FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &

IN THE COUNTY COURT at WILLESDEN, sitting at 10 Alfred Place, London WC1E 7LR

Tribunal reference	**:**	**LON/00AJ/LBC/2019/0072, LON/00AJ/LAC/2019/0021 and LON/00AJ/OLR/2019/1335**
Court claim number	**:**	**F01W1109**
Property	**:**	**2 Sandall Close, London W5 1JE**
Landlord	**:**	**Felix Samuel (Defendant in county court proceedings)**
Representative	**:**	**Carl Fain of Counsel**
Tenant	**:**	**Naveen Sagar (Claimant in county court proceedings)**
Representative	**:**	**Chris Green, Solicitors' Agent, for SLC Solicitors**
Tribunal members	**:**	**Judge P Korn & Mr M Taylor FRICS**
In the county court	**:**	**Judge P Korn, with Mr M Taylor FRICS as assessor**
Hearing date	**:**	**12th December 2019**
Date of decision	**:**	**11th February 2020**

DECISION

Those parts of this decision that relate to County Court matters will take effect from the 'Hand Down Date' which will be:

1. If an application is made for permission to appeal within the 28-day time limit set out below – 2 days after the decision on that application is sent to the parties, or;
2. If no application is made for permission to appeal, 30 days from the date that this decision was sent to the parties.

Summary of the decisions made by the Tribunal

1.1 In relation to the Landlord's application for a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("**the 2002 Act**") as to whether breaches of covenant or condition have occurred under the Respondent's lease, the Tribunal determines that a breach of covenant has occurred.

1.2 Specifically, a breach of the covenant contained in clause 13 of the Tenant's lease has occurred in that the Property was not insured in the joint names of the landlord and the tenant until 22nd May 2019.

1.3 The other alleged breaches raised by the Landlord in his application do not constitute breaches of covenant or condition.

2. In relation to the Landlord's application for a determination under Schedule 11 to the Commonhold and Leasehold Reform Act 2002 as to whether administration charges of £770.00 are payable, the Tribunal determines that they are not payable either in whole or in part.

Summary of the decision made by the Court

3. In relation to the Tenant's claim for an order pursuant to section 48(3) of the Leasehold Reform, Housing and Urban Development Act 1993 ("**the 1993 Act**") the Court orders as follows:-

    - Landlord to grant a new lease of the Property to the Tenant in the agreed form within 21 days from the date of this decision on the Tenant's solicitors paying to the Landlord's solicitors by bank transfer:-
        - the premium of £19,758.00;
        - the section 60 costs of £2,405.00; and
        - the ground rent of £210.00 for the period prior to 25th December 2019 plus the ground rent for the period from 25th December 2019 up to the date of completion.
    - On receipt of a bank transfer for the ground rent of £210.00 for the period prior to 25th December 2019, the Landlord or his solicitors to destroy the cheque for £210.00 previously tendered by or on behalf of the Tenant.
    - Tenant to undertake through his solicitors to remove his UN1 notice against the freehold title following completion.

Background

4. An application for an order under section 48(3) of the 1993 Act was originally made in the Willesden County Court by the Tenant under

claim number F01W1109. The order sought relates to the Tenant's claim for an extended lease.

5. On 6th September 2019 the Landlord then made two applications to the Tribunal, one for an order that breaches of covenant or condition had occurred in the Tenant's lease and the other for a determination as to liability to pay an administration charge.

6. The County Court proceedings were then transferred to this Tribunal by an order of District Judge Kanwar dated 26th November 2019.

7. Directions were issued and the matter eventually came to hearing on 12th December 2019.

8. The Tenant is the leaseholder of the Property, which is a two-bedroom converted flat within a building ("**the Building**") comprising one other leasehold flat. The Tenant is the Claimant in the County Court proceedings and the Respondent to the Tribunal proceedings. The Landlord is the freeholder of the Building and the leaseholder of the other flat. He is the Defendant in the County Court proceedings and the Applicant in the Tribunal proceedings.

Tribunal issues

Breaches of covenant

The alleged breaches

9. The Tenant's lease ("**the Lease**") is dated 16th June 1948 and was originally made between John Turner & Sons Limited (1) Borough Building Society (2) and Mabel Ellen Christina Field (3). It was subsequently varied by two separate Deeds of Variation, dated 20th February 1987 and 30th June 1987 respectively, and then rectified by a Deed of Rectification dated 1st July 1987.

