

THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE

**DECISION OF THE SOUTHERN LEASEHOLD VALUATION TRIBUNAL  
COMMONHOLD AND LEASEHOLD REFORM ACT 2002 SCHEDULE 11**

**9 AMBER COURT, 100-106 HOLLAND ROAD, HOVE, BN3 1LU**

Applicants: (1) Jerezy Oseicki

(2) Rose Oseicki (lessees)

Represented by: Mr JP Donegan of Messrs Osler Donegan Taylor (solicitor)

Respondents: Fairhold Homes (landlord)

Represented by: Mr N Hanning of RWPS Law (Legal Executive advocate)

Date of Application: 22 June 2009

Date of hearing: 14 January 2010

Members of the Leasehold Valuation Tribunal:

MA Loveday BA Hons MCI Arb

Mr N Robinson FRICS

Ms J Morris

## INTRODUCTION

1. On 22 June 2009 the applicants applied under paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform 2002 for a determination that an administration charge of £2,514.16 was not payable. The applicants are the leasehold owners of a flat at 9 Amber Court, 100-106 Holland Road, Hove, BN3 1LU. The respondent is the freehold owner. A hearing took place on 14 January 2010.
2. The Tribunal did not inspect the property.

## THE FACTS

3. The facts are not in dispute.
4. By a lease 31 August 1995, McCarthy & Stone (Developments) Ltd demised the flat to Freda Snell for a term of 125 years from 1 June 1995. The lessee's obligations are set out in the Fifth Schedule to the lease, which include the main service charge covenants. By paragraph 11 of the Fifth Schedule the lessee covenanted:

*"11. To pay all costs and expenses (including legal costs and surveyors fees and such Value Added Tax or similar tax as may from time to time by law be required to be added thereto) incurred by the Landlord in or in contemplation of any proceedings under section 146 of the Law of Property Act 1925 in respect of the Premises notwithstanding forfeiture is avoided otherwise than by relief granted by the court and also pay all costs and expenses incurred by the Landlord in relation to the preparation and service of a schedule of dilapidations at the Termination of the Term (including legal costs and fees payable to the Landlord's Surveyor) together with such Value Added Tax or similar tax as may from time to time by law be required to be added thereto."*

Paragraph 4 of the Seventh Schedule sets out regulations for the management of the property.

These include an obligation on the part of the tenant at paragraph 4:

*"4. Not to do or suffer to be done on the Premises or the Estate anything which may or become nuisance or annoyance or cause damage or danger to the Landlord or the occupiers of any other apartment in the building or any nearby or adjacent property or which may injure or tend to injure the character or reputation of the Estate."*

5. On 27 March 2007, the respondent applied to the Tribunal for a determination whether there had been a breach of covenant of the lease under section 168(4) of the 2002 Act. It was alleged that the applicants had been in breach of their obligations under paragraphs 4 and 5.1 of the

Seventh Schedule to the lease. A hearing took place on 23 June 2007, where oral evidence was given by both the second applicant and a Mrs Lavelle, the house manager for the property. The decision, in case number CHI/00ML/LBC/2007/0006, is dated 20 June 2007. The Tribunal found there had been a breach of paragraph 4 of the Seventh Schedule to the lease. Its findings were summarised as follows:

*"7.1 Having heard and read the evidence, the Tribunal decided that there was sufficient evidence on a balance of probabilities to satisfy them that the [lessees] had breached paragraph 4 of the Seventh Schedule to their lease and that a nuisance or annoyance had been caused to Ms Lavelle and other residents of Amber Court. This nuisance or annoyance consisted of the playing of loud music and the very strong cooking or garlic smell"*

6. On 20 July 2007, the respondent raised a demand for payment for £2,514.16 which was described as *"costs of LVT hearing"*. The respondent produced a fee note for this sum from solicitors Messrs Reynolds Williams. This fee note describes the cost as:

*"PROFESSIONAL CHARGES for legal services rendered up to and including 13 June 2007 in connection with the application to the Leasehold Valuation Tribunal for a declaration of breach by Mr Jerzy Osieki and Mrs Rose Osiecki with all due care and conduct throughout."*

There is a breakdown of the legal costs setting out the individual charges for work between 7 October 2006 and 25 June 2007.

