**FIRST - TIER TRIBUNAL**
**PROPERTY CHAMBER**
**(RESIDENTIAL PROPERTY)**

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| **Case Reference** | **:** | **LON/00BA/LBC/2019/0086** |
| **Property** | **:** | **Flat 1, 14 Lingfield Road, Wimbledon, London SW19 4QA** |
| **Applicant** | **:** | **Lingfield Road Maintenance Limited** |
| **Representative** | **:** | **Mr B Coulter, Counsel accompanied by Mr Anthony Main, Director of the Applicant Company and Mrs Nancy Roberts** |
| **Respondent** | **:** | **Ms Lesley Irvine** |
| **Representative** | **:** | **Mr Thomas Booth of Meade King Solicitors LLP and Mr Christopher Beaver MSc RIBA MCIArb** |
| **Type of Application** | **:** | **Application under section 168(4) of the Commonhold and Leasehold Reform Act 2002** |
| **Tribunal Members** | **:** | **Tribunal Judge Dutton**<br>**Mr H Geddes RIBA MRTPI** |
| **Date and venue of Hearing** | **:** | **10 Alfred Place, London WC1E 7LR on 13th December 2019** |
| **Date of Decision** | **:** | **21st January 2020** |

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**DECISION**

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## DECISION

The Tribunal determines that there has been a breach of covenants/condition of the Respondent's lease as set out below.

## BACKGROUND

1. By an application made on 17th October 2019 Lingfield Road Maintenance Limited (the Applicant) sought a determination from us that there had been a breach of covenant or condition of the lease pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 (the Act). The complaint was against Ms Lesley Irvine in respect of her flat at the property, Lingfield Road, Wimbledon (the Property). She is the owner of the basement flat and within the Property there is also a maisonette on two floors and a flat above that.

2. As set out in the application the breach relates to a licence for alterations dated 15th May 2018, the terms of which we will refer to as necessary later in this decision. In a document headed Particulars of Breaches and Authority to Forfeit (the Particulars) attached to the application, the authority to bring these proceedings it was said stems from clause 12 of the licence which gives a right of re-entry if the licence is breached and from clause 7(9)(A) of the lease again giving a right of re-entry on the non-observance or non-performance of lessees covenants contained within the lease. The lease itself is dated 22nd August 2016 in a renewal of an earlier lease and is made between the Applicant and the Respondent. The terms and conditions of both the licence and the lease applicable to this application will be referred to as necessary during the course of this decision.

3. The breaches of the licence are as follows:

   - Failure to provide CDM documentation
   - Failing to make good to the reasonable satisfaction of the landlord any damage caused by the works
   - Failing to pay the landlord's costs of the preparation of a deed of covenant
   - Failing to pay the costs of the landlord in connection with the preparation of a section 146 notice.

4. In respect of the breaches of the lease there are two matters. The first is failing to obtain a consent for keeping pets at the Property and the second is failing to obtain a deed of covenant from the tenants as required by clause 3(M)(ii)(a) of the lease.

5. Before the hearing we were provided with a bundle supplied by the Applicants containing the application, directions and the Particulars. In addition, we were provided with a copy of the original lease dated 3rd March 1978 and the new lease which we have referred to above, the licence for alterations dated 15th May 2018 and copies of an earlier licence dated 28th July 2016.

6. Also included was a substantial bundle of emails and correspondence passing between the parties and between Mr Beaver and Mr Main as well as between Meade King Solicitors and the Applicant.

7. A schedule of condition had been prepared by a Mr Martin Lewy MRICS a chartered building surveyor which had last been updated on 10th January 2019. Following on from that schedule of condition was a letter from TA Greig dated 30th April 2019 to Miss Irvine, they being consulting engineers, and a letter from MHA Building Consultancy Limited dated 28th May 2019 to Mr Beaver which we will refer to in due course.

8. In addition to the above, we had a copy of the tenancy agreement of flat 1 between Ms Irvine and Mr and Mrs Rendall being a two year agreement from 8th May 2019 at a monthly rental of £2,925.

9. The file also included details of costs which the Applicant says they have incurred in connection with these proceedings. These included an invoice from MHA Building Consultancy Limited in the sum of £716.28, an invoice from Rose & Rose Solicitors in the sum of £2,800 plus VAT with a breakdown of the costs and two further invoices from that company one in the sum of £1,330 plus VAT and the other in the sum of £1,485 plus VAT.

10. Behind tab six in the bundle were estimates from YVV Marek Deco Paint and Blanford Design & Build Limited in respect of refurbishment work to Mrs Roberts' property of various sums.

11. We had a statement from Mr Main and a letter from Nancy Roberts which bears a statement of truth. Finally, there is a document headed Lingfield Road Maintenance Limited Bullet Point Legal Submissions, although it is not clear who actually prepared this document.

12. We had the opportunity of considering these papers in advance of the hearing.

13. In addition to the papers prepared by the Applicant, the Respondent also filed a bundle of papers which included a response to the application and legal submissions of the Respondent, a statement by Ms Irvine with exhibits, a statement by Mr Christopher Beaver, an architect and relative of Ms Irvine likewise with a number of exhibits, a statement from Mr Martin Lewy who had prepared the schedule of condition referred to previously and finally a letter from Meade King Solicitors dated 12th November 2019 responding to a question from the Tribunal as to why breaches of the licence would also lead to breaches of the lease.

