

RECOVERING COSTS FALLING DUE UNDER LEASES

by

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Types

- Seeking landlord's consent
- S 146 notices and forfeiture
- Enforcing covenants: Schedules of dilapidations
- Proceedings – litigation costs
- Lease renewal

Debt or damages?

1. A covenant or provision in a lease makes the sum recoverable in contract as a debt and not as damages for breach of covenant: *Bader Properties Ltd v Linley Property Investments Ltd* [(1967) 19 P.&C.R. 621; *Middlegate Properties Ltd v Gidlow Jackson* (1977) 34 P&CR 4. In one limited case statute provides a remedy: LPA 1925, s146(3); and in relation to litigation costs Superior Courts Act 1981 s51 is the over-arching provision.

Judicial interpretation

2. Because these types of clause almost always involve payment by L to T and not the other way round, expect the courts to adopt a restrictive approach, especially where recovery is on an indemnity basis: *Agricullo v Yorkshire Housing Ltd* [2010] L&TR 9; *Riverside Property Investments Ltd v Blackhawk Automotive* [2005] 1 E.G.L.R. 114.

Reasonableness

3. If the clause does not expressly limit L's entitlement to recover to costs reasonably incurred and reasonable in amount such a qualification will readily be implied: *Riverside Property Investments Ltd v Blackhawk Automotive* (see further below); and in the context of service charges *Finchbourne v Rodrigues* [1976] 3 All E.R.581; *Plough Investments v Manchester City Council* [1989] 1 E.G.L.R. 244; *Holding & Management Ltd v Property Holding & Investment Trust plc* [1989] 1 W.L.R. 1313; *Morgan v Stainer* [1993] 2 E.G.L.R. 73.

4. The concept of reasonableness and recovery on an indemnity basis are not incompatible: see CPR 44.4 (dealing with assessment of costs on both standard and indemnity basis); court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount. Preferable to make any costs recovery covenant expressly subject to reasonableness especially if the clause provides for recovery on indemnity basis.
5. Final determination in case of dispute should not be left to L or L's retained surveyor.¹

Seeking landlord's consent

6. L's consent is often required and cannot be withheld unreasonably either because of an express provision to that effect or because such a term is implied: LTA 1927, s19. Most commonly found in covenants against alteration and alienation but also sometimes other cases, e.g. covenants dealing with applications by T for planning permission. Apart from administrative costs there may be professional fees: legal; surveying; accountancy.
7. Whether or not L's entitlement to recover is dealt with by covenant standard practice is for L to seek appropriate undertaking from T's solicitors. If this is lengthy or unresolved L risks proceedings for a declaration that consent has been unreasonably withheld or delayed and, in alienation cases, a claim for statutory damages under the LTA 1988: *Dong Bang Minerva (UK) Limited v Davina Limited* [1996] 2 E.G.L.R. 31.
8. Problems arising from an undertaking can be avoided by an express covenant and preferably one entitling reasonable recovery but on an indemnity basis.
9. CPR 44.4: see above.

¹ *Concorde Graphics v Andromeda Investments SA* [1983] 1 E.G.L.R. 83.

10. CPR 48.3 applies where in litigation court assesses costs that include an amount payable under the terms of a contract (which would include a lease or a licence made pursuant to it). Presumption that costs recoverable will be limited to those that have been reasonably incurred and are reasonable in amount unless the contract says otherwise (see further below).
11. Additional protection for the T if covenant qualified so that there is no recovery if consent is withheld or refused unreasonably or is granted subject to unreasonable condition; or to the extent that on any application for consent the landlord behaves unreasonably.

Forfeiture and LPA 1925, s146

12. The costs of preparing and serving a s146 notice are not recoverable as damages: *Skinner's Co v Knight*. [1891] 2 Q.B. 542; so need to be dealt with by an express covenant.
13. Partly mitigated by LPA 1925 s146(3) (but note limitations of this sub-section).