10. The Landlord alleges that the Tenant has breached clause 13 of the Lease by failing to (a) keep the Property insured at all times, (b) produce to the Landlord evidence of building insurance when requested for the years 2015-18 and early 2019, (c) produce to the Landlord complete building insurance policy documentation, (d) insure the Property in the joint names of the Landlord and the Tenant at any point prior to 22nd May 2019 or maintain the correct reinstatement value, (e) authorise the insurance broker to discuss details of the building insurance policy with the Landlord or his representative or (f) insure the Property against fire until 22nd May 2019.

11. The Landlord initially also alleged that the Tenant had sublet the Property on an Assured Shorthold Tenancy to Dorota Kusmierska for over 10 years and had allowed 8 other individuals to occupy the Property and that these actions constituted a breach of the Lease. However, during the course of the proceedings this alleged breach appears to have been abandoned.

Landlord's case

12. The Landlord requested building insurance information five times in 2018 for that year and for the preceding 3 years but no documentation was provided. The Landlord merely received an email from the Tenant's solicitors on 7th December 2018 stating that they were assured by their client that the Property was insured.

13. In 2019 there was detailed correspondence between solicitors regarding building insurance compliance for the years 2015 and 2019. The Tenant's solicitors gave various responses which are quoted in the Landlord's statement of case and are presented by the Landlord as evidence of breach of covenant or at least as being unhelpful. The Landlord states in particular that when in 2018 and 2019 it requested copies of insurance cover for 2015 to 2019 no documents were received for the period from 2015 to 5th February 2019 and only incomplete documents were received in respect of the period from 5th February 2019 as only four pages of the policy were provided.

14. The Landlord notes that clause 13 of the Lease states that the Property must be insured *"at all times against loss or damage by fire"* and submits that the Tenant has been unable to confirm that this has been the case. The only evidence of insurance against loss or damage by fire seen by the Landlord is a four-page schedule relating to cover taken out on 22nd May 2019. As the Tenant changed his cover at that point to include fire risk it follows that prior to this date there was no insurance against fire risk.

15. Clause 13 also requires the Tenant to produce the *"policy"* to the Landlord, and the Landlord submits that this means that he has the right to receive full policy documentation for the current year (i.e. the year in which the request is made) as well as previous years. The Landlord notes that the Tenant has stated that the paperwork for previous years is simply not available but points to the case of *Johnston v Leslie & Godwin Financial Services Ltd (1995) LRLR 472* in which it was held that the duty to retain insurance documents was a continuing one.

16. In addition, clause 13 requires the insurance to be taken out in joint names, and this has only happened since 22nd May 2019. That it is insufficient merely to list the Landlord as an 'interested party' is clear from the Upper Tribunal decision in *Denise Green v 180 Archway*

Road Management Company Limited (2012) UKUT 245 (LC). Insofar as the Tenant seeks to argue that there is no breach of covenant because the current policy is compliant and there is therefore no loss, it is clear from the Upper Tribunal decision in *GHN (Trustees) Ltd v Glass (Ref: LRX/153/2007)* that the only issue for the Tribunal under section 168 of the 2002 Act is simply whether a breach has occurred.

17. The Landlord further states that the Tenant has blocked the Landlord from discussing the insurance with the broker or obtaining copy policy documentation direct and maintains that this is a breach of the Lease. He does not give particulars as to precisely why this is considered to be a breach but adds in his further statement of case that a vigorous and concerted attempt has been made by the Tenant to conceal inadequate, invalid or non-compliant insurance cover over many years.

18. In addition, the Landlord states that the Tenant gave inaccurate information when applying for insurance cover in 2019, particularly in relation to sublettings, and that providing inaccurate information can invalidate the policy.

19. As to whether the Landlord has waived any breaches, the Landlord refers the Tribunal to the Upper Tribunal decision in *Swanston Grange (Luton) Management Ltd v Langley-Essen (Ref: LRX/12/2007)*. He quotes HHJ Huskinson as stating in that case that for a tenant to rely on waiver or promissory estoppel to prevent the landlord from relying on a covenant the tenant would have to show an unambiguous promise or representation that the landlord does not intend to insist on its legal rights thereunder and that the tenant had altered its position to its detriment on the strength of such a promise or representation.