7. On 13 August 2007, the respondent served notice under s.146 of the Law of Property Act 1925, referring to the breaches of paragraph 4 of the Seventh Schedule to the lease. The respondent then issued forfeiture proceedings in Brighton County Court under claim number 7BN04248. On 6 December 2007 the applicants served a Defence which at paragraph 5 raised a Defence of waiver. The claim was settled by way of a consent order made by DJ Merrick on 20 March 2008 which included undertakings by the applicants (a) not to *"[prop] or otherwise keep open the front door of the flat so as to cause nuisance or annoyance"* and (b) not to *"[play] loud music in their flat so as to cause nuisance or annoyance"*.

## THE STATUTORY PROVISIONS

8. The jurisdiction of the Tribunal in this application is under paragraph 5 of Schedule 11 to the Commonhold and Leasehold Reform 2002:

***Liability to pay administration charges***

5 (1) An application may be made to a leasehold valuation tribunal for a determination whether an administration 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.

The main limitation on such charges is at paragraph 2 of Schedule 5:

***Reasonableness of administration charges***

2 A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

9. The jurisdiction of the previous Tribunal in 2007 was under s.168 of the 2002 Act:

***No forfeiture notice before determination of breach***

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 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2) This subsection is satisfied if—

(a) it has been finally determined on an application under subsection (4) that the breach has occurred ...

(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.

11. The previous Tribunal's power to award costs was limited by paragraph 12 of Schedule 11 to the 2002 Act:

***Costs***

10 (1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—

(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or

*(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.*

*(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—*

*(a) £500, or*

*(b) such other amount as may be specified in procedure regulations.*

*(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.”*

### **THE APPLICANT’S SUBMISSIONS**

12. At the hearing of the present application on 14 January 2010, the applicant was represented by Mr Donegan, a solicitor. He relied on an amended statement of case dated 27 October 2009 and contended that the charges were not payable for two reasons.

13. Waiver. Mr Donegan submitted that the costs were not recoverable under paragraph 11 of the Fifth Schedule because it was implicit that the landlord must have had grounds to forfeit the lease. He relied on the decision in **15A Kenyon Street Fulham London SW6** (27 February 2006) LON/04AN/LAC/2005/0006 to this effect. In a claim relating to recovery of the costs of a s.146 notice, Mr I Mohabir determined (in a determination made on paper without a hearing) that “*it is implicit that the landlord is only able to recover its costs for the preparation and service of a s.146 notice if the notice is valid.*”

14. Mr Donegan went on to contend that any right to forfeit the lease for breach of paragraph 4 of the Seventh Schedule to the lease had been waived by the respondent. He relied on demands for ground rent and service charges dated 1 March and 1 September 2007 and on payments made by the applicants on 14 March and 17 September 2007. None of the alleged breaches were continuing breaches; they were all “one off” individual breaches. Mr Donegan referred to a passage from Tolley’s “*Claims for the Possession of Land*” at Section B2.9:

*“B2.9 A continuing breach of covenant, if waived, can arise again immediately after the waiver and, unless the landlord has shown that he will never insist upon the performance of the covenant again (eg City and Westminster Properties (1934) Ltd v Mudd [1959] Ch 129), can be found a new forfeiture (Penton v Barnett [1898] 1 QB 276), at least where the defaulting tenant has made no substantial efforts to improve things (see Greenwich LBC v Discreet Selling Estates Ltd [1990] 61 PCR 405).*

*It is difficult to find a single explanation of the characteristics which make a particular breach of covenant either a continuing breach or a once and for all breach. Remediability of the breach is not the test (Farimani v Gates (1984) 271 EG 887).*

*Examples of covenants where the breach was continuing are:*

*(i) to repair (Doe d Baker v Jones (1850) 5 Ex 498);*

*(ii) to insure (Doe d Muston v Gladwin (1845) 6 QB 953);*

*(iii) prohibition against a particular use (Doe d Ambler v Woodbridge (1829) 9 B& 376);*