14. In reply to the Respondent's bundle the Applicants filed a supplementary reply, the contents of which we have noted. This contains comments made by Mr Main on Ms Irvine's witness statement and Mr Beaver's witness statement. Copies of some emails are included and a further invoice from Rose & Rose dated 18th November 2019 in the sum of £2,046 inclusive. The bundle included a copy of the licence which was the travelling document showing alterations and what appears to be a party wall agreement. This party wall agreement refers to documents attached, which was the schedule of condition prepared by Mr Lewy

which we have seen but which was not in fact attached and a construction details drawing.

15. For the Applicant it was said clause 12 of the licence giving the right of re-entry specifically extends the right contained in the lease, making the terms of the licence enforceable in the same way as breaches of the lease. It was said that as a result the Tribunal had jurisdiction to determine breaches of the licence as if they were breaches of the lease. It is said that there have been breaches both of the lease and licence as set out in the application and that the Applicant is entitled to seek enforcement against the Respondent of those breaches both of the licence and the lease as if both were actionable in the same way.

16. The Respondent in its legal submissions submitted that it was inappropriate for the Tribunal to consider alleged breaches of the licence on a number of points. They are as follows;

(a) that it had not been validly executed as a deed by the Applicant by virtue of section 44 of the Companies Act 2006;
(b) that the First Tier Tribunal was not a court and accordingly the provision of the licence which states that the courts of England and Wales shall have jurisdiction to settle a dispute means that the First Tier Tribunal cannot consider the matter;
(c) clause 12 of the licence providing right of entry is on the basis that a covenant or condition of the licence is breached. It is said that the clauses of the licence which are breached are neither covenants or conditions and therefore no right of re-entry is available;
(d) it was suggested at the time the licence was negotiated there was an inequality in bargaining power and that as such the clause giving rise to these proceedings should be rectified or removed
(e) the breaches of the licence are breaches that could be settled by way of damages and that forfeiture is an inappropriate and inequitable remedy
(f) and finally, that the appropriate venue for the determination of these disputes was the courts as the disputer was substantively a money claim.

17. In respect of the various breaches, it is said by the Respondent that the relevant clauses set out under the heading Alleged Breaches of Licences are correct but as was suggested by the Respondent, the breaches of the licences are not a matter for us, although in any event no breach of the licence is admitted.

18. It is said in specific response to the issues that the CDM file was at the Property and was available for inspection and has now been provided to the Applicant.

19. To the extent that any damage has not been made good, it is accepted that it must be, although the Respondent says that the making good has been affected by the Applicant refusing access and that the reasonable satisfaction of the landlord is in fact unreasonable.

20. On the question of compensation or making good, there is firstly no time limit to this and that no figure has been specified by the Applicant. Notwithstanding that, a cheque for compensation, in an attempt to satisfy the obligation, was tendered by the Respondent but rejected.

21. In relation to the obligations to pay the costs of the deed of covenant, it is said that the breach is not particularised and that in any event the Respondent's liability is limited firstly on the basis that an obligation under the licence is to pay 'reasonable' costs, and they are not, and that the costs have not been assessed. Further it is not known which of the costs were incurred specifically in relation to the works and rectification works.

22. In respect of the alleged breaches of the lease, the Respondent agrees the terms cited are correct. In respect of the keeping of pets, the Respondent accepts that she has given her tenants the right to keep dogs at the Property and relies on written permission given on 4th May 2019 prior to the tenants taking possession such authority given on the understanding that the tenants are aware that it is the Applicant who can revoke it. It is also said that the Applicant has permitted other tenants to keep dogs at the Property and in any event that the breach is not serious or material.

23. In connection with the deed of covenant, it is accepted that the deed of covenant is not in the form prepared by the lessor and that on the face of it there is a breach but it is denied that there has been a loss or prejudice as a result of same. It is said that the Respondent has used their best endeavours to comply and that in any event the breach will be remedied by May 2020 when her tenants will vacate. On the question of costs associated with the deed of covenant, it is said that they are not payable at present because the deed of covenant has not been approved and that there has been refusal on the part of the Applicant to specify the costs relating to this particular head of expenditure.

24. In respect of the costs associated with the section 146 notice, it is said these are not payable until a breach has been determined and that no schedule of dilapidations or notice of repair has been given. Further it is said that no evidence has been given to show the Applicant has incurred any of the costs.

**HEARING**

25. At the hearing Mr Coulter represented the Applicants and Mr Booth the Respondent.

26. Mr Coulter opened the proceedings referring us to the application and the Particulars and confirming that we were only dealing with breaches of the 2018 licence. The Applicant's case is that building works had been carried out under the licence and these have caused damage, as set out in the schedule of condition within the bundle. However, the Applicant is concerned that the schedule may not be entirely complete and instructed Mr Harrison and MHA Building Consultancy to review. In his letter of 28th May 2019 to Mr Beaver he says this *"In summary I think the schedule of condition as at January 2019 doesn't adequately reflect the nature of the cracking to the specific areas at today's date which would suggest further settling of the structure is still occurring be this as a result of the original underpinning or the brick stitching undertaken last year.*

*In order to try and move the matter forward, I feel the best way to obtain a consensus will be to undertake a joint inspection by your original surveyor and*

*MHA so an accurate and agreed record of the cracking can be used as the basis for discussion of the required making good.*

*Once this has been established, the extent of the reasonable repair could also hopefully be agreed, and this could then be costed by three suitable contractors amenable to both sides.*" The letter goes on to mention the reimbursement limited to £1,500 made by Ms Irvine to Mrs Roberts and also issues concerning smells that have arisen since the works were undertaken.

27. We were told that an offer had been made for a Mr Gaul to carry out works to the Property or in the alternative to pay the compensation of £1,500 but the Applicant's position was that until clarification of all works to comply with the making good had been fully understood, it was impossible to value the costs of the work or what was needed. It is the Applicant's case that the Respondent has in effect failed to engage. Further Mr Coulter said the Applicant had provided three potential alternative quotes, but none had been responded to in any meaningful way.

