FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BK/LBC/2019/0029**
Property	**:**	**80A, Balcombe Street, London, NW1 6NE**
Applicant	**:**	**Rapperwood Limited**
Representative	**:**	**Verina Glaessner**
Respondents	**:**	**Kimberley Chutpinyacoub**
Representative	**:**	**Bowman & Company**
Type of Application	**:**	**Application for a determination in respect of an alleged breach of covenant – section 168(4) Commonhold and Leasehold Reform Act 2002**
Tribunal Member	**:**	**Mrs H C Bowers** **Mr K Ridgeway MRICS** **Ms N Rushton QC**
Date and Venue of Hearing	**:**	**8 July 2019 at** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**16 August 2019**

DECISION

Decision of the Tribunal

- The Tribunal finds that there is no breach of clause 3(xiii)
- The Tribunal finds that there is no breach of clause 3(xiv)
- The Tribunal makes an order under section 20C of the Landlord and Tenant 1985 Act that none of the costs incurred by the Applicant in connection with these proceedings may be recovered through the service charge
- The Tribunal makes an order under paragraph 5A of Schedule 11 to Commonhold and Leasehold Reform Act 2002 extinguishing the Respondent's liability to pay any of the costs incurred by the Applicant in connection with these proceedings and
- The Tribunal makes no cost order for either party under paragraph 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

The Application

1. An application dated 15 April 2019, was received by the Tribunal under section 168(4) of the Commonhold and Leasehold Reform Act (CLARA) for a determination as to whether there has been a breach of covenant under the terms of the lease granted for 80A, Balcombe Street, London, NW1 6NE ('the Flat').

2. The flat is described as a one-bedroom basement flat in a Grade II terraced house that is part of the Portman Estate. The property is situated in the Dorset Square Conservation area. It appears that there are three flats in the building, the basement flat that is the subject of this application; a ground floor flat and a three-storey maisonette.

3. The Applicant, Rapperwood Limited (Rapperwood), holds the freehold interest in 80, Balcombe Street, London, NW1 6NE (the Building) under title number LN90165. The Respondent, Kimberley Chutpinyacoub, holds a long leasehold interest of the flat under title number NGL979858. It appears that the lease was extended under the provisions of the Leasehold Reform, Housing and Urban Development Act 1993. The extended lease is dated 4 June 2018 and is for a term of 189 years from 1 July 1977.

4. On 23 April 2019, the Tribunal gave Directions. These set out the issues that the Tribunal would need to consider. The Respondent was advised to seek independent legal advice.

5. The Tribunal had bundles from both the Applicant and the Respondent. Documents referred to in these reasons are referenced with the pre-fix A and the page number for the Applicant's bundle and R plus the page number for the Respondent's bundle.

The Hearing

6. A hearing was held on 8 July 2019 at 10:00am at 10, Alfred Place, London, WC1E 7LR. The Applicant, Rapperwood, was represented by Mrs V Glaessner and the Respondent, Ms Chutpinyacoub was in attendance and was represented by Ms Scarborough.

7. As set out in the Directions the Tribunal will reach its decision on the basis of the evidence produced and the burden of proof rests with the Applicant.

8. The relevant sections of CLARA are set out in an Appendix to this decision.

The Lease

9. As mentioned above the lease for the flat is dated 4 June 2018 and is for a term of 189 years from 1 July 1977. The relevant clauses for this application are under Clause 3. The copy of the lease available to the Tribunal and the parties was poor and Ms Scarborough provided a transcript which is set out below. There was no particular dispute as to the transcript, other than as described in the decision below. Clause 3, provides that "*The Lessee for himself and his executors administrators successors in title and assigns HEREBY COVENANTS with the Lessor as follows:-*

    (a) *(xiii) Within seven days of the receipt of any notice of whatever nature or kind affecting the Flat by the Lessee or any sub-tenant give or procure to be given to the Lessee full particulars thereof and in the event of there being served any notice or order or proposal for a notice or order affecting the Flat or the owners or occupiers thereof made given or issued by a Planning Authority or by virtue of the Planning Acts then the Lessee will forthwith if so required by the Lessor produce or procure the production of every such notice or order or proposal for a notice or order to the Lessor. And also will without delay take all reasonable steps to comply with any such notice or order. And also at the request of the Lessor will make or join with the Lessor in making such objections or representations against or in respect of any proposal for such a notice or order as the Lessor shall deem expedient.*

