the costs of proceedings under section 81 of the Housing Act 1996 fell within that covenant. The Court of Appeal decided that they did not. Arden LJ (as she then was), with whom Wright J agreed, said that costs “incidental to” the preparation and service of the section 146 notice must be “a lesser or subordinate sum” than the actual costs of the notice. To say that the costs of the county court action were incidental to the costs of preparing and serving the notice would be “the tail wagging the dog.” Arden LJ cited a number of costs decision in which the courts have had to determine whether the costs of one action were incidental to, and so could be included in, the costs of another; she found that “of and incidental to” was a “time-hallowed phrase in the context of costs” and had a limited meaning, referring to something subordinate, or arising “casually or incidentally” in the course of doing something else. Accordingly the landlord was not entitled to indemnity costs in the county court action.
59. Equally therefore, says Mr Blakeney, the appellant is not entitled to its costs under paragraph 5 of the Fourth Schedule because they are not “incidental to” the preparation and service of a section 146 notice. There was no reference to *Contractreal* in *69 Marina*.
60. Mr Blakeney argues that I should disregard *69 Marina*. Either it was decided *per incuriam* because *Contractreal* was not considered, or it is not binding on the Tribunal. As a decision of the Court of Appeal it is of course binding on this Tribunal; but what I understand him to have meant by that is that it does not have any bearing on the outcome of this appeal because, he says, the Court of Appeal’s decision was taken purely on the basis of wording in the relevant clause that is not found in this respondent’s lease.
61. It will be recalled that the relevant wording in *69 Marina* were: “incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under Section 146 or 147”. So the clause had two limbs. What Mr Blakeney is arguing is that the Court of Appeal in *69 Marina* found the tenant liable only under the second limb, “in contemplation of proceedings”, and not under the first limb, “incidental to the preparation and service of a notice”; the latter words were too narrow to include the costs of the FTT proceedings.

62. He says this because at paragraph 20 of its decision the Court of Appeal quoted only that second limb when it expressed approval of the district judge’s decision. The discussion at paragraphs 17 and 18 is either irrelevant, says Mr Blakeney, or it is *obiter* to the crux of the decision in paragraph 20.
63. Mr Blakeney also endorses the FTT’s reasoning about the Tribunal’s decisions in *Barrett* and *Willens*; he says that “in contemplation of” is wider than “for the purpose of”.

*Discussion and conclusion on ground 3*

64. It may be useful to set out side by side the different clauses that the various courts and tribunals have considered in this context.

This appeal	To pay all costs charges and expenses (including Solicitors’ costs and Surveyors’ fees) incurred by the Lessor for the purpose of or incidental to the preparation and service of a Notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture may be avoided otherwise than by relief granted by the Court...
<i>69 Marina</i>	To pay all expenses including solicitors' costs and surveyors' fees incurred by the Landlord incidental to the preparation and service of a notice under Section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under Section 146 or 147 of the Act notwithstanding in any such case forfeiture is avoided otherwise than by relief granted by the Court...
<i>Barrett</i>	To pay all reasonable costs charges and expenses (including solicitors' costs and surveyors' fees) incurred by the Lessor in or in contemplation of any proceedings or the preparation of any notice under section 146 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court.
<i>Willens</i>	To pay all expenses including solicitor's costs and disbursements and surveyors' fees incurred by the Landlord incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under sections 146 or 147 of that Act notwithstanding in any such case forfeiture is avoided otherwise than by relief granted by the Court...
<i>Contractreal</i>	To pay all costs (including solicitors' costs and surveyors' fees) incurred by the landlord of and incidental to the preparation and service of: — (i) a notice under section 146 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by order of the court (ii) a schedule of dilapidations...

