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Neutral Citation Number: [2023] EWCA Civ 879
Case No: CA-2023-000201

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
MARTIN RODGER KC
[2022] UKUT 319 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL
25/07/2023

B e f o r e :

LORD JUSTICE LEWISON
LADY JUSTICE KING
and
LADY JUSTICE ANDREWS

Between:

EASTPOINT BLOCK A RTM COMPANY LIMITED **Appellant**

- and -

AKEHINDE OLUFUNLOLA OTUBAGA **Respondent**

Amanda Gourlay and Annie Higgo (instructed by Lazarev Cleaver LLP) for the Appellant
The Respondent did not appear and was not represented

Hearing date : 18/07/2023

HTML VERSION OF JUDGMENT APPROVED

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This judgment was handed down remotely at 11.00am on 25/07/2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Lewison:

Introduction

1. The division of jurisdiction between the county court and the First Tier Tribunal ("the FTT") in residential property matters has given rise to problems. In *GR Property Management Ltd v Safdar* [2020] EWCA Civ 1441, [2021] 1 WLR 908 a notice given under section 13 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") claiming to exercise the right to acquire the freehold was deemed to have been withdrawn because the lessees made an application to the county court rather than the FTT. In *Keith v Benka* [2023] EWCA Civ 821 a claim for forfeiture was stayed for over four years where the county court ordered certain issues relating to breaches of covenant to be referred to the FTT, but then failed to transmit the order to the FTT. Some of the problems were addressed by the flexible deployment of judges to sit in both the county court and the FTT; but even that has created its own problems. In *Behjat v Crescent Trustees Ltd* [2022] UKUT 115 (LC), [2022] L & TR 23 an order of the FTT purporting to strike out a county court claim was set aside for lack of jurisdiction.

2. This appeal throws up another jurisdictional problem: is a right to manage company ("an RTM company") entitled to apply to the FTT under section 168 of the 2002 Act for a determination whether the lessee of a flat is in breach of covenant? The Upper Tribunal (Martin Rodger KC, Deputy President), upholding the decision of the FTT, said "no" and struck out the application. His decision is at [2022] UKUT 319 (LC), [2023] L & TR 16. At the conclusion of the argument we announced that we would allow the appeal, with reasons to be given in writing. These are my reasons for joining in that decision.

The background

3. Because the Deputy President upheld the FTT's decision to strike out the application, no facts have been found. So, what follows is what is alleged. Eastpoint Block A RTM Co Ltd is an RTM company which has acquired the right to manage Pointer Close, a block of flats in Thamesmead. The company alleges that one of the lessees holding under a long lease is in breach of covenant by permitting the property to be used for a business and permitting a sub-tenant to cause serious nuisance and annoyance to other residents in the block. The company applied to the FTT under section 168 (4) of the 2002 Act for a determination that breaches of covenant had occurred. The FTT struck out the application, and the UT dismissed an appeal. The lessee has played no part in the application or the appeal.

4. Section 168 (4) provides:

> "A landlord under a long lease of a dwelling may make an application to the appropriate tribunal for a determination that a breach of a covenant or condition in the lease has occurred."

5. In England the appropriate tribunal is the FTT. The principal reason why the FTT struck out the claim was because the application was not the enforcement of covenants; but was part of the process of forfeiture, which is not a function that an RTM company can exercise. The Deputy President considered that there was a simpler route to the same conclusion. He held that when an RTM company acquires the right to manage it does not become the landlord. Since an application under section 168 (4) can only be made by "the landlord", it followed that an RTM company could not make such an application. He also considered, if the division between forfeiture functions and enforcement functions had any significance, that an application under section 168 (4) was "clearly on the forfeiture side of the line".

6. The effect of the Deputy President's decision is not that the RTM company cannot apply for a declaration that the tenant is in breach of covenant or for an injunction restraining breaches or for damages for breach of covenant. It is that any such application must be made to the county court (which has concurrent jurisdiction) rather than to the FTT: see *Realreed Ltd v Cussens* [2013] EWHC 1229 (QB), [2014] 1 WLR 275.