28. Under questions from the Tribunal Mr Coulter confirmed that there had not been an independent report on the condition of the Property other than by Mr Lewy and that there appeared to be no specification of any works that may be required. It is the Applicant's case that the Respondent must make good to the reasonable satisfaction of the Applicant and that what we were being asked to consider is what is 'reasonable satisfaction'. Whilst accepting that the Respondent could challenge what constitutes reasonable, it is not reasonable for her to merely say that she was not going to pay for it.

29. The Respondent had not sought a specification of works and just relied on the Lewy schedule yet the burden of proof was on the Respondent by reference to clause 4(5) of the licence which requires that the tenant must "*immediately make good to the reasonable satisfaction of the landlord any damage (including decorative damage) to any landlord building or any plant and machinery (other than the Property) which is caused by carrying out the works or the rectification works.*"

30. Mr Coulter confirmed that the breaches in respect of the CDM documentation had been complied with but only after the issue of the application. Apparently, the documents had been taken to a photocopying shop towards the end of October 2019 and left there for collection.

31. As to the lease breaches, it was asserted that the Respondent had sub-let her Property before obtaining the deed of covenant required and had sought retrospectively to get signature from the tenants, which they had refused to sign. Accordingly there is no deed of covenant in place and the Respondent is in breach of that term of the lease at 3(M)(ii) which says as follows: *"Not to transfer, assign, sub-let or otherwise part with possession of the flat as a whole without (a) first obtaining from the intended transferee or under lessee the execution of a deed of covenant in the form to be supplied by the lessors or by the managers and which shall embody a direct covenant with the lessors and with the managers to observe and perform all the covenants on behalf of the lessee in this lease other than in the case of any intended under lessee the covenant to pay*

*rent but so that any such under lease or any sub-under lease shall reserve at least the rental hereby reserved and shall impose an obligation upon the under lessees to be responsible for the outgoings referred to in clause 3(B) hereof and in addition to be responsible to the managers for the payment of the contribution referred to in clause 4 hereof and (b) procuring the registration of any such proposed assignee or (sub) under lessee as a member of the managers.*" The clause went on the provide that the costs of the solicitors for the lessors and managers in respect of providing the draft should also be met.

32. In respect of the breach alleging that pets were kept at the Property without consent, it was accepted by the Applicants that consent had been given as evidence by correspondence although no formal document of consent was provided. It was not a matter that the Applicant pursued.

33. After this opening we heard from Mr Main who is a Director and Secretary of the Applicant Company. He does not live at the Property but is a tenant in common of the maisonette occupied by Mrs Roberts, his former wife.

34. He confirmed the terms of his witness statement, which we have noted, and which is a document common to both parties and does not need to be repeated in any detail in this decision.

35. Asked about whether or not specifications for the proposed repairs works had been put in place, he confirmed that they were not, but quotes had been obtained. At his suggestion he had asked Mrs Roberts to get quotes from three local decorators based on the schedule of condition. It is the Applicant's case that these quotes were no longer valid. He said there had been no discussion with the Respondent as to settlement although there had been some in correspondence with her solicitors, and they had been asked to put forward a figure. In his view the first step must be to agree what the damage was, thereafter, obtain a specification and get quotes based upon same. This he said had been discussed with Mr Beaver who initially had suggested that everything should wait until the works had been concluded, which he thought was reasonable.

36. He was then subject to some cross examination by Mr Booth and in particular an email from Mr Beaver dated 29th September 2018 where he put forward certain thoughts, although the work had not been completed. His view was that there were two ways forward, the first being to obtain quotes based on Mr Lewy's schedule on the understanding that Ms Irvine would be responsible for paying the costs or alternatively to agree a sum of money in lieu. In February of 2019 Mr Beaver wrote indicating that he had made enquiries as to likely costs with Martin Lewy who had estimated six days at £150 per day plus materials giving a total cost of £1,000. This was suggested as being a potential settlement. The emails went on along this line and certainly Mr Main said that he was amazed that it was thought that the works could be undertaken in six days, the more so as there was no specification. The nearest there was to a specification was evidenced by Mr Beaver in an email citing an agreement he reached with Mr Gaul setting out five matters that need to be undertaken and referring to a quote open for acceptance until 13th May.

37. He was asked by Mr Booth what experience he had in connection with building projects and he said that he had been involved in those types of works over a number of years. He confirmed he had no building qualifications but that he was a qualified electrician. Asked why he had not taken up Mr Beaver on his suggestion that in the absence of an agreement the evidence of an independent third party might be appropriate, he told us that he was reluctant to go to the cost of obtaining further advice in the light of the Respondent's refusal to pay the costs of any further surveyor. It was his view that it was for the Respondent to meet those expenses. In a lengthy letter from Meade King Solicitors dated 25th July 2019 it was suggested that if agreement could not be reached there could be a further site meeting between Mr Lewy and a surveyor of the Applicant's choice provided agreement was reached as to the cost liability of such a meeting. The proposal from the Respondent's solicitors was that she would pay the cost of Mr Lewy's attendance unless the outcome of the meeting demonstrates that there was no further liability beyond that stated in the schedule of condition. That being the case, it was suggested that the costs would have been incurred unnecessarily outside the scope of their client's liability and she would expect reimbursement of the fees she incurred.