    (b) *(xiv) Not to do or omit to do or suffer to be done or omitted any act matter or thing in on or respecting the Flat or the Building the doing or omission to do which (as the case may be) would be a breach of any provision of the Planning Acts or which vitiates any policy or policies of insurance maintained by the Lessor on the Building or*

causes any increased premium to become payable thereunder and to repay to the Lessor any increased premium which thereby become payable on any such Policy or policies and at all times hereafter to indemnify and keep indemnified the Lessor from and against all actions proceedings costs expenses claims and demands in respect of any such act matter or thing vitiating any such policy or policies as aforesaid or contravening the said provisions of the said Acts or any of them as aforesaid".

The Evidence and Submissions:

Clause 3(xiii)

10. In respect of the alleged breach of clause 3(xiii), Mrs Glaessner stated that Ms Chutpinyacoub had not notified or provided the Applicant with any of the correspondence with Westminster City Council (Westminster). It is stated that there was a Building Notice from building control at Westminster. Westminster has not provided Rapperwood with a copy due to GDPR restrictions and Mrs Glaessner stated that she had never seen the document. Mrs Glaessner states that there is a distinction between the Enforcement Notice and a Building Notice and that a Building Notice would fall within the scope of the Planning Acts. She relied on correspondence in her bundle to indicate that there was a dialogue between Ms Chutpinyacoub and Westminster. It is suggested that clause 3(xiii) is wide enough to cover correspondence and proposals to be made. The failure to provide copies of any relevant document would have an impact as there are issues regarding the structural stability of the Building. There is a witness statement from Ms Sian Glaessner, a director of the Applicant company and the long leaseholder of the upper maisonette in the Building. This suggested that the Respondent had not been transparent, nor had shared the plans for the renovation of the Flat.

11. In responding to questions from Ms Scarborough, Mrs Glaessner stated that she had arranged to padlock the entrance to the Flat as it was empty. Consequently, it was accepted that the postman would have no access to the steps for the Flat and Mrs Glaessner stated that post was delivered to the letter box on the ground floor of the Building. Responding to A120, an email dated 15 August 2018 to her solicitors which stated, "*I at no point refused to return the keys, of course, and took the opportunity to return several months of correspondence to her at the same time*", Mrs Glaessner stated that she had collected the correspondence for the Respondent and had handed it over, the Respondent should have put alternative arrangements in place for her post and that the Respondent could have had her correspondence if it had been requested. It was put to Mrs Glaessner that if there had been a notice in that correspondence, it would have been difficult for Ms Chutpinyacoub to hand it over. It was also put to her that she had misunderstood the position with the correspondence with Westminster. She accepted that Westminster did get things wrong, but she ultimately would go with what they stated. It was accepted by her that the Applicant had received copies of the notice for the Listed Building Consent dated 30 April 2019 (R19).

12. Mrs Glaessner accepted that there had been communications between Westminster and the Respondent regarding the ceiling of the Flat in mid- 2018. She was referred to an email that was sent to her on 5 August 2018 (A107) that copied correspondence between the Respondent and Westminster. This included an email from Ms Chutpinyacoub dated 9 May 2018 asking for "*the letter enforcement reference Dp/pet/18/67348/m*" and the response from Westminster on 11 May 2018 that stated, "*Further to your request, please find attached a scanned PDF copy of the City Council's letter dated 19 April 2018*". Mrs Glaessner stated that she had been sent a copy of the letter dated 19 April 2018. She described that two letters had been delivered through the letter box of the ground floor door. They were apparently the same letter and one was addressed to the Applicant and was a copy of an Enforcement Notice and the second was addressed to Ms Chutpinyacoub. Neither Ms Chutpinyacoub nor her mother (acting as the respondent's agent) had a key to the ground floor communal area, but Mrs Glaessner stated that she gave a copy of the letter to the Respondent's mother.