*but not:*

*... The authors suggest that a breach of covenant will necessarily be a once and for all breach if:*

*(i) the covenant requires something to be done on or by a certain date, or within a reasonable time; or*

*(ii) the covenant prohibits one or more matters, and the particular breach cannot fairly be described as an activity."*

15. As a result of the demand for rent and payment on 1 and 14 March 2007, Mr Donegan submitted that any right to forfeit for the matters before that date were waived. It was therefore wrong for the landlord to incur any solicitor's costs in the LVT after that date. Moreover, the LVT findings related solely to breaches which occurred before 14 March 2007. The evidence before the Tribunal was (a) a letter dated 18 August 2006 from the lessee of flat 16 and the oral evidence of Carol Lavelle (the Estate Manager): see LVT determination para 5.2. Neither involved any alleged nuisance after 14 March 2007. In any event, the demand and payment in September 2007 was a further waiver of any breaches.
16. Schedule 12 para 10(4). The second contention was that the costs included in the demand dated 20 July 2007 were costs "*in connection with proceedings before a leasehold valuation tribunal*" and that they were not recoverable as a result of paragraph 10(4) of Schedule 12 to the Act.
17. Mr Donegan accepted that the starting point must be the decision of the Lands Tribunal in ***Canary Riverside Pte Ltd and others v Dr and Mrs Schilling and others*** (16 December 2005) LRX/65/2005, a case where a similar point arose. In ***Schilling***, certain lessees made an unsuccessful application to an LVT to appoint a manager under s.24 Landlord and Tenant Act 1987. The landlord then included the legal costs it had incurred before the LVT in service charge demands to the lessees of the whole block. The lessees issued a second application to the LVT, this time for a determination under s.27A of the Landlord and Tenant Act 1985 that

the service charges were not payable. The second LVT determined that the costs incurred by the landlord in connection with the earlier Tribunal were not payable as a result of Schedule 12 para 10(4) to the 2002 Act. The landlord appealed to the Lands Tribunal which allowed the appeal. The judgment was summarised by HHJ Rich QC at paragraphs 38 and 39:

*“38. I do, none the less, recognise that to exclude the application of the sub-paragraphs from affecting the contractual provisions of leases does involve, if not re-writing the statutory provisions, at least the cutting down of its application in a way not expressly enacted. I had been troubled by the use of the word “person” rather than “party” which might have been thought more appropriate and had been used in the predecessor sections deriving from the 1996 Act, but I was satisfied by Mr Fancourt QC that it was arguably more apt because by reason of sub-paragraph 9(3) it is not until a person pays a fee that he becomes a party. Moreover, if the word used had been “party”, it might have been argued that even if other tenants might be liable to pay such costs by way of service charge, the tenant who was a party to such proceedings should be exempted. Such a result would certainly be anomalous if it applied to such a tenant which was an party, even though he failed on application to obtain an order under s.20C, or even had an order made against him under sub-paragraph 10(1) of Schedule 12.”*

*39. I have therefore come to the conclusion that the application of sub-paragraph 10(4) is to be limited by its context and the title of the Schedule to the procedure of the Leasehold Valuation Tribunals and the enforcement of their determinations, and that properly construed, it does not prevent the recovery of costs incurred before the leasehold valuation tribunals which are otherwise recoverable by way of service charge.”*

Mr Donegan also referred to *Staghold v Takeda* [2005] 3 EGLR 45, CC, which was to a similar effect.

18. The applicant submitted that the decision in *Schilling* was appropriate where the landlord sought to include costs incurred before an LVT in a service charge maintenance account. HHJ Rich had referred only to schedule 12 not preventing recovery of costs by way of a “service charge”. However, this case was very different. Here, the landlord sought to impose individual liability directly on the parties to the previous LVT application. This was a direct imposition of liability for costs operated in exactly the same way as a costs order by the LVT.
19. Reimbursement of fees. At the conclusion of his submissions, Mr Donegan sought an order for reimbursement of costs under paragraph 9 of the Leasehold Valuation Tribunals (Fees) Regulations 2003. He argued that the application had been properly brought.