38. Asked about the deed of covenant, it was put to him that previously, the Applicant had not required a deed of covenant to be entered into. He confirmed that there had been lettings without a deed of covenant, and that this requirement had not been enforced until this year. Mr Main's concern was over dogs, which the Respondent had allowed under the terms of the tenancy agreement. His view was that the tenancy agreement should bind both the sub-tenants, and any other tenants and he wanted to ensure that the ability to revoke permission to keep a dog was vested with the Applicant and not with the Respondent. Asked why Mrs Roberts was able to keep a dog in the Property he confirmed that written permission had been given but no copy was within the papers before us. He did confirm that he thought the terms of a party wall agreement had been concluded.

39. In re-examination he confirmed that if there had been no pre-condition on costs as set out in the letter from the Respondent's solicitors referred to above, he would have agreed a meeting.

40. We then heard from Mrs Roberts who had provided a letter doubling up as a witness statement. She confirmed that she was a Director of the Applicant Company and the owner of Flat 2. We noted all that was said in her witness statement and as with Mr Main's it does not seem necessary to recount that in great detail given that both parties have the document. She confirmed that there had been resolution of external issues and she had hoped that the same arrangements would apply in respect of internal matters. She said Mr Beaver had suggested one week's work, but she thought it would be far longer than that and had three tradesmen to review. She said that she did not want to move out of the Property for the works to be undertaken but had got the tradesmen in to get a feel as to the works that were required. The quotes that she had obtained were only exploratory based on the schedule of condition. It was hoped that the three quotes would open a discussion with Mr Beaver resulting in a full specification and the matter then being resolved.

41. She told us she had spent time with the decorators to understand how they would carry out the work and would have worked with any of the three that she had put forward. She did not think that any of the decorators had the schedule of condition with them and was not sure whether they had sight of same. She knew there would need to be a full specification obtained and that the quotes were just an initial view.

42. Her view was Mr Gaul wanted to do the work as quickly as possible and this would have impacted on her son's studying time for university. The alternative was to have taken money in lieu which she would have been prepared to do so but she needed to know what works were required.

43. In cross examination she confirmed that she had shown the decorators around the Property but could not remember showing them a schedule of condition. She confirmed that it had been agreed that where touch-up work was required to a wall the whole wall would be decorated and the assessment was based on her recollection of the schedule of condition. However, she considered there were clear omissions, for example in the dining room and that there had been no attempt made by contractors to contain the dust. She confirmed that Flat 3 was not included but she did not think that it was badly affected. The tenant of Flat 3 we were told was very tolerant.

44. This concluded the evidence on behalf of the Applicant.

45. Mr Booth called Ms Irvine first to give evidence. She had provided a statement dated 25th November 2019. This was within the bundle and as with the other statements is common to both sides and does not need to be recounted in detail. She gives a detailed history of the background and of the licences. There have been two licences, the first dealt with works that were undertaken by Mr Cavelle of Scarib Limited. It appears that these were not to standard and that the works had taken longer to complete and were not finalised during the period of the first licence. The second licence that we are dealing with was then entered into and it was her assertion that new clauses were included within the licence of alterations which were more onerous and made her liable for costs. She thought that the conduct of negotiations by the Applicant for this second licence was unreasonable and at worst extortionate.

46. As a result of the delay in the works she instructed her relative, Mr Christopher Beaver an experienced architect to become involved. On his advice Mr Cavelle was removed and another contractor obtained. Under her heading 'Attempts to Perform Remedial Works' she listed what had been done and stated that a reinspection now would inevitably be less reliable than the contemporary schedule of condition which was also the only comprehensive survey report. She dealt with the CDM files and also the quotes obtained by Mrs Roberts which she said were between two and six times the quotes that she had acquired. She was sceptical about the usefulness of re-inspecting the Property particularly as the Applicants insisted that she pays the costs of the inspection. She was critical of the Applicant's refusal to commit to a figure for compensation or a method of determining the true value.

47. Her statement then went on to deal with the alleged breaches of the lease. She said that Mr Main had indicated that previously the deed of covenant which forms one of the alleged breaches had not been sought and she had already signed a tenancy agreement allowing the tenants to occupy from 8th May 2019. It appears that on 3rd May Mr Main had emailed her advising that the deed of covenant should be entered into. She arranged for her solicitors to produce a deed of covenant which was sent to the tenants and which they agreed and executed. It was subsequently brought to her attention that this was not in accordance with the terms of the lease and a new deed of covenant was prepared by the Applicants which the tenants refused to sign. On the question of dogs, we were told that the tenants kept two dogs at the Property and that other tenants had also kept dogs. She recited an email that had been sent to her from Mr Main indicating that the Applicant was happy to grant permission for the tenants to keep dogs provided it was made clear to them that the Applicants could revoke that permission.

48. On the question of costs of the deed of covenant, she was of the view that the Applicants were loading those in respect of other works and that she had not been served a notice under section 146 or 147 or a schedule of dilapidations or notice of repair and she could not therefore see how the Applicants could claim the costs.

49. She did accept that there was a liability to pay the costs associated and arising under the lease and the licence but that they were unreasonable. In summary she accepted that she may strictly be in breach of two covenants of the lease due to an oversight on her part, but she denied the liability of any others. There were copies of various emails and other items of documentation exhibited. Before she was cross-examined she told us that she did not know about the cigarette smells although she used to smoke but she had always done so with the doors open onto the patio.

