FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AU/LBC/2019/0057**
Property	:	**Flat 8, 152 Goswell Road London EC1V 7DY**
Applicant	:	**Ground Rent Trading Limited**
Representatives	:	**Mr Paul Simon; In-house Solicitor**
Respondents	:	**Norman Stephen Norton**
Representative	:	**Mr Gary Cowen of Counsel**
Type of Application	:	**Application for an order that a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002**
Tribunal Members	:	**Judge Professor Robert Abbey** **Mr Luis Jarero BSc FRICS**
Date and venue of Hearing	:	**6th November 2019 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**11 November 2019**

DECISION

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Decisions of the Tribunal

(1) The Tribunal grants the application for an order that a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002.

(2) The reasons for our decision are set out below.

The background to the application

1. The Applicant seeks an order that a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002. The application concerns alleged breaches ("the alleged breaches") carried out at **Flat 8, 152 Goswell Road London EC1V 7DY** ("the property.").

2. Section 168 of the Commonhold and Leasehold Reform Act 2002 provides as follows with sub-section (4) shown in bold:

> *(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 a leasehold valuation 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.

3. The applicant is the registered proprietor of the land and buildings comprising part of the ground, first, second, third and fourth floors being part of 150 to 164 (even) Goswell Road London EC1V 7DU being a registered leasehold under title number NGL 791463. This property is stated in the charges register to be subject to several leases one of which is the subject property listed at item 10 in the schedule of leases in the charges register. The respondent is the registered proprietor of the leasehold property at Flat 8, 152 Goswell Road London EC1V 7DY. He holds the property on a lease dated 7 February 2006 for a term of 125 years commencing on 1 November 2005. The respondent was so registered in June 2010 under title number NGL 862461 and is not the original lessee.

4. The application before the Tribunal was issued by the applicant on or about 5th August 2019. The applicant alleges in its application several breaches of the lease covenants. In particular and in detail the applicant says there are breaches of lease clauses more particularly described and listed in the applicant's skeleton argument at paragraph 9 and amounting to twelve breaches in total. These will be considered in detail in each case in this decision.

5. The Tribunal needs to establish from the evidence presented to it whether or not, on the balance of probabilities, the respondent has acted in such a way that he is in breach of a covenant or covenants in the lease and as listed in paragraph 4 above.

The hearing

6. The Tribunal had before it a bundle of papers prepared by the applicant in the form of a lever arch file containing copies of documentation and registered title copies and a copy of the lease as well as copy correspondence. Another bundle was also submitted by the respondent containing witness statements, copies of documentation and correspondence. An applicant's reply was also supplied. The applicant at the hearing also provided for the tribunal a skeleton argument providing legal submissions as did Counsel for the respondent who also provided a file of authorities in support of legal submissions.

7. Both parties also handed in at the start of the hearing witness statements that did not comply with the time frame set out in directions made by Judge Dutton on 8th August 2019. Consequently, the parties made cross applications at the start of the hearing that this evidence be disallowed. Notwithstanding this the Tribunal decided that there was no immediate and evident prejudice caused by this and so the Tribunal decided to allow these late submissions especially given the terms of Rule 3 of The Tribunal Procedure (First-tier Tribunal) (Property

Chamber) Rules 2013 2013 No. 1169 (L. 8) the details of which are set out below with the most relevant elements highlighted in bold:-

> *Overriding objective and parties' obligation to co-operate with the Tribunal*
>
> ***3.**(1) **The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.***
>
> *(2) Dealing with a case fairly and justly includes—*
> *(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;*
> *(b) avoiding unnecessary formality and seeking flexibility in the proceedings;*
> ***(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;***
> *(d) using any special expertise of the Tribunal effectively; and*
> *(e) avoiding delay, so far as compatible with proper consideration of the issues.*
>
> *(3) The Tribunal must seek to give effect to the overriding objective when it—*
> *(a) exercises any power under these Rules; or*
> *(b) interprets any rule or practice direction.*
>
> *(4) Parties must—*
> *(a) help the Tribunal to further the overriding objective; and*
> *(b) co-operate with the Tribunal generally.*

8. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

9. The respondent has, at all relevant times for this application, demised the property on one year Assured Shorthold Tenancies, (AST). Between 2008 and 2016, these AST's were granted on an annual basis to a tenant named as Liyan Xu. The respondent provided a specimen copy of one of the AST's granted to Ms Xu that was in the respondent's bundle at pages 11-16. Then from 2016 until 2019, the respondent demised the property to his daughter, Kielly Norton on one year AST's. Copies of these AST's were also provided to the Tribunal and were to be found at pages 17 and 44 of the respondent's bundle.