20. At the hearing, Mr Fain for the Landlord said that the Tenant had failed to produce evidence of insurance when requested, had produced an incomplete copy of the policy for 2019 and had failed to show that the Property was insured against fire until quite recently. As to whether there has been a waiver, in addition to the arguments advanced in the Landlord's statement of case Mr Fain distinguished between waiver for the purposes of forfeiture and waiver of a covenant itself.

Tenant's case

21. The Tenant states that he has insured the Property properly and adequately at all times and that the Landlord has only raised concerns following the Tenant's exercise of his statutory right to obtain a lease extension under the 1993 Act. The Tenant claims that these proceedings are an abuse of process and have been brought to vex and harass the Tenant. In his statement of case he sets out the background, as he sees it, and a timeline.

22. Specifically in relation to the alleged breaches of clause 13 of the Lease, the Tenant submits that the purpose of clause 13 is to enable the landlord to be satisfied that the tenant has current, valid and adequate insurance cover in place. The Landlord requested this in 2012 and was provided with a copy of the Tenant's insurance policy. The Landlord did not request this information between 2013 and 2018 but is now retrospectively seeking to obtain copies of previous insurance policies.

23. When requested, the Tenant provided the Landlord with valid and current insurance policy documentation for 2019, together with the receipt for the last premium, on both 6th February and 22nd May 2019.

24. As regards the specific allegation that the Tenant has not insured the Property "at all times", this is denied. It is in the Tenant's own best interests to obtain proper and adequate insurance to protect his investment and there is no basis for assuming that the Property was not insured at any stage. In any event, it is unreasonable to expect the Tenant to have kept copies of all previous, expired insurance policies simply so as to enable the Landlord to satisfy himself that the Property has been insured at all times. Nevertheless, in an email dated 3rd October 2019, which was forwarded to the Landlord's solicitor on 10th October 2019, the Tenant's insurance broker Frazer Hart confirmed that insurance cover had been in place since 2011.

25. As regards whether the Property has been insured against loss or damage by fire, again the Landlord has simply assumed that it has not been. It would be extremely unusual for a building insurance policy to exclude loss or damage by fire and there is no express exclusion of fire in any of the documentation provided to the Landlord on 6th February 2019. On the contrary, it cross-refers to the "Nelson Policies at Lloyds Non-Standard Home Owners Insurance Policy Wording, Section A of which refers to fire as the first risk that is covered.

26. As for whether the Tenant has failed to provide a copy of the insurance policy "whenever required", the Tenant submits that the Landlord's position is misleading as the Landlord did not request a copy in 2011 or between 2013 and 2018 (until October 2018). The Landlord made a request on 30th May 2012, with which the Tenant complied, and the Landlord confirmed in writing that he had done so by stating in a letter dated 12th October 2012 *"Many thanks for forwarding a copy of your building insurance certificate"*. The policies for the other years were not requested in those years and the Tenant has not kept copies of expired policies.

27. The Landlord's solicitor did write to the Tenant's solicitor on 19th October 2018 during negotiations relating to the lease extension requesting a copy of the current building insurance but then widened this request on 26th November to include the insurance papers for the last 3 years. No explanation was given for this wider request, despite

the point being questioned by email. On 10th December 2018 assurances were given on behalf of the Tenant that the Property was properly insured, following which the Landlord did not make any further requests for insurance policy documentation. The Tenant did, though, provide the Landlord with a copy of his current policy at the Tribunal hearing on 6th February 2019.

28. On 3rd May 2019 the Landlord purported to serve a forfeiture notice on the basis of alleged breaches of clause 13 of the Lease, and the Tenant's solicitor responded by stating that the forfeiture notice was invalid as the provisions of section 168(2) of the 2002 Act had not been satisfied. A receipt for the premium was provided on the Tenant's behalf as evidence that an insurance policy had been in place during 2018 and it was accompanied by responses to each of the queries raised by the Landlord by email on 5th April 2019 as to the length of the policy and reinstatement value. On 15th May 2019 the Landlord raised further queries on insurance but the Tenant was growing increasingly concerned that such queries were being used to frustrate the grant of the new lease. Nevertheless, the Tenant answered these queries and also incurred additional expense by updating the policy.

29. Insofar as the Landlord is also alleging that the Property has not been insured for the "full reinstatement value", the Tenant denies this allegation.