50. In cross examination she confirmed she thought the licence terms were unfair but accepted that she had taken legal advice before entering into the document. She accepted that works need to be done to the reasonable satisfaction of the Applicants and had relied on Mr Beaver in that regard. She accepted on the face of it the CDM file should have been supplied before it was, but that had now been dealt with. On the question of the further meeting she said that she had been advised that she should not pay the costs if the Lewy report was found to be correct and that she expected the Applicants to accept the surveyor's findings and not have their own expert involved. She said that she was terribly upset that the works had caused problems. She accepted that had now let the Property without a deed of covenant and that she had not read the lease. She told us she had been advised about the need of a deed of covenant by Mr Main and that her solicitors had initially dealt with the matter.

51. The second deed was one that the tenants refused to sign. Indeed, if they had been presented with this deed before the tenancy agreement had been signed, she did not think that they would have taken on the tenancy. She had not paid the costs associated with the deed of covenant as she had been advised not to do so. She told us that she relied on others to deal with these issues and that she trusted her experts to resolve the problems.

52. The evidence of Mr Beaver then followed. He like other witnesses had provided a statement setting out the background to the matter and his involvement. He advised the Respondents to tender a cheque in the sum of £1,500, which was the amount of Mr Gaul's quote subject to a further sum of £300 that he had allowed for materials. Under the heading Summary of Witness Statement he confirmed that he considered himself to be responsible to all parties and that the task was complicated by the fact that he took over a project from other workers where there was significant aspects of the project that required rectification and redesign. He confirmed that he had never at any time refused to accept responsibility on the part of the Respondent for any of the alleged breaches. His position had always been to follow procedures that were considered good practice within the construction industry and his profession. He said that if the Applicants could demonstrate the alleged damage was caused by the Respondent's building work then he would advise her that she was responsible for the cost of making good that damage. However, he was of the view that she was not able to agree the alleged damage was the responsibility of the Respondence unless adequate supporting evidence was provided by the Applicant.

53. In evidence to us at the hearing he confirmed that the schedule of condition had originally been prepared by Mr Cavelle and included the state of works at the time Scarib left site. A schedule was then prepared by Mr Lewy in January of 2019 but he was not sure that the schedule was ever sent to the Applicants. He accepted the Respondent's obligation to make good and normally the existing contractor would carry out such work. It was accepted that the Applicants had reservations about the contractors. Mr Roberts had got quotes, as had he, and he gave a verbal specification to include repayment of the whole of any wall where there was some touch-up required. He sent a summary of this to the Applicants and hoped that he would get agreement. However, there was a timescale to accept Mr Gaul's quote and he did not think it was reasonable for the Respondent to lose a competitive quote because of that. As a result of this he advised the Respondent to send to the Applicants a cheque for the amount that he had been quoted by Mr Gaul. Mr Gaul's quote appeared to be contained in an email to Mr Beaver confirming that he had visited the Property and giving a fixed price for labour only of £1,300. There would then be the cost of the paint. He confirmed that he had not been involved in the negotiations leading to the licence and that the advice he had given to the Respondent was on the basis of his experience and not by reference to the licence itself.

54. Asked by the Tribunal about kitchen fittings, he confirmed that this was not included as was not on the schedule of condition. He said, however, that he would inspect and could include the works to the kitchen tops and the damaged wallpaper but not works to the external structure. As Mr Lewy's schedule was being challenged, he thought it would be sensible to meet on site with himself and the Applicant to agree the works. He confirmed that if on reinspection any of the works can be shown to be the responsibility of the Respondent then she would pay the cost of same. It was put to him that the suggestion made by Mr Main in his email of 1st May to the Respondent with a copy to Mr Beaver was a sensible way forward which he agreed. This was for the Respondent's representative together with Mr Beaver and Mr Lewy to revisit the Property with

the Applicants and update the report. It was considered this was the most cost effective way of agreeing the extent of damage, but that this was not a suggestion that had been taken up by the Respondents. It was confirmed that this was still open to acceptance and if it was not accepted then the Applicants would employ their own surveyor to inspect the damage. It does not appear that Mr Beaver responded to this email. On the question of defects liability, he confirmed that Power Day, the Respondent's contractors, had made good damage within the Property owned by the Respondent but had not carried out other works. He confirmed that he had not read the schedule of condition in full but was familiar enough to know what was there. The question of kitchen floor issues was not within the Gaul specification which had been based on what Mr Beaver had told him he considered was necessary. He accepted that there had been an intention of meeting on 27th March 2019 but he did not recall being able to gain access, although it does not appear that he had written to agree a fixed date.

55. He did not think it necessary to involve a further surveyor. He considered his duty was to manage the project to be fair to all parties and that therefore it was unnecessary for a further surveyor to be instructed. He thought that the offer of £1,500 was fair and that Mr Lewy was a very experienced surveyor who could be relied upon.

56. The last statement was made by Mr Lewy but he did not attend and we did not accept it as an expert statement as it contained none of the usual wording. Having given us his qualifications he confirmed that in his view the schedule of condition stands as evidence of the condition of the building but that he would be prepared to answer any questions had he attended.

57. That concluded the evidence.

58. We then heard from Mr Booth who backed up the statement of response suggesting that the licence had not been properly executed as there appeared to be some question about the position of the witness signature; apparently the postman may have been involved.

59. On the right of re-entry, he did not consider that this was a covenant or a condition and the losses could be dealt with by way of damages. As to the CDM file, he considered this was no longer an issue.

60. He then referred to the cost clauses dealing first with the under letting and the occupation by dogs. He told us it is not something that had been insisted on before and there was therefore the question as to whether there was a waiver. There was no dispute that the deed had not been entered into and it appeared that the major concern was the presence of the dog for which there was some written permission in the form of an email from Mr Main dated 4th May 2019 in which he confirms that there is specific permission for the tenant to have two dogs but that the Applicant is entitled to revoke in certain circumstances. That email also dealt with the costs associated therewith and the need for the deed of covenant, notwithstanding that it had not been required previously. Mr Booth's view was it was not contentious that costs are payable, but the question was what sum is due. The costs in the licence have nothing to do with the costs occasioned

by the lease. In respect of the section 146 notice the costs have not yet crystallised.