13. Ms Scarborough submitted that given the burden of proof, the Applicant had not shown which was the relevant notice and had not shown that the document had not been received. If the notice had been the letter dated 19 April 2018 from Westminster, the Applicant had received the document before the Respondent. The Respondent's position is that the relevant clause is specific and it is not aimed at general correspondence but is limited to specific documents such as a notice. It is also stated that on 5 August 2018 all the relevant correspondence including the letter of 19 April 2018 was sent to the Applicant. A technical point was taken by the Respondent that the relevant clause makes reference to the documents being provided to the Lessee rather than the Lessor.

Clause 3(xiv)

14. Mrs Glaessner explained that there had been some historical issues with regards to insurance. There had been a previous issue in respect of subsidence of the Building and the Applicant had now secured an insurance policy that covered subsidence risks and was therefore reluctant to put the policy in jeopardy. The Applicant claimed that as the Flat had been empty, subject to development and with increased insurance risks, the premiums had increased. However, Mrs Glaessner then went on to say that the Applicant's case did not extend to the claim that the insurance premiums had been increased.

15. It is claimed that the rear of the Building had been vulnerable due to an unlockable backdoor/patio. Mrs Glaessner referred to a letter from Kyriakides & Braier dated 1 November 2018 to the Respondent that stated, "*Our client's insurer has advised that 'external doors should be secured by a mortice deadlock BS3621 or by a multi-point locking system, with either a lever or built in deadlocking cylinder or key operated security bolts fitted internally to the top and bottom'*" (A79). The Applicant had not provided any correspondence from the insurers but Mrs Glaessner stated that she had corresponded with them and they confirmed their requirements for the locks. Mrs Glaessner said the lock had been on the door for 25 years, it did not work

and was old and rusty and the Respondent should have changed the lock when the Flat was acquired.

16. Responding to the Respondent's point that the door had been damaged by the Applicant's contractors, Mrs Glaessner stated that prior to any alleged incident, the lock was not of a BS standard. She acknowledged that the insurers were aware that the Flat was empty and in a poor condition and she had notified them of the security arrangements.

17. Ms Scarborough asked Mrs Glaessner about an email she sent to her solicitors dated 29 October 2018 (A133) in which she stated "*The insurers recommend fully functioning locks of a particular standard. The lock on the rear door to the rear yard does not meet requirements. It did not while the long-term resident lived there and it certainly does not now*". It was suggested that 'recommend' was not a requirement. Mrs Glaessner considered that if the Applicant was not to follow the recommendations, then the insurers would not honour any claim made. She stated that she had provided the insurers with all the correct information about the Building.

18. Mrs Glaessner confirmed that the Applicant changed the lock on 12 February 2019 and said that the Respondent should bear the cost. Ms Scarborough referred Mrs Glaessner to the accounts for the year ending March 2019 (R22) which showed that the insurance premium had increased from £1,042.80 to £1,582.00. It was put to her the increase in the premium had occurred after the lock had been changed, but she responded that higher premium was due to the flat being empty.

19. The Applicant accepted that the replaced lock had been part of the property demised to the Respondent and the repair obligation for it was with the Respondent. However, it was denied that the Applicant's contractors had broken the lock Mrs Glaessner said that the lock was in working order when it was replaced but was replaced because this was an insurance recommendation.

20. Ms Chutpinyacoub explained that Mrs Glaessner had used the Flat for access relating to works to be carried out on behalf of the Applicant. The keys had been borrowed for three weeks and she had assumed the keys were used by the Applicant's contractors. Both prior and afterwards to the Applicant's workmen using the patio door, there had been no problems with the lock. In her opinion the lock was fine but the Applicant's contractors had damaged the door frame. It is claimed that the Applicant stated that the lock was not in good working order but refused to ask the contractors to return to repair the lock. When Ms Chutinyacob examined the lock, she considered that it was stiff but it was operational. She had contacted the insurers to clarify the position in respect of the lock, but could not obtain any information as she was not the policy holder. At no stage did she or her mother leave the door unlocked. There was an incident with unauthorised access to the building and Mrs Glaessner had changed the padlock to the front gate to the Flat and had not provided any keys.