65. It is a mistake to construe clauses in leases as if they were sections in a statute. A painstaking analysis of the difference between “for the purpose of”, “in contemplation of”, “with a view to” “in order to” and suchlike is unlikely to reveal any difference in the intentions of the parties to the lease where those words appear. They almost certainly gave no thought to the precise words used; and the conveyancer will not have drafted the clause afresh but probably used a precedent, with or without amendment and necessarily without the enlightenment that might, or might not, have been gained by foreknowledge of later decisions on the wording of the clause in question.
66. So I am unimpressed by analysis that rests heavily upon those distinctions; such analysis generally focuses on trees and obscures the wood.
67. As a matter of ordinary language I see no difference in this context between “for the purpose of” and “in contemplation of”.
68. Nor do I see any difference between costs incurred for the purpose of, or in contemplation of, the preparation and service of a section 146 notice and costs incurred in contemplation of or for the purpose of proceedings under section 146; the only point of serving a section 146 notice is to enable the bringing of proceedings under section 146. Anything done for the purpose of serving the notice is also done for the purpose of taking the proceedings. As I observed above, leases are beset by torrential drafting, and the use, out of caution or of habit, of more than one expression often does not mean that more than one thing is meant.
69. More generally, I take the view that the clauses in question in *69 Marina, Barrett, Willens* and the present appeal were all doing the same thing; they were all ensuring that the landlord could recover from the tenant the costs of serving a section 146 notice and of everything that the landlord had to do in order to serve that notice. Since the amendment of the Housing Act 1996 by the addition of section 81(4A) that has included the obtaining of a determination of payability by the FTT, as the appellant did here.
70. I am not persuaded that *69 Marina* can be construed, as Mr Blakeney argues, as resting only on words that are not part of the clause in question in the present appeal. First, as a matter of language that would be very strange, because the FTT proceedings were as much a necessary precursor to the service of a section 146 notice as they were to the taking of proceedings under section 146. Second, I find it impossible to read the reasoning as Mr Blakeney urges me to do. In paragraph 17 of the decision the Chancellor recorded the arguments of counsel for the freeholder: “she claims all the costs against the Lessees under clause 3(12) as costs incidental and preparatory to the service of the s.146 notice or notices”. At paragraph 18 he said “I prefer the submissions of counsel for the Freeholders.” There is no suggestion that any aspect of those submissions was incorrect. If the Court of Appeal had found that the freeholder’s argument was only partly right, or that the clause covered the costs only because it included the “in contemplation of proceedings” words then it would have said so.
71. It is true that at paragraph 20 the Chancellor quoted only the other limb of the clause; but that has to be read in context:



“the District Judge was right to have concentrated on the terms of clause 3(12). Liability under that covenant extends to:

(a) “expenses...incurred by the landlord...in or in contemplation of proceedings under s.146...”; and

(b) “...all solicitors costs...incurred by the landlord of and incidental to the service of all notices and schedules relating to wants of repair...”.

\*\*Given that the determination of the Tribunal and a s.146 notice are cumulative conditions precedent to enforcement of the Lessees' liability for the Freeholders' costs of repair as a service charge it is, in my view, clear that the Freeholders' costs before the Tribunal fall within the terms of clause 3(12). If and insofar as any of them may not have been strictly costs of the proceedings they appear to have been incidental to the preparation of the requisite notices and schedules.\*\*

21. The District Judge considered this matter at a time before any s.146 notice had been served. This accounts for her conclusion in paragraph 6 of her judgment and the decision of the Circuit Judge in paragraph 10 of his. Whilst neither of them spelled out the exact nature of the liability of the Lessees under clause 3(12), there is no doubt as to their conclusions. I agree with them. This disposes of the first two submissions of counsel for the Lessees summarised in paragraph 16 above.”

72. The words from \*\* to \*\* appear in the Westlaw copy of the decision, and not in the copy in the appeal bundle which is taken from [2012] HLR 12. I cannot explain that discrepancy. The extra words, with their mention of the section 146 notice, are helpful; even without them, it is clear that the partial quotation in paragraph 20 was focused on the district judge’s decision, taken when no section 146 notice had been served. Paragraph 21 unambiguously endorses the circuit judge’s decision, and is consistent with the Court of Appeal’s acceptance of the arguments for the freeholder, which referred to both limbs of the clause.
73. Was *69 Marina* decided *per incuriam* because *Contractreal* was not cited? A decision is only *per incuriam* if, had the missing authority been cited, it must have reached a different decision. I do not think that the decision in *69 Marina* would have been any different had *Contractreal* been cited. It might well have distinguished *Contractreal* as being a construction of a narrower clause; there is no “for the purpose of” and no “in contemplation of”, simply the costs of and incidental to the notice. More convincingly, *Contractreal* can be distinguished because the authorities relied upon by Arden LJ in making that costs decision are all costs decisions; she was careful to point out that “incidental to” has a time-hallowed meaning *in that context*, and it is not at all obvious that it can be extended to a different context. Most importantly, *Contractreal* was a decision taken at a date when proceedings to determine the payability of a service charge were not necessary for the service of a section 146 notice, and in any event no section 146 notice was required in respect of failure to pay service charges reserved as rent. FTT proceedings

were needed before forfeiture proceedings could be taken, but there was no section 146 notice within the process.