61. Mr Coulter rebutted the issues concerning the signature of the licence. It was clearly a deed and had been properly signed. The allegation that the requirements were conditions and warranties and not covenants and conditions was without authority to support that proposition. The licence required the Respondent to undertake certain steps. It appears that the Respondent had not read the licence nor indeed the lease and had relied on Mr Beaver who it appeared had not read the licence either. There was an uncertainty as the specification given by Mr Beaver to Mr Gaul and something of a guess work as to the sums involved. There was, he said, no proper engagement on the part of the Respondent with the Applicants and asked us to consider the three quotes that had been obtained by Mrs Roberts and compare them with the four line email from Mr Gaul. It was the Applicant's case that the Respondent had failed to make good and that they had tried to engage, offered to attend a meeting with Mr Lewy and Mr Beaver and to go through the schedule, but that had not been accepted. There was no obstruction by the Applicant and we were reminded that it was the Respondent's responsibility to make good. It would appear that the Respondent, and Mr Beaver, agree that there is the potential for more works, for example the kitchen floor and therefore the schedule did need to be reviewed.

62. On the question of costs, no offer had been made nor any payment on account nor a suggestion as to what the costs should be. The Respondent has a cost liability but has not offered a penny. The bills have been provided and there were no challenges to the hourly rate. Costs are payable on an indemnity basis.

63. In respect of the tenancy, no licence had been obtained and it was right that the Applicants should maintain control of the Property and the lack of the deed of covenant was not a trivial breach.

64. Today's hearing was incidental to the preparation of a section 146 notice and the costs of those proceedings, therefore, could be included. This was not an abusive position adopted by the Applicant. They were entitled to take advice on costs and to recover them on an indemnity basis. This concluded the submissions by both representatives.

**FINDINGS**

65. Taking the headings to be considered from the Respondent's Response to the application and legal submissions, we make the following findings.

66. Under legal submissions the heading is Breaches (e-h) which refer to breaches of Clauses 4.5, 4.7(f), 11 and 5.3 of the licence. Taking them in that order, the terms of the licence that are to be considered are as follows:

*4.5 The tenant must immediately make good to the reasonable satisfaction of the landlord any damage (including decorative damage) to any land or building or any plant and machinery (other than the Property) which is caused by carrying out the works or the rectification works.*

Clause 4.7(f) of the licence says as follows*:*
*4.7(f) Make good or pay compensation for all damage identified in schedule 2 as being caused by works under the expired licence. Nothing in this clause shall prevent the tenant also being responsible for any further damage.*

The next clause we are asked to consider is clause 11 of the licence which sets out the costs that will be payable and that is as follows:
*11.1 The tenant must pay on demand the reasonable costs and disbursements of the landlord, its solicitors, surveyors and insurers in connection with this licence.*

*11.2 The tenant must pay on demand any further reasonable costs and disbursements of the landlord, its solicitors, surveyors and insurers incurred in connection with the works, the rectification works or any removal of them and reinstatement of the Property or in making good any damage to any land or building, plant or machinery (other than the Property) which is caused by the carrying out of the works or by the removal of them or the reinstatement of the Property.*

*11.3 The obligation in this clause extends to cost and disbursements assessed on a full indemnity basis and to any value added tax in respect of those costs and disbursements except to the extent that the landlord is able to recover the value added tax.*

The final clause we are asked to consider is 5.3 relating to CDM regulations which without recounting the totality of the wording requires the Respondent to keep all documents required to comply with CDM regulations in a health and safety file for the Property and on completion of the works to ensure that those are passed to the landlord.

67. Whilst we are on the question of the licence it is appropriate to set out a couple of other clauses which are of relevance.

- Under the heading Background the following wording is to be found: (A) *This licence is supplemental and collateral to the lease*.
- Under the heading Works it says the works to be carried out at the Property which are referred to in schedule 1 together with making good any damage to the Property caused by carrying out such work. Unfortunately, the copy of the licence provided to us in the bundle did not appear to have schedule 1 annexed.
- At paragraph 4.1 it says as follows: The tenant must carry out the work to the rectification works:
  *(a) using good quality new materials which are fit for purpose for which they were used;*
  *(b) in a good and workman manner and in accordance with good building and other relevant practices, codes and guidance; and*
  *(c) to the reasonable satisfaction of the landlord.*
- Under 4.7 as well as paragraph (f) referred to above, at paragraph (d) it says "*on demand reimburse the landlord for any inspections reasonably required by the landlord.*"

- At paragraph 9 of the licence the following wording is to be found: "*the tenant covenants in the lease will extend to the works and rectification works and apply to the Property as altered by the works and the rectification works. The tenant is responsible for ensuring that the tenants contractors, servants and agents do not breach any tenant covenant in the lease and any such breach will also be a breach of the terms of this licence.*"
- Under clause 12 of the lease the right of re-entry is recorded and it says as follows: *"the right of re-entry in the lease will be exercisable if any covenant or condition of this licence is breached as well as if any of the events stated for the provision for re-entry in the lease occurs."*
- Finally, under heading 19 Jurisdiction it states *each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any disputes or claim arising out of or in connection with this licence or its subject matter or formation (including non-contractual disputes or claims).*

68. In the Respondent's legal submissions the first point they appear to be making is that it is not appropriate for this Tribunal to consider the licence breaches. The first complaint is that the licence had not been validly executed; the second is the jurisdiction point which is set out above; the third is that the clauses which are alleged to have been breached are neither covenants nor conditions and accordingly the right of entry is not available; the fourth point is that there was allegedly an inequality in bargaining provisions; fifthly a suggestion that the matter could be dealt with by payment of damages thus rendering forfeiture inappropriate and inequitable remedy; and finally because there are a number of disputes in respect of the licence relating to its validity and interpretation it is not possible for breaches to be considered and in any event claims under the licence are substantially money claims.