10. As Counsel for the respondent observed "On none of the occasions when he granted twelve month AST's of the flat did R require his sub-tenant to enter into a form of Deed of Covenant direct with A. That was a breach of Clause 3(f)(iii). On none of those occasions did R produce a

copy of the sublease and pay a registration fee of £30 plus VAT. That was a breach of Clause 3(s)." Accordingly, the respondent admits two breaches of covenant of clauses 3(f) (iii) and 3(s).

11. The core issue is what took place once the property was demised to the respondent's daughter. The respondent asserts that without his knowledge his daughter, Kielly advertised the property for short-term stays on a website, booking.com. The respondent goes on to assert that for periods when she was either on holiday or staying with her then boyfriend the property was occupied by third parties on a number of nights from the summer of 2017 onwards. The Tribunal was advised that days when the property was so occupied were set out at page 45 of the respondent's bundle. The respondent goes on to say that as soon as he became aware that Kielly had been offering the property for short-term stays, he took steps to bring Kielly's sub-lease to an end. It would appear that that sub-lease has now been terminated and the respondent has in its place granted a fresh twelve month AST dated 16 September 2019 of property to a third party.

12. To support the above assertions both the respondent and his daughter attended the Tribunal having submitted witness statements. Surprisingly the applicant's solicitor declined to cross examine them on their evidence. The Tribunal noted this as it appeared to the Tribunal that this brought with it an assumption regarding the precision and correctness of this evidence. It is a well-established principle that, in general, a party must challenge in cross-examination the evidence of any witness of the opposing party if he/she wishes to argue that evidence given on a particular issue should not be accepted (*Browne v Dunn* (1894) 6 R. 67, HL). Failure to cross-examine a witness on a particular important point may lead the court to infer that the cross-examining party accepts the witness' evidence, and it will be difficult to suggest that the evidence should be rejected. Indeed, it remains a fundamental principle that all significant points that form a party's case must be put to the other side's witnesses in cross-examination. In this dispute this simply did not happen.

The issues and the decision

13. The only issue for the Tribunal to decide is whether or not a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002. Having heard evidence and submissions from the Applicant and from the Respondent and having considered all of the documents provided, the Tribunal determines the issues as follows.

14. As noted above the respondent admits two breaches of covenant of clauses 3(f) (iii) and 3(s). Accordingly, the Tribunal determines that there are two breaches of covenant on the part of the respondent of

these two lease covenants. This leaves ten more alleged breaches to consider.

15. However, before doing so it is important to consider the effect of the law in this context. It is significant to bear in mind the principle set out at Para 11.199 of *Woodfall's Landlord and Tenant* that "*a covenant not to do something is generally not broken if the prohibited thing is not done by the covenantor but by a third party*". The effect of this legal principle is to say that if the respondent's daughter made the holiday lets without the respondent knowing what she had done, then the respondent is not in breach.

16. To support this statement of principle in *Berton v Alliance Economic Investment Co* [1922] 1 KB 742, 759 it was specified that;-

> *"It is clear that a person under a covenant not to use premises in a particular way cannot commit a breach of the covenant except by his own act or that of his agent. The same is true of a covenant not to permit. The user in one case and the permission in the other must be something which can be predicated of the defendant or the defendant's agent. It is not sufficient to show that the premises have been used in a way which would constitute a breach of the covenant; it must further be shown that the user is by the defendant or his agent, or that it is permitted by the defendant or his agent".*

17. More recently in the case of *Earl of Sefton v Tophams Limited* [1967] AC 50, 68 it was stated that:-

> "*In Berton v. Alliance Economic Investment Co. 29 Atkin L.J. said that a person under a covenant not to use premises in a particular way cannot commit a breach of the covenant except by his own act or that of his agent*".

18. Here is the key feature; the breach must be by the party with the burden of the covenant or his agent. The person with the burden in this dispute is the respondent and not his daughter. The applicant sought to assert that the breach was by the agent of the respondent. The Tribunal was not persuaded by this argument as they could not find any convincing evidence to support this assertion.