The right to manage

7. The right to manage is a fault free entitlement on the part of an RTM company controlled by the lessees to assume management responsibilities in relation to property to which Chapter 1 of Part 2 of the 2002 Act applies. In essence the property to which that Chapter applies is a self-contained building or part of a building containing two or more flats held under long leases.

8. Section 96 of the 2002 Act provides:

> "(1) This section and section 97 apply in relation to management functions relating to the whole or any part of the premises.
>
> (2) Management functions which a person who is landlord under a lease of the whole or any part of the premises has under the lease are instead functions of the RTM company.
>
> (3) And where a person is party to a lease of the whole or any part of the premises otherwise than as landlord or tenant, management functions of his under the lease are also instead functions of the RTM company.
>
> (4) Accordingly, any provisions of the lease making provision about the relationship of—
>
> (a) a person who is landlord under the lease, and
>
> (b) a person who is party to the lease otherwise than as landlord or tenant,
>
> in relation to such functions do not have effect.
>
> (5) "Management functions" are functions with respect to services, repairs, maintenance, improvements, insurance and management.
>
> (6) But this section does not apply in relation to—
>
> …
>
> (b) functions relating to re-entry or forfeiture."

9. Section 97 (2) provides that the landlord under the lease is not entitled to do anything which the RTM company is required or empowered to do under the lease by virtue of section 96, except in accordance with an agreement made by him and the RTM company. Section 98 deals with the grant of approvals under long leases. It provides:

> "(2) Where a person who is—
>
> (a) landlord under a long lease of the whole or any part of the premises, or
>
> (b) party to such a lease otherwise than as landlord or tenant,
>
> has functions in relation to the grant of approvals to a tenant under the lease, the functions are instead functions of the RTM company.
>
> (3) Accordingly, any provisions of the lease making provision about the relationship of—
>
> (a) a person who is landlord under the lease, and
>
> (b) a person who is party to the lease otherwise than as landlord or tenant,
>
> in relation to such functions do not have effect."

10. Section 99 lays down certain procedural requirements; and what happens in the case of an objection. The FTT has jurisdiction to deal with questions arising under section 99. Section 99 (5) provides:

> "An application to the appropriate tribunal for a determination under subsection (1)(b) may be made by—
>
> (a) the RTM company,
>
> (b) the tenant,
>
> (c) if the approval is to a tenant approving an act of a sub-tenant, the sub-tenant, or
>
> (d) any person who is landlord under the lease."

11. Section 100 deals with the enforcement of tenant covenants. It provides:

> "(1) This section applies in relation to the enforcement of untransferred tenant covenants of a lease of the whole or any part of the premises.
>
> (2) Untransferred tenant covenants are enforceable by the RTM company, as well as by any other person by whom they are enforceable apart from this section, in the same manner as they are enforceable by any other such person.
>
> (3) But the RTM company may not exercise any function of re-entry or forfeiture.
>
> (4) In this Chapter "tenant covenant", in relation to a lease, means a covenant falling to be complied with by a tenant under the lease; and a tenant covenant is untransferred if, apart from this section, it would not be enforceable by the RTM company.
>
> (5) Any power under a lease of a person who is—
>
> (a) landlord under the lease, or
>
> (b) party to the lease otherwise than as landlord or tenant,
>
> to enter any part of the premises to determine whether a tenant is complying with any untransferred tenant covenant is exercisable by the RTM company (as well as by the landlord or party)."

12. Section 101 requires the RTM company to monitor compliance with tenant covenants and to make regular reports to the landlord.

13. The provisions I have set out so far deal with functions under the lease itself. They do not deal with rights or obligations imposed by statute. Statutory modifications are dealt with by section 102, which introduces a long list of statutory modifications set out in Schedule 7. These include modifications to section 19 of the Landlord and Tenant Act 1927 and the Landlord and Tenant Act 1988 (covenants against alienation); section 4 of the Defective Premises Act 1972; section 11 of the Landlord and Tenant Act 1985 (implied repairing obligations); sections 18 to 30 of the 1985 Act (service charges); sections 35, 36, 38 and 39 of the Landlord and Tenant Act 1987 (variation of leases), as well as others. The drafter's technique in these cases is to provide that references to the landlord are references to the RTM company; or that obligations of the landlord are, instead, obligations of the RTM company. Section 168 (4) of the 2002 Act is not among the modified statutory provisions.