69. Our findings in respect of these legal submissions is as follows. The licence appears to have been validly executed. The only issue appears to be that the witness to Mr Main's signature has completed his details in the wrong position. Signature by a single Director in our finding is sufficient.

70. The question of jurisdiction is something of a red herring. Under the Commonhold and Leasehold Reform Act 2002 an order is required from the Tribunal before any section 146 notice can be issued. In those circumstances the Applicant considering that an application for forfeiture is the correct way forward, clearly enables this Tribunal to have jurisdiction of the dispute. The Tribunal is after all part of Her Majesty's Courts and Tribunal Service and there is now clear deployment and cross over between the two.

71. The alleged breaches of the licence are in our findings breaches of the conditions contained therein and on the face of it therefore the right of re-entry set out at clause 12 of the licence, if it is found that there have been breaches of the conditions of the licence, clearly give rise to the right for the Applicant to seek re-entry.

72. The allegation that somehow the Respondent had inequality of bargaining position in respect of the new licence seems to be somewhat disingenuous. The

draft of the licence, which was provided in the response papers from the Applicant indicates that amendments were made to the licence by solicitors acting on the behalf of the Respondent. In those circumstances we reject that particular submission.

73. The other points relate to the alleged breaches being matters that could be based on a monetary remedy, which whilst accepting there is the right for damages to be paid, does not remove, in our finding, the entitlement of the Applicant to seek rights of forfeiture under the terms of the licence.

74. We are satisfied having read the licence and the provisions of the lease which we will return to in due course that there was clearly intention that the rights and obligations contained in the lease in this regard would pass across to the licence. If we are satisfied that there has been a breach of condition of the licence then the Applicant is entitled to proceed as he has.

75. In the legal submissions reference is made to the breach of clause 3(N)(ii)(a) which we will deal with when we deal with matters under the terms of the lease.

**76.** Continuing with the response lodged by the Respondent in this matter and for ease of understanding, we will specifically deal with the points they have made relating to the alleged breaches of the licence. The first appears to be the question of the delivery of the CDM documentation. There appears to have been an unnecessary convoluted exchange of emails and other communications concerning the provision of this document. We were told that it was not eventually produced until after the application to us had been made. The CDM regulations would seem to apply to the tenant's contractor. The licence refers to the production of all documents relating to the works and rectification works required under the CDM regulations being provided to the landlord on "completion of the construction phase of the works." That phrase is not defined. It does, however, state that the documents must relate to works and the rectification works. In our finding, therefore, it would seem that it would be appropriate for the CDM documentation to be provided when all matters had been resolved and not necessarily at the stage that it was in fact produced**. In our finding this matter is something of an irrelevancy and we are not satisfied that there has been a breach of condition of the licence in respect of this documentation.**

77. The response then becomes somewhat convoluted in that it refers to paragraph 4 being denied and we believe that the intention is that the document has moved from the list set out in the directions, unfortunately a full copy was not provided, to the Particulars appended to the application. There appears to be an acceptance that where a damage has not been made good the breach is admitted. However, it is said that the failing to make good is as a result of the conduct of the Applicant in refusing access and that the level of satisfaction demanded by the landlord has been unreasonable.

78. The only evidence of this is set out in Ms Irvine's witness statement under heading Attempts to Perform Remedial Works. We must say that we found her somewhat less than a compelling witness. It does not appear that she had read the licence in any degree nor indeed the lease. Instead in answering to questions

much of the time it was on the basis of that this was something being dealt with by another person and she was not able to assist. Contrary to this assertion there had been attempts made by the Applicants to resolve the matter. On 1st May 2019 Mr Main wrote to Ms Irvine by email with a copy to Mr Beaver suggesting that there be a meeting between the Applicants, Mr Beaver and Mr Lewy, revisit the affected properties and update the report. This was not acted upon.

79. Further, in a letter from MHA Consultancy on 28th May 2019 it was suggested that there be a joint inspection by their original surveyor and Mr Harrison so as an accurate and agreed record of the cracking could be used as the basis for making good. This was not taken up. Instead by a letter dated 25th July 2019, from the Respondent's solicitors amongst numerous other matters, a suggestion as to a meeting was put forward but contained unacceptable reservations concerning the Respondent's liability to pay costs associated therewith.

80. There then followed attempts by Mr Beaver to reach a compromise but it appeared at all times to be on the assumption that the schedule prepared by Mr Lewy stood and save for a possible review concerning some kitchen elements, there was no real offer to arrange for an alternative surveyor to inspect or indeed to cover the costs of the Applicant in instructing their own surveyor to inspect the works and to advise as to what was required. It should be remembered that they had already engaged the services of Mr Harrison who had raised concerns as to the schedule in his letter in May 2019.