19. Turning to each breach listed by the applicant in its skeleton argument at paragraph 9 thereof, item (i) is in regard to covenant 3 (f) (i); specifically permitted under lettings. The Tribunal considered that the legal principle applied to this covenant and therefore there was no breach. Item (ii) related to a covenant prohibiting underletting without consent except in the case of an AST for not more than 12 months. It should be remembered that the respondent let the property on this

precise basis. Therefore, the short-term holiday lettings were not the acts of the respondent or the respondent's agent. Consequently, the Tribunal could not find any breach by the respondent.

20. Item (iii) is the admitted breach of covenant 3(f)(iii).

21. Item (iv) listed in the skeleton argument relates to covenant clause 3(g). This is a covenant not to use the property or permit the property to be used other than as a private residential property in the occupation of one household. It seemed to the Tribunal that the respondent had in fact complied with this covenant. When he let the property, it was to a single occupier to occupy the property as their private residential property, i.e. his daughter. The AST's which he granted expressly prohibited anything other than that user. He did not know that it was taking place and as soon as he knew, he put a stop to it. Therefore, there is no breach by the respondent.

22. Item (v) relates to covenant 3(h). This is a covenant not to use the property or permit it to be used for business purposes. Again it appeared to the Tribunal on the evidence that the respondent had complied with this covenant. When he let the property, it was to a single occupier to occupy the property as their private residential property and not for business purposes. The AST's which he granted expressly prohibited any user other than residential. He did not know about the short-term lettings but as soon as he knew, he did put a stop to them and the unlawful user. Therefore, there is no breach by the respondent.

23. Item (vi) in paragraph nine of the skeleton argument refers covenant 3(i) and conduct that might amount to a nuisance or annoyance. The Tribunal took the same view as set out above regarding the alleged breach and also took the view that the applicant had not set out any clear evidence of conduct of this type that might amount to a breach. Therefore, there is no breach by the respondent.

24. Turning to item (vii) this relates to covenant 3(j). This is a covenant not to use or permit any use of the property which might render the insurance policy void. When applying the above mentioned legal principle, it seemed to the Tribunal that the respondent had complied with this covenant. Therefore, there is no breach by the respondent.

25. Item (viii) is a covenant relating to clause 3(n)(i) of the lease regarding common parts user and was not mentioned in the original application. The Tribunal was not convinced of the merits of this claim and if the legal principle et out above is applied then the Tribunal considered that there was no breach by the respondent.

26. Item(ix) in the list is an alleged breach of lease covenant 3(p) relating again to possible conduct that might amount to a nuisance or annoyance. The Tribunal took the same view as set out above regarding the alleged breach and also took the view that the applicant had not set out any clear evidence of conduct of this type that might amount to a breach. Therefore, there is no breach by the respondent.

27. Item (x) is the admitted breach of covenant 3(s).

28. Item (xi) was not in the original application and relates to a possible breach of lease covenant 3(y) regarding potential breaches of the head lease. Interestingly the applicant did not provide a copy of the headlease and so it has proved somewhat difficult to make an informed decision in this respect. However, applying the effect of the above legal principle then the Tribunal could only conclude that any breaches were not made by the respondent.

29. Finally, item (xii) in the list of breaches on the applicant's skeleton argument related to an alleged breach of lease covenant 3(z). This is a covenant not to use the property in a way which would cause the applicant to be in breach of the head lease. No details were provided of the head lease and no particulars were provided as to the manner in which the respondent is said to be in breach. The Tribunal noted that the AST's which the respondent granted effectively sought to stop breaches of this kind. If there was a breach he did not know that it was taking place and as soon as he knew what his daughter had done, he did put a stop to it. Therefore, there is no breach by the respondent.

30. In the case of *GHM (Trustees) Limited v Glass (2008)* LRX/153/2007 which is a decision of the Lands Tribunal about a lease clause breach in similar terms to the core breach of covenant of this lease, the President George Bartlett QC wrote that

> *"The jurisdiction to determine whether a breach of covenant has occurred is that of the LVT. The question whether the breach has been remedied….is a question for the court in an action for forfeiture or damages for breach of covenant…. The breach of covenant has not ceased to exist by reason of the fact that the landlords now know of the assignment and the names of the assignees".*

31. The effect of the Lands Tribunal decision is clear. This Tribunal need only determine whether a breach has occurred. The tribunal is satisfied that in the light of the evidence set out above that breaches (two) have occurred and as such this Tribunal grants the application for an order that a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002

32. Rights of appeal available to the parties are set out in the annex to this decision.

Application for costs

33. An application was made by the respondent under Rule 13 of the Tribunal Rules in respect of the Applicant's costs. The details of the provisions of Rule 13 are set out in the appendix to this Decision.