“A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any), all *reasonable* costs and expenses *properly* incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is *waived by the lessor*, or from which the lessee is *relieved, under the provisions of this Act.*”
14. NB: only applies in two situations: (1) where there is a breach of covenant giving rise to a right to forfeit and where either the right is waived at the request of the lessee (very unusual in practice) and (2) where relief is given by the court under section 146(2): *Middlegate Properties Ltd v Gidlow Jackson* (1977) 34 P&CR 4. It will therefore *not* apply where:
 - (unsurprisingly) costs and expenses are unreasonable in amount or are not properly incurred
 - (unsurprisingly) L alleges a breach but the breach is not proved and so does not give rise to a right to forfeit

- (unsurprisingly) there was a breach but L has waived right to forfeit for it otherwise than at request of T (e.g. by accepting rent with knowledge of the breach and after the right to forfeit has arisen)
 - forfeiture whether by peaceable re-entry or the service of proceedings where right to forfeit is not waived by L or where relief from forfeiture is either not sought or is sought but is not granted
 - right to forfeit does not arise under LPA 1925 or where relief is not given under that Act but instead on a different basis e.g. under the court's inherent jurisdiction. The final words of the sub-section ("under the provisions of this Act") will, for example, exclude the most typical case of forfeiture for non-payment of rent: section 146(11) except where there is an application for relief by a sub-lessee or chargee under section 146(4)²
 - a right to forfeiture or damages is subject to the procedural requirements of the Leasehold Property (Repairs) Act 1938
 - L serves section 146 notice and T responds by remedying the breach alleged in it.
15. A well-drafted clause will entitle L to recover on an indemnity basis all reasonable costs, charges or expenses, including legal costs and costs paid to a surveyor or other professional, incurred by L in dealing with or incidental to or in or in contemplation of:
- the preparation and service of any notices under section 146 and notices required by the 1938 Act 1938 (including all such costs charges or expenses incurred in the preparation of schedules served with any such notice)³
 - applications and proceedings under the 1938 Act

² Section 146(9) also excludes from the section a ragbag of other types of lease; and section 146(10) excludes from the remit of the section leases cases where the lease contains a condition for forfeiture on bankruptcy or taking in execution of the tenant's interest and its interest is not sold within a year of the bankruptcy or taking in execution.

³ If the s146 notice includes an allegation of dilapidations and attaches a schedule, the costs of preparing the schedule would be recoverable as part of the cost of preparing *Johnsey Estates v SoS for the Environment*.

- peaceable re-entry or proceedings for forfeiture under the 1925 Act or otherwise and whether or not relief from forfeiture is obtained by order of the court pursuant to sections 146 or 147 of the 1925 Act or otherwise.
16. See *Middlegate Properties Ltd v Gidlow-Jackson* (1977) 34 P&CR 4 and *Fairview Investments Ltd v Sharma* (CA, unreported 1999) for examples of successful recovery under an express provision; and *Agricullo v Yorkshire Housing Ltd* [2010] L&TR 9 for a restrictive interpretation where L failed to recover.

Non-forfeiture cases

17. A wider express covenant will be required if the claim or contemplated claim does not involve forfeiture but some other remedy such as an injunction or specific performance for the enforcement of the tenant's covenants or a claim for damages for non-performance. The commonest of these is a post-termination claim for damages for disrepair.

Schedules of dilapidations

18. Preparation of a schedule of dilapidations may need one or more surveyors from different fields and possibly other professionals to advise on and list the T's breaches and can be expensive.
19. The conventional view: such costs not usually recoverable as *damages*⁴; nor part of the calculation of loss under LTA s18 (not an expense that the

⁴ *Skinnners Co v Knight* [1891] 2 Q.B. 542 (deciding that such costs were not payable as "compensation" under section 14 (1) of the Conveyancing and Law of Property Act 1925 which was the statutory predecessor of section 146(1) of the Law of Property Act 1925. *Maud v Sandars* [1943] 2 All ER 783. Lewis J rejected the argument that the costs incurred in preparing the schedule were damages because it was only due to the fact that the tenant had broken his covenant that these costs were incurred in order to assess the damages to which he was entitled. (In this case the tenant admitted the full extent of the breaches). Followed in *Lloyds Bank v Lake* [1961] 1 W.L.R. 884 where the landlord was not allowed to recover from the lessee their own solicitors' costs before action or their surveyor's costs of preparing

hypothetical purchaser would incur); only recoverable either as a matter of contract pursuant to an express provision in the lease or as part of a costs order. Unless there are proceedings that result in a costs order that extends to the preparation of the schedule the costs of doing so will be irrecoverable unless a claim in debt can be made. Does this view need to be revised in the light of *PGF II SA v Royal & Sun Alliance Insurance plc* [2010] EWHC 1459 (TCC). It was held that *Maud v Sanders* was no longer good law following the decision of the HL in *Ruxley v Forsyth* and the reasonable cost of preparing a schedule of dilapidations was the direct consequence of the T's breaches. Could it be said that the argument is circular?