14. The expression "landlord" is not defined by the 2002 Act, although section 112 provides:

> "(2) In this Chapter "lease" and "tenancy" have the same meaning and both expressions include (where the context permits)—
>
> (a) a sub-lease or sub-tenancy, and
>
> (b) an agreement for a lease or tenancy (or for a sub-lease or sub-tenancy),
>
> but do not include a tenancy at will or at sufferance.

(3) The expressions "landlord" and "tenant", and references to letting, to the grant of a lease or to covenants or the terms of a lease, shall be construed accordingly."

15. It is necessary at this stage to set section 168 (4) of the 2002 Act in its statutory context. It forms part of a group of provisions headed "Forfeiture of leases of dwellings". Section 168 provides:

> "(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,
>
> (b) the tenant has admitted the breach, or
>
> (c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.
>
> (3) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.
>
> (4) A landlord under a long lease of a dwelling may make an application to the appropriate tribunal for a determination that a breach of a covenant or condition in the lease has occurred.
>
> (5) But a landlord may not make an application under subsection (4) in respect of a matter which—
>
> (a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
>
> (b) has been the subject of determination by a court, or
>
> (c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement."

16. Section 169 (5) provides that "landlord" has the same meaning as in Part 2, Chapter 1 (i.e. the meaning given in section 112).

17. In any property which consists of two or more flats held on long leases it is overwhelmingly likely that the lessees will be required to contribute to a service charge. The collection of service charges will be one of the primary functions transferred to an RTM company. Control over service charges has been a feature of statute law for some 50 years. The current provisions are contained in sections 18 to 30 of the Landlord and Tenant Act 1985. Section 27A of that Act provides:

> "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."

18. That section does not, on its face, restrict the identity of person who may make such an application. Moreover, section 30 provides that:

> ""landlord" includes any person who has a right to enforce payment of a service charge"

19. Clearly, that would include an RTM company to whom the right to enforce payment of a service charge has been transferred by section 96 of the 2002 Act; but if there were any doubt as to that, Schedule 7 paragraph 4 (2) of the 2002 Act provides that where the right to manage has been acquired by an RTM company references to the landlord are to the RTM company.

20. Finally, I refer to section 176A of the 2002 Act which provides:

> "(1) Where, in any proceedings before a court, there falls for determination a question which the First-tier Tribunal or the Upper Tribunal would have jurisdiction to determine under an enactment specified in subsection (2) on an appeal or application to the tribunal, the court—
>
> (a) may by order transfer to the First-tier Tribunal so much of the proceedings as relate to the determination of that question;
>
> (b) may then dispose of all or any remaining proceedings pending the determination of that question by the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal, as it thinks fit."

21. The 2002 Act is one of the specified Acts.

The argument

22. Ms Gourlay did not challenge the Deputy President's decision that an RTM company is not the landlord. The essence of her argument is that even if the RTM company is not the landlord, it is entitled to exercise the landlord's right to apply to the FTT under section 168 (4).

23. Ms Gourlay put the argument in two ways. First, the enforcement of covenants is part of "management", although this argument was not strenuously pressed in oral argument.

24. The alternative and principal argument is that section 100 gives the RTM company the right to enforce "untransferred covenants". The expression is a puzzling one, since the Act does not refer to transferred covenants. But it must refer to those covenants which are outside the scope of section 96. The key sub-section is section 100 (2):

> "Untransferred tenant covenants are enforceable by the RTM company, as well as by any other person by whom they are enforceable apart from this section, in the same manner as they are enforceable by any other such person."

25. Thus section 100 (2) expressly provides that untransferred covenants are enforceable by the RTM company. It does not remove the power of the landlord to enforce them. But what is critical, on this argument, is that both the RTM company and the landlord are entitled to enforce the covenants "in the same manner". If, therefore, the landlord could enforce the covenant by applying to the FTT for a determination that the lessee is in breach, so, too, may the RTM company.