74. We can see that from the concurring judgment of Wright J, who said at paragraph 68 that the county court costs “were not “of and incidental to” the preparation and service of a section 146 notice, since no such notice was necessary to support a claim for forfeiture in the circumstances of this case, the service charges in the lease having been expressly reserved as rent by the terms of the lease.”
75. In the light of that I have no hesitation in saying that *69 Marina* was not, on this particular issue, decided *per incuriam*. In the light of what I have said about the construction of the words in this and other clauses I have no difficulty in finding that where the landlord can show that it has taken the FTT proceedings with a view to serving a section 146 notice then paragraph 5 of the Fourth Schedule allows the recovery of the costs of those proceedings.
76. The FTT did not make a finding of fact about that intention because of its construction of the lease. And proceedings about payability in the FTT are not always taken with a view to forfeiture. However, the letter of 3 December 2014 sets out the appellant’s intention and it is difficult to see what clearer evidence of that intention could be produced (see paragraph 44 above). I therefore find that the 2017 proceedings were taken for the purpose of serving a section 146 notice, and that the costs of those proceedings can be recovered by the landlord under paragraph 5 of the Fourth Schedule, subject to the FTT’s decision as to what were the costs within the scope of that description, for which purpose I remit the matter to the FTT.

#### **Are the legal costs of the FTT proceedings recoverable as part of the service charge**

77. The FTT held that the appellant could not recover its legal costs of the present proceedings and of the 2017 application from the respondent as service charges under the terms of the lease (and therefore made no order under section 20C of the Landlord and Tenant Act 1985.)
78. The appellant’s argument was that those legal costs were recoverable by virtue of paragraph 5 of the Seventh Schedule (which, it will be recalled, defines the services whose cost makes up the maintenance charge, see clause 4(2) of the lease set out at paragraph 9 above):

“5. The cost of employing such professional advisers and agents as shall be reasonably required in connection with the management of the building.”

79. The FTT referred in its decision to the authorities on the question whether a landlord can recover legal costs by way of service charges under a clause drafted in general terms such as this one. It noted that “Clear and unambiguous lease terms are required” for this sort of liability (*St Mary’s Mansions Limited v Limegate Investments Co Limited* [2002] EWCA Civ 1491) but that general words may be sufficient (*Assethold Limited v Watts* [2014] UKUT 537 (LC)). It relied upon *Sella House Limited v Mears* (1989) 21 HLR 147 where the Court of Appeal held that the legal costs of recovering unpaid rent and service charges

were not recoverable under service charge provisions that extended to the landlord's ability:

“To employ at the Lessors’ discretion a firm of Managing agents and Chartered Accountants to manage the Building and discharge all proper fees salaries charges and expenses payable to such agents or such other person who may be managing the Building including the cost of computing and collecting the rents and service charges” and

“To employ all such surveyors builders architects engineers tradesmen accountant or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building”.

80. The FTT found that the terms of the leases and the factual background were very similar in the present case to those in *Sella House*, that the language of paragraph 5 was not sufficiently clear or unambiguous to include the legal costs of litigation, and that therefore the costs of the two sets of FTT proceedings were not recoverable as service charges.
81. The appellant appeals that finding (although of course it then resists the making of an order under section 20C).
82. I can describe the problem in general terms as follows. The cases relevant to this ground of appeal all require the tenant to pay as part of the service charge the landlord's costs of managing the building and (usually) of collecting rent and service charges. The conundrum is whether such a requirement includes an obligation to pay the landlord's legal costs involved in pursuing a tenant for service charges or for an injunction requiring him to comply with his covenants. Are such costs included, or are they too far removed from the actual management of the building?
83. As one would expect, the two parties to this appeal rely upon different cases; Mr Peachey points me to those cases where the clause was found to be wide enough to include legal costs, in particular *Iperion Investments Corporation v Broadwalk House Residents Limited* (1995) 27 HLR 196 and *Assethold*. Mr Blakeney naturally looks to cases that went the other way, in particular *Sella House* and *St Mary's Mansions*.
84. What the Tribunal has to do is to construe the words of paragraph 5 of the Seventh Schedule, rather than to match them to a previous decision. Mr Peachey argues that costs incurred “in connection with” management are wider than costs incurred simply “in management” and that therefore the legal costs can be included. The words “in connection with” take the scope of the clause outside pure management. He reasons as follows:
  - a. Is the administration and collection of service charges part of the management of the building? Answer: yes.

- b. Is the bringing of legal proceedings pursuant to s.27A and the service of s.146 notices in cases of non-payment of service charges something done “in connection with” the collection of service charges? Answer: yes.
- c. Is it reasonable to employ lawyers to conduct such proceedings? Answer: yes.
- d. Are lawyers “professional advisers? Answer: yes.

Therefore, says Mr Peachey, the “cost of employing such professional advisers ... as shall be reasonably required in connection with the management of the Building” includes the legal costs of both sets of proceedings. Mr Blakeney’s answer to that reasoning is that Mr Peachey is eliding the collection of service charges with the recovery of service charges.