20. Extent of L's entitlement to recover is a matter of interpretation: compare *Agricullo v Yorkshire Housing Ltd* [2010] L&TR 9 and *Riverside Property Investments Ltd v Blackhawk Automotive* [2005] 1 E.G.L.R. 114.
21. Two relevant clauses in the lease in *Riverside Property*: first to do with notices or schedules of dilapidations; second to do with the enforcement of the tenant's covenants whether before or after the end of the term):

Clause 22(b): "To pay all proper costs and expenses (including solicitors costs and surveyors fees) incurred by the Lessor in or incidental to the preparation and service of any notice or schedule relating to dilapidations and whether or not the same is served before or after the expiration or determination of the said term" and

Clause 22(c): " To pay all costs and expenses incurred by the Lessor in or in connection with the enforcement of any of the Lessee's covenants and conditions herein contained whether during the currency of or after the termination of the said term".

22. L's claim subjected to detailed examinations and largely rejected.
23. L cannot expect to recover costs of an exaggerated schedule (usually counter-productive anyway); or for items not proved or not pursued. See *Business*

the schedule of dilapidations; and *Commercial Union Life Assurance Co Ltd v Label Ink Ltd* [2001] L&TR 29.

Environment Bow Lane v Deanwater Estates (No.2) [2008] EWHC 2003 (TCC) for an example of L succeeding to a very limited extent and being ordered to pay T's costs on an indemnity basis (L's claim initially £550,000 settled at just over £1000).

Litigation costs

24. Entitlement to recover depends partly on whether there is an express covenant. Statutory basis for court's discretion to order costs is the Superior Courts Act 1981, s51. Only applies if there is litigation, and even then not to costs incurred pre-action investigating issues that are not pursued in the litigation (they cannot be said to be "costs incidental to proceedings").⁵ Does not apply to costs incurred in a dispute that is resolved without the issue of proceedings.⁶
25. On an assessment of costs falling due under a covenant there is a rebuttable presumption that costs which have been reasonably incurred and are reasonable in amount: CPR 48.3.
26. This is the case even where there is a contractual right to costs on an indemnity basis: *Gomba Holdings Ltd v Minorities Finance Ltd (No. 2)* [1992] 4 All ER 588 *Church Commissioners for England v Ibrahim* [1997] 1 E.G.L.R. 13.
27. CPR 44.12A: for cases where no proceedings have been issued and where the parties to the dispute have reached an agreement in writing on all issues including who is to pay the costs but not as to the amount of those costs. Pt 8 claim form. Application must be unopposed. Court can either make the order or dismiss application. Usually sent for detailed assessment.
28. CPR 44.3(6)(d) for court's powers in relation to costs incurred before proceedings begun. Could include costs incurred in following a pre-action protocol and in such matters as preparing the schedule of dilapidations provided

⁵ White Book para C1A-106.

⁶ *McGlenn v Waltham Contractors Ltd* [2005] EWHC 1419.

that proceedings ensue: *Birmingham CC v Lee*⁷ [2008] EWCA Civ 981 (Housing Disrepair Protocol). A landlord could not expect to recover costs incurred relating to allegations of breach that were not pursued or that were pursued unsuccessfully.

29. If contractual provisions purports to entitle L to recover all of his costs in litigation (even if court has ordered it to pay the costs to T) in practice it will be interpreted as being subject to an implied term that the costs are reasonable in amount and reasonably incurred; and such costs as L has been ordered to pay to T which L seeks to recover under such a clause will be treated as unreasonable in amount and unreasonably incurred: *Holding & Management Ltd v Property Holding & Investment Trust plc* [1989] 1 W.L.R. 1313.
30. Still worth having a clause entitling L to recover on the indemnity basis all reasonable costs reasonably incurred in or incidental to the enforcement of the covenants against T whether or not proceedings are contemplated or brought.
31. Even where there is a contractual provision the discretion of the court under s51 can override it: *Forcelux v Binnie*¹ [2009] EWCA Civ 1077.

Lease renewal

32. Covenants requiring T to pay the costs of renewing the lease. *Cairnplace Ltd v C.B.L. Co. Ltd*[1984] 1 W.L.R. 696. Business tenancy case under the 1954 Act. Lease term requiring T to pay [long redundant] scale costs of the landlord's solicitors and the stamp duty on the counterpart. Costs of Leases Act 1958 s1:
"Notwithstanding any custom to the contrary, a party to a lease shall, unless the parties agree otherwise in writing, be under no obligation to pay the whole or any part of any other party's solicitors' costs of the lease."

CA held it a wrong exercise of discretion as to terms in s35 of the 1954 Act to require T to accept such a term depriving it of the protection conferred by 1958 Act.

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