## THE RESPONDENT'S SUBMISSIONS

20. The respondent was represented by Mr Hanning, a legal executive advocate with RWPS Law. Mr Hanning relied on a statement of case dated 15 September 2009 and oral submissions at the hearing.
21. Waiver. Mr Hanning did not accept the suggested "inference" in paragraph 11 of Schedule 5 to the lease. The provisions were clear, and they included a right to recover costs incurred "*in contemplation of*" forfeiture proceedings. This clearly allowed the landlord to recover costs even where possession proceedings were not issued.
22. In any event, Mr. Hanning submitted that the breaches found by the Tribunal on 20 June 2007 were as a matter of law 'continuing' breaches and that any waiver on 1 and 14 March 2007 did not prevent the landlord from forfeiting the lease for breaches after that date. He disputed the assertion that the previous LVT had not relied on breaches which occurred after 4 March 2007, and referred to paragraphs paras 5.5 and 6.2 and of the Tribunal's decision. As at 13 August 2007, when it served notice under s.146 of the Law of Property Act 1925, the landlord was therefore entitled to forfeit the lease. After service of the s.146 notice, the landlord could not waive its right to forfeit the lease, and the later alleged purported acts of waiver in September 2007 were therefore irrelevant.
23. Schedule 12 paragraph 10. Mr Hanning submitted that the Tribunal was bound by the decision of the Lands Tribunal in *Schilling*, which applied as much to administration charges as to service charges. Administration charges were subject to statutory controls under Schedule 11 to the 2002 Act in the same way that service charges were subject to stator controls under the Landlord and Tenant Act 1985. Moreover, the judgment of HHJ Rich in *Schilling* was of general application: see paragraphs 38 and 39 of the judgment (above).
24. Reimbursement of fees. Mr Hanning submitted that there was no reason for the applicants to recover the fees involved in the application. Even if they succeeded in their application the landlord had acted quite properly in resisting this application on proper grounds.



## DECISION

25. Waiver. The waiver argument was expressly advanced on one basis only. This was that by reason of a waiver of the right to forfeit, the administration costs were not contractually recoverable under paragraph 11 of the Fifth Schedule - a matter which falls within the Tribunal's general jurisdiction to determine liability for an administration charge under paragraph 5(1) of Schedule 11 to the 2002 Act.
  
26. The first issue is the interpretation of paragraph 11 of the Fifth Schedule. The lessees contend that it is "implicit" that legal costs are only recoverable under this provision if there are proper grounds for forfeiting the lease. The precise basis on which the implication was advanced was never fully developed in argument. The Tribunal doubts that any such term can be implied, particularly given the specific reference in the clause to the landlord recovering costs "in contemplation of" proceedings. Moreover, the decision in *15A Kenyon Street* (while not binding on this Tribunal), does not take matters much further. In *15A Kenyon Street*, the issue was the "reasonableness" of administration costs under paragraph 2 of Schedule 11 to the 2002 Act: see paragraph 1 of the decision. The claim did not deal with implication of terms at all.
  
27. However, on the facts of this particular case, the implication argument is of little relevance. The recoverable administration charges here are limited to those which are "reasonable" by paragraph 2 of Schedule 11 to the 2002 Act. The Tribunal accepts that one factor to be taken into account in assessing reasonableness is whether the landlord had waived its right to forfeit the lease. If the landlord incurred legal costs in pursuing a s.168 application at a time when it could not forfeit the lease, that would be consideration (perhaps an overriding consideration) to be taken into account in deciding if the costs were reasonable. This was the approach of the Tribunal in *15A Kenyon Street*; the case relied upon by the applicants, albeit that the case itself related to the costs of a s.146 notice.
  