Practicalities

26. There are, in my judgment, good practical reasons for accepting Ms Gourlay's argument, if it is open to us to do so. As Lord Briggs explained in *FirstPort Services Ltd v Settlers Court RTM Co Ltd* [2022] UKSC1, [2022] 1 WLR 519 at [56]:

> "An RTM company is, because of the statutory provisions which regulate it, not a creature of substance. It is a company limited by guarantee with no share capital and no assets other than the right to enforce the tenant covenants in the leases of the flats in its building, otherwise than by forfeiture."

27. There are undoubtedly advantages to applying to the FTT rather than to the county court. In practice, applications under section 168 (4) are allocated to the Residential Property Tribunal. The judges of that tribunal are specialists in residential property; the procedure is potentially less formal than in the county court, and as a general rule it is a "no costs" jurisdiction. Those are benefits both to the RTM company (which will almost invariably be funded by the leaseholders through a service charge) and also to the lessee.

28. But if the Deputy President is correct, then that route is unavailable to an RTM company. On the other hand, the effect of the Deputy President's decision is that only the landlord may make such an application. But since (by definition) the RTM company is in day-to-day control of the block, it is likely to be much better placed than the landlord to give evidence about what is actually going on. This is implicitly recognised by section 101 which imposes on the RTM company a duty to monitor compliance with tenant covenants.

29. Even in a case in which forfeiture is in prospect, there may be good reason for the RTM company to make the initial application to the FTT. In a case such as the present, where the complaints relate to the day-to-day conduct of the lessee or his sub-tenant, the RTM company may again be in a far better position than the landlord to prove the case. Once the RTM company has secured the determination of the FTT that a breach has indeed been committed, the way is clear for the landlord to serve a section 146 notice and, if the breach remains unremedied, to begin proceedings for forfeiture.

Is the application "management"?

30. Section 96 (5) describes "management functions". It refers specifically to services, repairs, maintenance, improvements and insurance. It does not refer to the use of leasehold property. But tacked on to the end of the description is "management". Ms Gourlay's first argument is that the application to the FTT is part of "management" which has been transferred to the RTM company under section 96. This argument does not discriminate between particular types of lessee covenant. It would encompass the enforcement of tenant covenants whatever their nature. The consequence is that what had been the landlord's power to enforce covenants has been transferred to the RTM company by virtue of section 96 (2). If that is correct, it seems to me to follow that the landlord cannot enforce the covenants, because section 96 (2) provides that management functions under the lease are functions of the RTM company "instead" of the landlord; and section 97 (2) actually prohibits the landlord from doing anything that the RTM company is empowered to do under the lease by virtue of section 96 except by agreement with the RTM company. There may be certain covenants which the landlord has a real and powerful interest in enforcing. For example, a covenant against making alterations may, if broken, endanger the fabric of the building. It would, I think, take very clear language to deprive a landlord of its ability to enforce a covenant of that nature. The rather vague expression "management" is not, in my judgment, clear enough.

Is the application covered by section 100 (2)?

31. The second argument is that the application is part of the enforcement of covenants, which may be undertaken either by the RTM company or the landlord (or both); and therefore, that the RTM company was entitled to make the application under section 168 (4) "in the same manner" as the landlord. The Deputy President rejected this argument because the RTM company was not "the landlord".

32. In its Consultation Paper on The Right to Manage (Consultation Paper 243) the Law Commission took the view that either the landlord or the RTM company could make the application. In paragraph 10.12 the Commission said that covenants such as covenants against nuisance behaviour or sub-letting could be enforced by both the RTM company and the landlord. They went on to say in paragraph 10.13 that both the court and the FTT had jurisdiction to deal with such disputes (referring in a footnote to section 168), but without distinguishing between the RTM company on the one hand and the landlord on the other. This view does not appear to have been repeated in its final report: Law Com No 393.