81. In these circumstances, we do not consider that the Applicants did block or seek to impose unnecessary requirements in respect of the remedial works. As to the level of satisfaction, all that the Respondent has done is produce a quote from Mr Gaul at a figure of £1,300 plus paints and made an offer of £1,500 to settle. It is not surprising that the Applicants declined this given that they had received the advice from Mr Harrison and had obtained albeit somewhat informal estimate from three decorators indicating the costs would be substantially more than that. **There was no attempt on the part of the Respondent to engage with the Applicants to arrange for a meeting where the Applicants could have an independent surveyor involved and we consider, therefore, that she has failed to meet her obligations under clause 4 of the licence, in particular under clause 4.5 and 4.7(d) and (f). Those are conditions and we believe that the Respondent has merely prevaricated in respect of compliance with those and as such, therefore, is in our finding in breach of the terms of the licence in that regard**.

82. For the record we should say that it seems to us it is behoven on the Respondent to put forward an offer of settlement if it was to be dealt with by way of financial compensation rather than works being undertaken. She has based her offer of settlement on what on the face of it would appear to be an incomplete and unhelpful estimate provided by Mr Gaul and she should have reflected upon that and considered the estimates provided by Mrs Roberts as an indicative figure and planned her settlement figure accordingly. The sum tendered was clearly in our finding not relevant to the actual cost of the potential works required.

83. The response now appears to revert back to the numbering set out in the incomplete directions order provided to us. This refers to clause 11 of the licence concerning costs. In this regard we have some sympathy with the Respondent's position. A number of invoices from solicitors have been produced. The costs are intended to be met on an indemnity basis and whether an assessment is therefore strictly speaking required is another matter. There is, however, provision that the costs payable must be reasonable, which tends to suggest that there is at least some provision to challenge what is considered to be reasonable. This does not it seems to us fall within the jurisdiction of this application and we have insufficient information available to us to make any findings in this regard. **In those circumstances we do not consider that there has been a breach of the licence at the moment and that it may be further steps are required to deal with the assessment of the costs perhaps by way of application to the County Court**.

**84. That as we understand it deals with the provisions of the licence and we have found that there has been a breach of clause 4.**

**85.** Turning now to the breaches of the lease. Insofar as the failure to obtain permission for keeping a dog is concerned, it seems to us that that is not as matter that should be troubling this Tribunal. There was clearly a written permission given by the Applicants, albeit on certain terms, but we are not aware of any response from the Respondent indicating that the ability of the Applicant to revoke the right for the dogs to remain was challenged. **In those circumstances, therefore, we dismiss this particular alleged breach.**

86. It is accepted by the Respondent that she did not and has not obtained a deed of covenant as required under the terms of the lease. We have some sympathy with her as it appears that she is the first person who has been required to provide such a licence notwithstanding that there appears to have been sub-letting by others. The deed of covenant is to be provided by the lessor and not by the Respondent's solicitors and accordingly we find that technically there has been a breach of the covenant to provide a deed of covenant in respect of the letting. We should say, however, that we are surprised at the extent to which the deed of covenant is intended to bite. Ordinarily a short term letting on an AST basis would not expect the tenant to be responsible for the terms of a lease particularly with regard to service charges and other issues. It may well be that this clause could do with some review. It is clearly to the benefit of all concerned that if there is a letting on an AST the details of that tenancy are given to the landlord so that they know who is in occupation but it is unrealistic in our view to expect an AST tenant to sign a deed of covenant essentially making them responsible for the terms of the lease. If that were invoked in each case, it would seem to us that it would be difficult to ever get a short term letting of any flat/maisonettes within the Property. **Nonetheless, it is technically a breach of the lease and we so find.**

87. The Respondent appears to be saying that there is no breach of clause 3(j) of the lease. That clause says as follows: "To pay all expenses (including solicitors costs and surveyors fees) which may be incurred by the lessors incidental to the preparation and service of a schedule of dilapidations and notice to repair or any notice under section 146 or section 147 of the Law of Property Act 1925

notwithstanding that forfeiture is avoided otherwise and by relief granted by the Court."

88. It seems clear to us that these proceedings are required to obtain a finding from us under the 2002 Act which will then enable the issue of a section 146 notice. It does, however, seem to us to be premature to be expecting the Respondent to pay the costs at the moment. As a result of our findings, it may well be that if the question of costs is not resolved that there is a breach of this covenant. **However, at the moment we take the view that there is no such breach and that the application in respect of this matter is somewhat presumptive.** We do say, however, that the costs associated with these proceedings would clearly be incidental to the preparation and service of a notice and therefore on the face of it would be recoverable. It is just a question of when and we find that point has not yet been reached.

89. To sum up, therefore, we find that there have been breaches of the licence and of the lease and we make the findings set out above.

90. It does, however, seem to us that this is a case that can and should be resolved. We understand the Applicant's concern about accepting the terms of the schedule of condition given the views expressed by Mr Harrison. We would suggest that it would be worthwhile either retaining the services of an independent surveyor recommended by the RICS or in the alternative to take up the suggestion of Mr Harrison that he meets with Mr Lewy or some other surveyor instructed by the Respondent to resolve this matter once and for all. There is a danger of putting the cart before the horse. It is not possible for the Respondent to assess whether she could make a payment to resolve these issues without knowing what works are required. Equally, it is not possible for the Applicants to know whether such a payment is reasonable until they know what the position is in respect of ongoing works. In those circumstances, therefore, we would recommend to the parties that they should put on hold any further litigation, concentrate on putting together a list of works that are required to comply with the terms of the licence and deal with that before any further issues are considered.

91. Our findings are under the jurisdiction limited to whether or not there has been a breach of condition or covenant. We have made those findings. If there is to be any enforcement action in respect of same it will have to be at the County Court who may well now be the better forum for determining any outstanding issues that may arise in respect of the works and the costs.

Judge: Andrew Dutton

A A Dutton

Date: 21st January 2020

**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 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 to 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 (ie 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.