21. Ms Scarborough submitted that it is for the Applicant to prove that any breach by the Respondent resulted in either an increase in the insurance premium or vitiates the policy. She submitted it was denied that the property was left unlocked and this has not been proven. In respect of the lock the Respondent's position is that the lock was not broken, it was stiff but the Applicant's contractors had damaged the frame, a point that had not been denied. If the lock had been damaged by the Applicant's contractors, then it is the company who should bear the cost. The Flat had been locked and was not insecure. Even if the actions of the Respondent had resulted in an increase in the premium then she would be liable for that extra cost, but that had not been proven. It has been suggested that the failure to fit a 'recommended' lock would affect the premium, but that has not been proven but the evidence was that even when the lock was replaced by the Applicant there had been an increase in the premium. On the balance of probabilities any increase in the premium was most likely to be due to the extension in the policy to cover subsidence.

22. The Applicant alleged that the lath and plaster ceiling in the Flat had been removed and the failure to obtain Listed Building Consent was a breach of the Planning Acts. Reference was made to various correspondence sent to the Respondent (A74, A 77 and A81) from the Applicant or its solicitor when the various breaches were alleged. The Applicant claims that it has incurred £1,175.00 plus VAT dealing with these breaches and that the Respondent should be liable for those costs. These costs arise from the engagement of the Applicant's solicitors and their correspondence with the Respondent dealing with the 'unauthorised development'. The request for this sum is made in a letter from Kyriakides & Braier dated 1 November 2018 (A78).

23. The Respondent's position was that she had been waiting for planning permission and that there had been delays to the development of the flat due to the Applicant refusing agreement to damp proofing works. The plaster was removed from the ceiling by Ms Chutpinyacoub's contractors but without her permission. The Respondent's instructions to her contractors was to remove the fixtures and fittings, but they had taken it upon themselves to remove the ceiling as they considered it was in poor condition and she told them to stop when she was made aware that they had taken down the ceiling. The Respondent was unable to say if the contractors had done any further work.

24. Reference was made to an email from John Caulfield from Thames Building Control to the Respondent's representative dated 20 May 2019 (R9) that detailed the removal/collapse of the ceiling and what remedial work was needed. It was agreed that there was no enforcement action in respect of this issue. However, Mrs Glaessner stated that within the scope of works of development would be acts that change the character of a building and that the removal of a lath and plaster ceiling from a listed property such as this would change its character. Ms Scarborough suggested that Westminster would seem to consider that there was no change in character as they had not pursued any enforcement action. Part of the current Listed Building Consent (LBC) includes works to replace the ceiling and therefore even if there was a breach, there was no practical effect due to the LBC.

25. Mrs Glaessner was taken to a letter written by her solicitors (A75) that required various steps to be undertaken by the Respondent within seven days. Responding to those six points, she acknowledged that the work at the Flat had ceased; she maintained that she should have been provided with copies of reports and planning permissions and she acknowledged that the remaining four points were not related to any planning issues. Ms Chutpinyacoub confirmed that all action points listed in the letter had been complied with prior to 14 August 2018.

26. In an email dated 28 February 2018 sent by the Respondent's brother to the Applicant (R26) the work to be undertaken by the Respondent's contractors was described as '*all we are doing is move all fixture and fitting bathroom kitchen and remove all damp wall. Once the wall clear of the damp which will take around a month then we will let you know what plan to do*'. The contractors then attended in March 2018 and had seen yellow staining to the ceiling, so had pulled away the lath and plaster. The Respondent then instructed them to stop work. There was no specification of works as they had agreed an hourly rate and had met the contactors on site and given them verbal instructions.

27. The Respondent's position is that the Respondent had not instructed her contractors to remove the ceiling, they had done so under their own initiative. When the Respondent became aware of what had occurred, she instructed the work to stop. Ms Scarborough referred the Tribunal to the decision in Hagee (London) Ltd v Cooperative Insurance Society Ltd (1992) 63 P & CR 362, (Hagee) which states '*In my judgement a tenant cannot be held responsible for work not done by it, not authorised by it nor known of by it. I hold that Hagee committed no breach of its covenants with the landlord by reason of the fact that these works were carried out to the building'*. Hagee was a case in which the tenant's subcontractor had carried out works without the tenant's knowledge or consent and the issue was whether those actions should be attributed to the tenant, because if they should be, that would have amounted to a breach of the lease in that case. Ms Scarborough said the same principle applied here (even if it was proved by the Applicant that the action of pulling down the ceiling amounted to a breach of the lease). It was also on the Applicant to prove that there has been a change to the character of the Flat, which was not proven and there was no evidence of any enforcement action. In the alternative then if there was a breach and some costs are payable then those costs that relate to clause 3(xiv) should be considered. However, the sum claimed of £1,175.00 covered a number of issues that were not within the scope of clause 3(xiv) and in any case no statement of costs had been provided.