33. Looking first at section 168 (4), I consider that acceptance of Ms Gourlay's second argument is not precluded by the use of the word "landlord" in that sub-section. Section 100 (2) gives the RTM company the right to enforce the covenant "in the same manner" as the landlord. Plainly that would

include, for example, an action for damages for breach of covenant or an injunction restraining a breach. It would also, in my judgment, include a claim for a declaration that the lessee was in breach of covenant. The only remedy that the RTM company cannot exercise is that of forfeiture. An action for damages for breach of covenant or for an injunction restraining breach would have to be started in the county court. But if there were any issue about whether a breach had been committed, the county court would almost certainly wish to transfer those issues to the FTT pursuant to section 176A of the 2002 Act. The court's power of transfer to the FTT, however, is limited to cases in which there is a question which the FTT would have jurisdiction to decide "on an application" to the tribunal under the 2002 Act. If the Deputy President is correct, the court could transfer the question whether there had been a breach of covenant to the FTT if the action had been brought by the landlord, but not if it had been brought by the RTM company because (on the basis of the Deputy President's decision) it would not have had jurisdiction on an application made by the RTM company. It is difficult to discern a policy reason why Parliament would have intended that radical difference in available dispute resolution mechanisms.

34. Moreover, in a case where it is alleged both that service charge has not been paid and also that there are other breaches of covenant, the service charge aspects of the claim could be transferred to the FTT, but whether other breaches have been committed could not. Clearly, that would complicate proceedings.

35. The Deputy President placed some weight on the list of statutory provisions in Schedule 7 that were specifically amended by the 2002 Act. Section 168 (4) was not among them. But that was principally in connection with an argument that the expression "landlord" was wide enough of itself to encompass an RTM company, rather than the slightly different argument that Ms Gourlay has advanced on this appeal. In addition, the statutes modified by Schedule 7 are almost all concerned with substantive rights and obligations, rather than procedural mechanisms for dealing with disputes. I do not, therefore, consider that the modifications to other statutes made by Schedule 7 are an obstacle.

36. In my judgment the express power given to the RTM company to enforce covenants "in the same manner" as the landlord is capable of encompassing not only the remedies involved, but also the forum in which those remedies or issues are decided. The only restriction, contained in section 100 (3), relates to the exercise by the RTM company of functions of re-entry or forfeiture.

Is the application on the forfeiture side of the line?

37. It is to be noticed, that whereas section 96 (6) excludes from the exclusive transfer to the RTM company of "functions *relating to* re-entry or forfeiture," section 100 (3) precludes the RTM company exercising the "function *of* re-entry or forfeiture." In my judgment that suggests a narrow interpretation of the prohibition in section 100 (3).

38. It is true that section 168 (1) is concerned with paving the way to a forfeiture. But an application to the FTT under section 168 (4) is not, itself, a proceeding for forfeiture. It may be a necessary precondition to the exercise of a right of forfeiture, but it is a discrete and separate step. The mere fact that the FTT has found the existence of a breach of covenant may itself persuade the tenant to cease the activities complained of or remedy the breach without the need for further action. Alternatively, it may, for example, be the prelude to obtaining a judgment from the county court for an injunction or damages; or a charging order; or enabling the landlord to serve notice under section 146 of the Law of Property Act 1925 and forfeit the lease. A determination under section 168 (4) is no more than a declaration that a breach has taken place and cannot without more be enforced in the county court: compare *Termhouse (Clarendon Court) Management Ltd v Al-Balhaa* [2021] EWCA Civ 1881, [2022] 1 WLR 1529 (dealing with determinations of the amount of service charge payable). Quite apart from that, an application to the FTT alone cannot result in a forfeiture. The FTT has no jurisdiction to entertain a forfeiture action; and no jurisdiction either to make an order for possession or to grant relief against forfeiture. These are questions for the county court. If proceedings for forfeiture are to be pursued they must be pursued, if at all, in court. Nor does the FTT have the power to consider whether a right to forfeit for breach of covenant has been waived or whether a breach has been remedied: *Kyriacou v Linden* [2021] UKUT 288 (LC), [2022] L & TR 19, following *GHN (Trustees) Ltd v Glass* LRX/153/2007. If a breach has been remedied, there can be no question of a subsequent forfeiture.

39. To the extent that the FTT or the UT considered that an application under section 168 (4) was "on the forfeiture side of the line", I respectfully disagree.

Result

40. Since there are good practical reasons for accepting Ms Gourlay's second argument, and no legal impediments to it, I joined in the decision to allow the appeal on that ground.

