# Recovery of costs in service charge disputes in the LVT

## LVT's powers

The LVT has no general power to award costs other than when an application is dismissed as frivolous or vexatious, or otherwise an abuse of process or a party has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings. In such circumstances the costs are capped at £500: para 10 of Sch 12 to the Commonhold and Leasehold Reform Act ("CLRA") 2002.

A landlord may, however, be able to recover legal costs under the lease. A landlord's contractual right to legal costs is not restricted by para 10(4) of Sch 12 to CLRA 2002: *Schilling v Canary Riverside*, unreported, Land Tribunal LRX/65/2005.

## Costs recoverable from an individual lessee

Leases commonly provide that legal costs may be recovered directly from a defaulting tenant. Ordinary contractual principles apply. The terms of the lease must be clear and unambiguous but, in such cases, there should be little difficulty in recovering costs.

In the absence of such a clear provision, it is often argued that legal costs in service charge disputes are recoverable under a provision whereby the lessee covenants to "pay all expenses (including solicitors costs and surveyors fees) incurred by the Lessor incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court" (or similar).

In *Escalus Properties Ltd v Robinson* [1996] Q.B. 231 the Court of Appeal held that where the terms of the lease provide that the service charge should be payable as additional rent, it "invests the charge with the character of rent". The received wisdom was that, by s.146(11) of the Law of Property Act 1925 (which provides that the section does not apply to forfeiture for non-payment of rent), it was not necessary to serve a s.146 notice before forfeiting a lease for unpaid service charges reserved as rent.

Further, by s.169(7) of CLRA 2002 it is not necessary for a breach in respect of a failure to pay a service charge to be determined under s.168 before serving a s.146 notice (this provision is particularly helpful to landlords where the service charge is not reserved as rent ).

This being the case, legal costs of service charge disputes were not recoverable under provisions relating to the recovery of costs in respect of forfeiture: the costs of service charge disputes could not be said to be costs incidental to the preparation and service of a s.146 notice.

The position may have changed following the decision in *Freeholders of 69 Marina, St Leonards-on-Sea v Oram* [2011] EWCA Civ 1258; [2012] H.L.R. 12 (CA (Civ Div)). In that case, the Chancellor (Sir Andrew Morritt) purported to suggest that, in

every case where service charges are recoverable as rent following agreement or determination, the landlord must serve a s.146 notice before it can forfeit. The decision itself has not escaped criticism but until the law is 'clarified' it is arguable that, in some circumstances, LVT proceedings to determine the service charge payable would be "incidental to the preparation and service of a s.146 notice".

It should be remembered that in the case of dwelling houses, legal costs recovered directly from a defaulting tenant are an administration charge within the meaning of para 1 of Sch 11 to CLRA 2002 and are, therefore, subject to the test of reasonableness.

Costs recoverable through the service charge

Where a landlord is unable to recover costs directly from the defaulting tenant, the landlord may seek to recover the costs through the service charge. The terms of the lease must be clear and unambiguous.

By example, in *Sella House Ltd v Mears* [1989] 1 EGLR 65, it was held that a provision: (1) "To employ at the Third Company's 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 in respect of the Building or any parts thereof"; and (2) "To employ all such surveyors builders architects engineers tradesmen accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building" did not allow for the recovery of legal costs. *Sella House* was followed, albeit reluctantly, by the Lands Chamber in *Greening v Castelnau Mansions Limited* [2011] UKUT 326 (LC).

In *St Marys Mansions Ltd v Limegate Investments Co Ltd* [2002] EWCA Civ 1491; [2003] 05 EG 146, the landlord sought to rely upon clauses in the lease entitling it to recover the costs of all other services which the lessor may at its absolute discretion provide and for the reasonable and proper fees for the collection of rents and general management of the building. The Court of Appeal held that neither of these provisions was sufficient to allow the landlord to recover its legal costs.

Conclusion

The combined effect of Sch 12 to the CLRA 2002 and various court decisions is that the recovery of legal costs in service charge disputes in the LVT is severely restricted to cases in which the terms of the lease clearly and unambiguously allow recovery. Even then, the LVT has the power under s.20C of the Landlord and Tenant Act 1985 to order that all or any of the costs incurred by the landlord in connection with any proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable.

The ordinary rules on litigation costs apply to court proceedings in respect of service charge disputes. Landlords confident in the merits of their case may prefer to issue

court proceedings rather than a s.27A application in the LVT in the hope that, as the successful party, they will obtain a costs order. The practice of many courts is, however, to automatically transfer ‘standard’ service charge disputes to the LVT pursuant to para 3 of Sch 12 to CLRA 2002.

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