28. In summing up Mrs Glaessner stated that the policy of Westminster City Council was such that the change to the character of a building included its interior. She considered that it was unlikely that a contractor would go beyond the scope of their contact/instructions and that the Respondent had not produced a schedule of works or specification.

The Tribunal's Determination

Clause 3(xiii)

29. In coming to its determination, the parties were and are advised that it is not sufficient that the Applicant alleges that the lease has been breached, the Tribunal requires evidence that the breaches have occurred. The burden of proof to provide that evidence is on the Applicant.

30. The Tribunal determines that clause 3(xiii) is limited to the provision of a notice, order or a formal proposal and does not envisage the provision of general correspondence. Therefore, there is no obligation on the Respondent to provide copies of her general correspondence with Westminster to the Applicant. It is for the Applicant to prove what documents were required to be provided. The Applicant makes various references to a Building Notice, but there is no evidence that such a document existed. The only document that may be a notice, order or proposal seems to be the letter of 19 April 2018. This was copied to the Applicant on 5 August 2018 (A107 and A110), so beyond the seven days as required under clause 3(xiii). However, the Tribunal has not been provided with a copy of this letter, so we are not able to find that it is a document that would come within the scope of the clause. In particular it could be that the letters to both the Applicant and the Respondent, that went to the ground floor common parts as described by Mrs Glaessner in paragraph 12 above, are the same documents as the letter dated 19 April 2019. But again, the Tribunal has not been provided with copies of these documents. Without these documents, the Tribunal is not able to find that these are notices, orders or proposals within the meaning of the clause and therefore The Tribunal finds that no breach of clause 3(xiii) has been proven.

Clause 3(xiv)

31. In respect of the lock on the patio doors, there is a conflict in the oral evidence of the parties with the Applicant stating that it was damaged and the Respondent denying that it was damaged. The burden of proof is on the Applicant and it did not provide any specific evidence that the lock was damaged. Ms Glaessner's evidence was inconsistent as to whether the lock was broken or only non-compliant with the insurer's recommendation (see para. 19 above). As to the specification of the lock that should be installed, the Applicant makes reference to the insurer's recommending a particular standard of lock, but there is no evidence originating from the insurer that the lock was a requirement of the insurance policy. Additionally, the Tribunal noted that Mrs Glaessner had stated in oral evidence that the insurer knew of the security arrangements and the condition of the Flat. The Tribunal also noted that in fact the insurance premium had increased after the Applicant had fitted a new lock and there is a clear possibility that the increase in the premium was due to the extended insurance policy to cover subsidence or even insurance market forces. Overall, the Tribunal was not persuaded on the balance of probabilities that the insurance policy had been vitiated nor that there had been any increase in the insurance premium because of the situation with the lock. Therefore, the Tribunal finds that in respect of the lock to the patio door that there was no breach of the lease by the Respondent.

32. The evidence of Ms Chutpinyacoub was that she gave verbal instructions to her contractors to remove the fixtures and fittings and there is no evidence that contradicts that position. The Tribunal accept the Respondent's position that her contractors acted on their own initiative. Following the decision in Hagee, the work done by the contractors and without instruction would not amount to a breach of covenant by the Respondent. Therefore, the Tribunal finds that in respect of the ceiling that there was no breach of the lease by the Respondent.

Costs

33. On behalf of the Respondent, Ms Scarborough made an application for costs under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. She also applied for orders under section 20C of the Landlord and Tenant Act 1985 and paragraph 5A to Schedule 11 of CLARA. Although some submissions were made at the hearing, the Tribunal made further directions so that the extent of the costs claimed was identified and to give the Applicant an opportunity to respond to the costs claimed.

34. In compliance with those Direction the Tribunal received a letter from Bowman & Co dated 15 July 2019 with the Respondent's statement of costs. The total costs claimed are £9,456.00.