34. Before a costs decision can be made, the tribunal needs to be satisfied that there has been unreasonableness. At a second stage it is essential for the tribunal to consider whether, in the light of unreasonable conduct (if the tribunal has found it to have been demonstrated), it ought to make an order for costs or not. It is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.

35. The respondent filed (and served) with the tribunal the applicant's written costs application that was contained within Counsel's skeleton argument and comments/observations thereon were requested of the applicant and these were given orally at the hearing by the solicitor for the applicant.

36. It now falls to the Tribunal to consider the costs application in the light of the written and oral submissions before it. The Tribunal does this but in the context of the circumstances of the original decision set out above.

Costs decision

37. The tribunal's powers to order a party to pay costs may only be exercised where a party has acted "unreasonably". Taking into account the guidance in that regard given by HH Judge Huskinson in *Halliard Property Company Limited v Belmont Hall & Elm Court RTM, City and Country Properties Limited v Brickman* LRX/130/2007, LRA/85/2008, (where he followed the definition of unreasonableness in *Ridehalgh v Horsefield* [1994] Ch 205 CA), the tribunal was not satisfied that there had been unreasonable conduct so as to prompt a possible order for costs.

38. The tribunal was also mindful of a fairly recent decision in the case of *Willow Court Management Company (1985) Limited v Mrs Ratna Alexander* [2016] UKUT 0290 (LC) which is a detailed survey and review of the question of costs in a case of this type. At paragraph 24 of the decision the Upper Tribunal could see no reason to depart from the views expressed in *Ridehalgh*. Therefore, following the views expressed in this recent case at a first stage the tribunal needs to be satisfied that there has been unreasonableness.

39. At a second stage it is essential for the tribunal to consider whether, in the light of any unreasonable conduct it has found to have been demonstrated, it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of that order should be.

40. In *Ridehalgh* it was said that “"Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently.

41. The *Willow Court* decision is of paramount importance in deciding what conduct might be unreasonable. I have mentioned the approach of the Upper Tribunal in this decision but I think it appropriate to quote the relevant section of the decision in full:-

> “*An assessment of whether behaviour is unreasonable requires a value judgment on which views might differ but the standard of behaviour expected of parties in tribunal proceedings ought not to be set at an unrealistic level.....“Unreasonable” conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham’s “acid test”: is there a reasonable explanation for the conduct complained of?”*

42. It seems to Tribunal that therefore the bar to unreasonableness is set quite high in that what amounts to unreasonableness must be quite significant and of serious consequence. This being so the Tribunal must now consider the conduct of the parties in this dispute given the nature of the judicial guidance outlined above.

43. The respondent maintains that the applicant was unreasonable in the conduct of the breach of covenant dispute. The applicant denies this and has asserted that it had done all it could to conduct the litigation is a proper and effective manner. The respondent says that once the respondent admitted two breaches that the matter should not have progressed after that event. The applicant asserted that it was entirely right and proper to proceed as there were several breaches still in dispute notwithstanding the respondent’s admissions.

44. The Tribunal was not satisfied that there was enough information or detail to persuade it that there had been unreasonable conduct on the part of the applicant. Taking into account all that the parties have said about the case and the actions of the parties involved, the Tribunal cannot find evidence to match the high bar of unreasonable conduct set out above. The tribunal was therefore not satisfied that stage one of the process had been fulfilled in that it found there has been no unreasonableness for the purposes of a costs decision under Rule 13 on the part of the applicant. The conduct may have been verging on the finicky, pedantic or mistaken but it was not vexatious or such that following the legal tests the tribunal might consider such conduct unreasonable.

45. In the circumstances the tribunal determines that there be no order for costs pursuant to Rule 13.

Name:	Judge Professor Robert Abbey	**Date:**	11 November 2019

ANNEX - 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.

4. 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

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Orders for costs, reimbursement of fees and interest on costs

13.—(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, or
(iii) a leasehold 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.