28. However, the Tribunal finds that there was no waiver of the breaches of covenant, for two reasons. First, the factual basis of the applicants' case is inconsistent with the written reasons given by the previous LVT on 20 June 2007. The Tribunal expressly relied on nuisance which occurred very shortly before the hearing and in any event after 14 March 2007. In particular,

the Tribunal relied on evidence of Mrs Osiecki that she had kept the door of her flat open in the past and that “*until this problem of their was sorted out she would continue to keep the front door open*”: see para 6.2 of decision. It also relied on the oral evidence of Mrs Lavelle that “*there were incidents of noise or smells from flat 9 almost every day and that matters have reached such a stage that they are ‘beyond endurance’ and that it is a ‘nightmare’ living there*”: see para 5.5 of the decision. It follows that there were breaches of covenant found by the previous LVT which post dated any waiver in March 2007 and which preceded any waiver in September 2007.

29. Secondly, as a matter of law, the acts relied upon by the applicants did not amount to a waiver. The Tribunal finds that the breaches of paragraph 4 of the Seventh Schedule to the lease were so-called ‘continuing’ breaches which recurred every day. In this respect, a covenant not to commit a nuisance is analogous to a user covenant. The case of *Doe d Ambler v Woodbridge* (1829) 9 B& 376 referred to in the passage in Tolley’s *Claims for the Possession of Land* relied on by Mr Donegan is authority for this proposition.
30. Finally, insofar as it is relied on by the applicants, the demand and payment of rent on 1 and 19 September 2007. The landlord served a s.146 notice on 13 August 2007 and thereafter its right to forfeit for the earlier breaches of covenant could not be waived. Furthermore, by that stage the costs of the LVT proceedings had already been incurred, and any later waiver of the right to forfeit did not affect the reasonableness of the legal costs at the time they were incurred.
31. No objection is made that the sums charged by the solicitors were unreasonably high. The Tribunal therefore finds that the administration charge was reasonable and that it was not irrecoverable as a result of any waiver.
32. Schedule 12 para 10(4). The Tribunal finds that Schedule 12 paragraph 10(4) of the 2002 Act does not bar the landlord from recovering its costs by way of an administration charge.
33. The primary reason is that there is nothing in *Schilling* which limits the application of the decision to serviced charge costs alone. The conclusion of the judgment at paragraph 39 does of course refer to “service charges” alone, but that is not surprising given that the facts of the

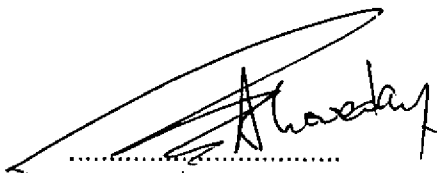
case involve service charge liability. The opening words of section 38, however demonstrate that the Lands Tribunal was dealing with more general concepts. More importantly, the opening words of paragraph 39 explain the narrow nature of Schedule 11:

*"I have therefore come to the conclusion that the application of sub-paragraph 10(4) is to be limited by its context and the title of the Schedule to the procedure of the Leasehold Valuation Tribunals and the enforcement of their determinations..."*

34. In this case, the sums sought by the landlord are not payable pursuant to any procedure of the LVT or the enforcement of any decision of the Tribunal. **Schilling** is therefore authority for the proposition that paragraph 10(4) of Schedule 12 to the 2002 does not prevent a landlord from recovering legal costs in connection with an LVT application by way of an administration charge.
35. Reimbursement of fees. Under paragraph 9 of the Leasehold Valuation Tribunals (Fees) Regulations 2003 the LVT has a wide discretion to reimburse fees incurred. In this case, the application was not wholly unreasonable, since it involved a point of law which was not entirely an easy one. Equally, the landlord quite properly resisted the application and has succeeded. There is no suggestion that either party has acted improperly in the way it has pursued the application. There is no reason to depart from the usual requirement for the applicant to pay the fees in connection with the proceedings, and Tribunal does not make any reimbursement order under the 2003 regulations.

## CONCLUSIONS

36. The Tribunal finds that the administration charge of £2,514.16 made on 20 July 2007 is payable.
37. No order is made for reimbursement of fees under paragraph 9 of the Leasehold Valuation Tribunals (Fees) Regulations 2003 .



Mark Loveday BA(Hons) MCI Arb  
Chairman  
14 February 2010