35. Ms Scarborough submitted that the application had been made on trivial grounds. There had been no breaches and if there had been breaches, then these had been dealt with by the obtaining of Listed Building Consent. Mrs Glaessner had been referred to A123 which is an email that she wrote to Ms Chutpinyacoub on 16 August 2018 which starts with the comment 'Thank you for your predictable response'. She was asked if she considered this professional language, to which she responded - yes. She also considered that an email to her solicitors in which she stated 'Kimberley's mother, had, delightfully to call the young man off as he sidled up to me, in best karate film style. I've seen a lot of Hong Kong movies but don't appreciate being in one' was also professional but was ironic. It was suggested that there was an element of harassment from Mrs Glaessner in the way she had communicated with the Respondent. Overall the Applicant had been unreasonable in bringing the application.

36. Mrs Glaessner's position is that the Applicant had felt legally bound to communicate with the Respondent and the communication had been made in good faith. She confirmed that the Applicant would not be trying to recover the costs of the application via the service charge mechanism. In a letter dated 18 July 2019 in compliance with the further directions, Mrs Glaessner repeated her claim for the Respondent to pay the Applicant the sum of £1,175.00 plus VAT to indemnify the Applicant for its legal costs plus a further £114.00 for the cost of replacing the lock. She said the Applicant has not had engagement from the Respondent about her plans for the Flat and that was why it had been necessary to bring the application. Mrs Glaessner stated that the Applicant had not been at fault and it would be unreasonable for it to be subject to costs. The costs claimed were grossly disproportionate and it is suggested that the correspondence from the Respondent's solicitors includes matters that are not within the scope of the application.

37. In respect of the Rule 13 application the Tribunal followed the guidance given in Willow Court Management Limited v Alexander [2016] UKUT 290 (LC) (Willow Court). The first stage is to consider if there was any unreasonable behaviour in the bringing and conducting of this case. Whilst the Applicant has not been successful in this application, in the opinion of the Tribunal this cannot be considered as unreasonable behaviour. The directors of the Applicant company were essentially litigants in person, rather than a commercial landlord and the documents provided in the file provide a glimpse of the frustration of both sides. But this in itself is not unreasonable on any particular party. Ms Scarborough had referred Mrs Glaessner to certain emails (as set out above) and whilst unfortunate they were communications prior to the application and do not in the Tribunal's views suggest unreasonable behaviour. So overall the Tribunal does not find that the Applicant was unreasonable in bringing or conducting the case. As there is no finding of unreasonable behaviour, it is unnecessary to consider the additional stages from the Willow Court decision.

38. In respect of the application for orders under section 20C and paragraph 5A, the comments of the Applicant that it will not seek its costs as a service charge item is noted. However, the Tribunal is still required to make a determination on these points. Essentially the Respondent has been successful in this case. The Applicant has pursued its application in a long-winded and often quite muddled way and overall there has been little substance to the arguments pursued. In these circumstances the Tribunal considers that it is right to make orders under section 20C of the 1985 Act and under paragraph 5A of Schedule 11 to CLARA.

39. As regards the Applicant's own application for the reimbursement of its costs for the replacement of the lock for the rear door, this is not a matter for the Tribunal under this application. The current case is limited to whether the Respondent is in breach of the terms of her lease and costs under Rule 13, section 20c and paragraph 5A. If the Tribunal takes the application for the reimbursement of legal costs under Rule 13, then as explained in paragraph 37, the Tribunal needs to consider whether there has been any unreasonable behaviour on the part of the respondent in the conduct of the case. The Respondent has been in a position where she has had to provide a defence and the Tribunal cannot identify any behaviour by the Respondent that we would classify as unreasonable. As such the tribunal makes no order under Rule 13 for the Respondent to reimburse any costs to the Applicant.

40. Therefore, in conclusion, the Tribunal:-

- makes an order under section 20C of the 1985 Act that none of the costs incurred by the Applicant in connection with these proceedings may be recovered through the service charge;
- makes an order under paragraph 5A of Schedule 11 to CLARA extinguishing the Respondent's liability to pay any of the costs incurred by the Applicant in connection with these proceedings; and
- makes no costs order under paragraph 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Mrs H C Bowers **16 August 2019**

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

1. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Appendix of Relevant Legislation

Landlord and Tenant Act 1985

Section 20C.— Limitation of service charges: costs of proceedings.