85. Turning to the authorities, I begin by saying that the words of the clause in *Sella House* do not naturally, to my mind, include the costs of taking legal proceedings. There are two clauses; the first refers to managing agents and their accountants and their expenses in managing the building and collecting rent and service charges. Dillon LJ expressed some hesitation about the costs of solicitors instructed by managing agents, but found that the costs of solicitors instructed by the landlord were not included. The second provision was about maintenance, safety and administration. Mr Peachey argues that the provision in *Sella House* used “similar words but, crucially, not similar wording”; and he says that the issue in *Sella House* was conceptually different from the issue here. I think by “conceptually different” Mr Peachey refers to the fact that the issue arose in the context of whether the FTT should have made a section 20C direction; and I find that that makes no difference to the construction of the clause. But the clause in the present appeal is certainly in different terms from the one in *Sella House* and raises an issue that did not arise there, namely the meaning of costs incurred “in connection with” the management of the building.

86. In *St Mary’s Mansions* the clause relied upon was very narrow:

“The cost of all other services which the lessor may at its absolute discretion provide or install in the said buildings for the comfort and convenience of the lessees”.

87. Unsurprisingly the Court of Appeal found that legal advice for a landlord was not a service provided in the buildings for the lessees.

88. *Iperion Investments* was a decision of the Court of Appeal in 1994, not long after *Sella House* was decided. The clause in question required the tenant to pay a proportion of “the Landlord’s costs” which were defined as

“all costs sums payments charges and expenses properly incurred by the Landlord in carrying out its obligations under the Seventh Schedule and also under the covenants and conditions contained in the Head Lease (but not so as to include any sum reserved by way of rent in the Head Lease) and in the proper and

reasonable management of in and about [Broadwalk House]. The items comprising and included in the Landlord's costs are set out (but not by way of definition) in the Eighth Schedule.”

89. The Eighth Schedule listed items included in the Landlord’s costs, including “The proper cost and management of Broadwalk House.”
90. The Court of Appeal found that the landlord could recover as part of the service charge, under those provisions, its costs of an action brought against the tenant for an injunction, which had not been granted, and for forfeiture, from which the tenant obtained relief. The Court of Appeal pointed out that the clause is wider than those in *Sella House*, and it found that the landlord’s litigation costs were part of the proper and reasonable management of the building.
91. The case principally relied upon by Mr Peachey is *Assethold*, a decision of the Tribunal in 2014 on appeal from an LVT. The landlord sought to recover, not its legal costs against defaulting tenants, but its legal costs in an action brought against the owners of an adjoining building under the Party Wall Act 1996, under a range of provisions in the lease. The tenant was required to pay a proportion of the “Annual Expenditure” defined as all the landlord’s costs expenses and outgoings reasonably and properly incurred in providing the services listed in the First Schedule. That Schedule included an obligation to maintain and repair the building, and the Deputy President held that the action taken against the neighbour did not fall within that item. It also required the landlord to carry out

“all works, installations acts matters and things as in the reasonable discretion of the Landlord may be considered necessary or desirable for the proper maintenance safety amenity and administration of the Development.”

92. The LVT had found that the surveyor’s costs incurred in the party wall litigation were recoverable under that provision; the Deputy President held that there was no reason why the landlord’s legal costs should not also be recoverable.
93. The appellant relies upon the Deputy President’s observation at paragraph 55 that there are no “magic words” that make legal costs recoverable, and that what is required is a consideration of whether the action taken was within the purposes set out in the clause. He found that although the words in the clause just quoted were general, “they are sufficient to encompass the Landlord taking professional advice prior to deciding what course of action to follow in order to preserve the safety and amenity of the Building.” He added that the things covered “may include those for administration, as well as for the safety, amenity and maintenance” (paragraph 57).
94. The provisions considered by the Tribunal in *Assethold* take us into very different territory from that covered in *Sella House* and in *Iperion*. The decision in *Assethold* turned on the purposes set out in the relevant clause; safety, amenity and maintenance are a great deal wider than management. For that reason I do not regard *Assethold* as being particularly relevant in construing the clause in question in this appeal.

95. Reverting to the clause in question in the present appeal, I find its construction difficult. The purpose in the relevant clause is the management of the building. Of the cases cited by counsel, it comes closest to the one in *Iperion*, although it is arguably wider because of the words “in connection with”. I do not think that the different form of the legal action in *Iperion*, involving a claim for an injunction, makes any difference to the construction of the clause as Mr Blakeney argues. I take the view that the landlord’s legal costs incurred in the 2017 and 2019 proceedings were incurred in connection with the management of the building and are therefore recoverable as part of the service charge.

### **Conclusion**

96. The appeal succeeds on the issues on which I heard argument at the hearing; I shall give directions, following written submissions by counsel, for the determination of the section 20C issue on the basis of written representations and for the remission of the matter to the FTT for a decision as to which of the costs claimed as service charges were costs incurred in the 2017 FTT proceedings.

Judge Elizabeth Cooke

18 December 2020