

Number 19

Service Charges: A Further Safeguard for Residential Leaseholders

Residential leaseholders are protected from the risk of losing their homes for non-payment of service charges until the level of the charges has been fixed by agreement or decided by the court.

Section 81 of the Housing Act 1996

The 1996 Act came into force in September 1996 and was one of a series of statutory controls brought into being to combat the growing problem of apparently excessive service charge demands being levied by landlords who were then able to recover possession of leasehold properties, even those let on long leases, from tenants who were unable to pay and who did not have the means to dispute the amounts sought.

Section 81 provides as follows:

A landlord may not, in relation to premises let as a dwelling, exercise a right of re-entry or forfeiture for failure to pay a service charge unless the amount of the service charge –

- a) is agreed by the tenant, or
- b) has been the subject of determination by a court or by an arbitral tribunal in proceedings pursuant to an arbitration agreement...

The Section goes on to provide that where the amount in question has been determined, a landlord cannot exercise any right of re-entry or forfeiture until the expiry of 14 days after the determination.

A recent Court of Appeal decision (*Mohammadi v Anston Investments Limited and another* [2003] EWCA civ 981)¹ will have the effect of widening that protection, as it recommended that even if a tenant does not plead Section 81 as a Defence in forfeiture proceedings, a court should be alive to its provisions and give effect to it regardless.

The facts of the case were that a tenant had suffered water ingress and damage to her flat caused by subsidence which she claimed was due to breaches of the Defendant landlord's repairing obligations. The Claimant tenant issued proceedings for damages for the alleged breaches and withheld payment of ground rent and service charges. The Defendant landlord counterclaimed for the arrears of ground rent and service charges and claimed possession of her flat by forfeiture on the basis of the arrears.

The service charge was not reserved as rent and there was no provision in the lease pursuant to which the service charge could be deemed to be additional rent or recoverable as such.

¹ Copies of the case are available upon request from RadcliffesLeBrasseur

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At first instance the County Court gave judgment to the Defendant landlord and made a possession order. However, the tenant appealed to the Court of Appeal which decided that pursuant to Section 81 of the 1996 Act re-entry for failure to pay service charges was prohibited and that a landlord cannot forfeit or take back leasehold premises for non-payment of service charges unless there has been agreement as to the amount due or the amount has been determined by an arbitrator or a court.

Consequences of the decision

- Before being in a position to enforce a tenant's obligations to pay service charges by way of forfeiture, a landlord either has to obtain agreement as to the sums claimed or will have to apply to the County Court to have them determined
- Even if a tenant does not cite Section 81 in his Defence, the Court is likely to apply it anyway
- Landlords who commence possession or forfeiture proceedings for non-payment of service charges which have not been agreed or determined are likely to be unsuccessful and ordered to pay the tenant's costs.

The decision does not affect a landlord's entitlement to forfeit a lease for non-payment of ground rent.

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Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

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