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court [, residential property tribunal] or leasehold valuation tribunal [or the First-tier Tribunal] , or the [Upper Tribunal] , or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to [the county court] ;
(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;
(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
(ba) in the case of proceedings before the First-tier Tribunal, to the tribunal;
(c) in the case of proceedings before the [Upper Tribunal], to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to [the county court].
(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Section 168 - No forfeiture notice before determination of breach

(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][1] 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.
(6) For the purposes of subsection (4), *"appropriate tribunal"* means—
(a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and
(b) in relation to a dwelling in Wales, a leasehold valuation tribunal.

Section 169 - Section 168: supplementary

(1) An agreement by a tenant under a long lease of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject of an application under section 168(4).
(2) For the purposes of section 168 it is finally determined that a breach of a covenant or condition in a lease has occurred—
(a) if a decision that it has occurred is not appealed against or otherwise challenged, at the end of the period for bringing an appeal or other challenge, or
(b) if such a decision is appealed against or otherwise challenged and not set aside in consequence of the appeal or other challenge, at the time specified in subsection (3).
(3) The time referred to in subsection (2)(b) is the time when the appeal or other challenge is disposed of—
(a) by the determination of the appeal or other challenge and the expiry of the time for bringing a subsequent appeal (if any), or
(b) by its being abandoned or otherwise ceasing to have effect.
(4) In section 168 and this section *"long lease of a dwelling"* does not include—
(a) a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (c. 56) (business tenancies) applies,

(b) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 (c. 5) in relation to which that Act applies, or
(c) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (c. 8).
(5) In section 168 and this section—
"arbitration agreement" and *"arbitral tribunal"* have the same meaning as in Part 1 of the Arbitration Act 1996 (c. 23) and *"post-dispute arbitration agreement"*, in relation to any breach (or alleged breach), means an arbitration agreement made after the breach has occurred (or is alleged to have occurred),
"dwelling" has the same meaning as in the 1985 Act,
"landlord" and *"tenant"* have the same meaning as in Chapter 1 of this Part, and
"long lease" has the meaning given by sections 76 and 77 of this Act, except that a shared ownership lease is a long lease whatever the tenant's total share.
(6) Section 146(7) of the Law of Property Act 1925 (c. 20) applies for the purposes of section 168 and this section.
(7) Nothing in section 168 affects the service of a notice under section 146(1) of the Law of Property Act 1925 in respect of a failure to pay—
(a) a service charge (within the meaning of section 18(1) of the 1985 Act), or
(b) an administration charge (within the meaning of Part 1 of Schedule 11 to this Act).

Schedule 11 paragraph 5A

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.
(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.
(3) In this paragraph—
(a) *"litigation costs"* means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and
(b) *"the relevant court or tribunal"* means the court or tribunal mentioned in the table in relation to those proceedings.

Proceedings to which costs relate	***"The relevant court or tribunal"***
Court proceedings	The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court
First-tier Tribunal proceedings	The First-tier Tribunal
Upper Tribunal proceedings	The Upper Tribunal

Arbitration proceedings	The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court.”

Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013/1169

Rule 13.— Orders for costs, reimbursement of fees and interest on costs

(1) The Tribunal may make an order in respect of costs only—
(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—
(i) an agricultural land and drainage case,
(ii) a residential property case,
(iii) a leasehold case,
(iv) a tenant fees case; or
(c) in a land registration case.
(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.
(3) The Tribunal may make an order under this rule on an application or on its own initiative.
(4) A person making an application for an order for costs—
(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and
(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.
(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—
(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
(b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.
(6) The Tribunal may not make an order for costs against a person (the “paying person”) without first giving that person an opportunity to make representations.
(7) The amount of costs to be paid under an order under this rule may be determined by—
(a) summary assessment by the Tribunal;
(b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the “receiving person”);

(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

(8) The Civil Procedure Rules 1998, section 74 (interest on judgment debts, etc) of the County Courts Act 1984 and the County Court (Interest on Judgment Debts) Order 1991 shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.

(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.