41. Ms Gourlay applied for an order for the RTM company's costs to be paid by the lessee. We decline to make that order. First, the jurisdictional point was not one that the lessee took. It was raised by the FTT of its own motion. Second, the lessee has not played any part in the application and has not resisted the appeal. Third, CPR rule 52.19 (1) gives the court an unrestricted power to limits costs in an appeal from a "no costs" jurisdiction. Although rule 52.19 (4) says that an application must be made as soon as possible, the making of such an application does not appear to be a pre-condition to the application of rule 52.19 (1). Fourth, although Ms Gourlay submitted that it would be unfair for the lessees collectively to pay for proceedings to curtail anti-social behaviour, no facts have yet been found and consequently at this stage allegations of anti-social behaviour are no more than allegations.

Lady Justice King:

42. I agree with both judgments.

Lady Justice Andrews:

43. I have had the advantage of seeing in draft the judgment of Lord Justice Lewison, with which I respectfully agree. I agree with my Lord, for all the reasons he has given, that it is desirable that the RTM company should be able to make an application under section 168(4). Of course, it does not follow from the fact that something is desirable that it is permitted by statute. Fortunately, in this case it is both desirable and permissible.

44. The covenants with which the tenant in this case is alleged to have failed to comply fall within the definition of "untransferred tenant covenants" in section 100(4). They are therefore enforceable by the RTM company in the same manner as they are enforceable by the landlord. On the face of it, as the FTT accepted, section 100(2) operates to confer on the RTM company a right which it would not otherwise have (because it is not a landlord) to make an application that the landlord could make under section 168(4) for a determination by the FTT that there has been a breach of covenant. The key issue is therefore whether section 100(3) precludes the exercise of that right.

45. In my judgment, in making such an application, the RTM company is not "exercising a function of re-entry or forfeiture" which is prohibited by section 100(3). That is illustrated by two of the decisions of the UT referred to by Ms Gourlay, *Bedford v Paragon Asra Housing Ltd* [2021] UKUT 266, [2022] L & TR 7, and *Kyriacou v Linden* (above). Both concerned applications by a landlord under section 168(4) for a determination of whether there had been a breach of covenant. In *Bedford*, the tenant alleged that the breach had been waived, and that the application should have been struck out as an abuse of process. The UT rejected that contention. The Deputy President observed at [28] that:

> "The FTT's jurisdiction under section 168, 2002 Act, is to determine whether a breach of covenant has occurred. Before the right to forfeit for a breach of covenant can be waived, it is necessary that a breach of covenant must first have been committed. It is the determination of *that prior question* which has been allocated by statute to the FTT." [Emphasis added].

46. In a later passage at [46] to [48] he went on to explain that the availability of alternative remedies to forfeiture was highly relevant to the question whether the application was abusive, pointing out that the landlord might seek an injunction or damages, and that whichever remedies the landlord chose to pursue, it was essential for it first to be determined whether a breach of covenant had occurred.

47. In *Kyriacou v Linden* the tenant submitted that the breach of covenant complained of had been remedied, and the FTT refused to make a determination that there had been a breach. The landlord's

appeal succeeded. The Deputy President said, at [33] that:

> "it is clear on the face of the statute that the FTT's only task is to determine whether a breach of covenant has occurred. Whether any breach has been remedied, or the right to forfeit for that breach has been waived, are not questions which arise under this jurisdiction".

48. These cases demonstrate that, despite the fact that section 168 appears under the general heading "forfeiture of leases of dwellings", although a determination under section 168(4) may be a step on the path to forfeiture, that is not its sole function. In making an application under section 168(4) the applicant is doing no more than seeking to obtain a determination by a specialist tribunal that may be used for a number of purposes including (but not limited to) the service of a notice by the landlord under section 146. If such a determination may be sought and obtained in circumstances where forfeiture is no longer an option (e.g. where there has been a waiver of the right to forfeit, or the breach has been remedied), the applicant cannot be exercising a function of forfeiture in asking the FTT to make such a determination.

49. To my mind, therefore, section 100(3) is no obstacle. Section 100(2) confers the necessary power upon the RTM company to make an application under section 168(4). I therefore agree that we should allow this appeal.

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