30. As for the submission that the Property has not been insured in the joints names of the landlord and the tenant, the Landlord is named on the policy and in letters dated 30th May and 12th October 2012 the Landlord states *"you will need to seek buildings insurance … noting the interest of the freeholder"* and *"you are required to register the interest of the freeholder with your insurers"*. In the Tenant's submission the Landlord therefore waived the specific requirement to insure in joint names and the Tenant relied on this waiver. The decision in *Doe on the demise of Knight v Rowe (1826) 2 C&P 246* states that a requirement to insure in joint names can be waived by a landlord.

31. Regarding the allegation that, by failing to authorise his insurance broker to discuss the insurance policy with the Landlord, the Tenant was actively breaching the terms of the Lease, the Tenant denies any such breach.

32. On the allegation that the Tenant is in breach as he has not provided "complete" policy documentation for 2015 to 2019, the Tenant denies this too. The Landlord has produced no evidence to show that the insurance is deficient or inadequate in any way, the Lease does not specify exactly what insurance documents are required and clause 13 of the Lease does not use the word "complete".

Administration charge

The issue

33. The administration charge is for £770.00 and was charged to the Tenant on 18th June 2019. It covers 3½ hours of legal support at £220 per hour for chasing compliance by the Tenant with his covenants under the Lease relating to building insurance.

Landlord's case

34. The Landlord accepts that if there has been no breach of covenant then he has no right to recover the administration charge. On the assumption that there have been breaches, the Landlord submits that this charge is recoverable on the wording of the Lease as amended by the Deed of Variation dated 13th June 1987.

35. The Landlord relies on clause 3 of the Deed of Variation which reads: *"The Lessee hereby covenants with the Lessor to enter into a covenant with the Lessor to keep the Lessor indemnified against all proceedings costs demands and expenses arising out of the enforcement of the said covenant by the Lessee or by the Lessor at the request of the Lessee".*

36. The Landlord argues that in the Lease itself the word "indemnified" appears to be synonymous with the word "reimbursement" and that this approach was continued in the Deed of Variation. It is therefore wide enough to cover all costs arising out of the enforcement of the Tenant's insurance obligations. The Landlord has also referred the Tribunal to the Upper Tribunal decision in *Fairhold Freeholds No. 2 Limited v Alistair C Moody (2016) UKUT 0311 (LC)* as to the meaning of the word indemnity, as well as to the Upper Tribunal decision in Alexander *Christoforou and Diogenis & Costas Diogenous v Standard Apartments Limited (2013) UKUT 0586 (LC).*

37. The amount of £770.00 is considered by the Landlord to be reasonable as the work involved spending a lot of time chasing the Tenant to comply with his obligations.

Tenant's case

38. The Tenant interprets the abovementioned Deed of Variation differently. It enables the Tenant to require the Landlord to enforce covenants contained in other leases on the basis that the Tenant has to indemnify the Landlord for the cost of doing so. In the Tenant's submission, it does not do any more than that.

39. In particular, recital (6) at the beginning of the Deed of Variation is a cross-reference to specific clauses in the Lease, and if a wider indemnity were intended then recitals (6) and (7) would not be needed. In addition, the contra proferentem rule applies in that the Landlord – being the party seeking payment – needs to show that clause 3 is sufficiently wide to allow him to levy this charge.

County court issue – section 48 of 1993 Act

40. After the proceedings were sent to the Tribunal offices, the Tribunal decided to administer the whole claim so that the Tribunal Judge at the final hearing performed the role of both Tribunal Judge and Judge of the County Court (District Judge). No party objected to this.

The issue

41. On 19th December 2017 the Tenant served a notice under section 42 of the 1993 Act claiming the right to acquire a new lease of the Property. The Landlord served a counter-notice on 20th February 2018 and the amount of the premium and the other terms were determined by the Tribunal on 12th February 2019. The form of new lease has now been agreed. The Tenant's claim is for an order under section 48(3) of the 1993 Act requiring the Landlord to grant him a new lease.

42. Section 48(3) reads as follows:-

"Where –

(a) the landlord has given the tenant such a counter-notice or further counter-notice as is mentioned in subsection (1)(a) or (b), and

(b) all the terms of acquisition have been either agreed between those persons or determined by the appropriate tribunal under subsection (1),

but a new lease has not been entered into in pursuance of the tenant's notice by the end of the appropriate period specified in subsection (6), the court may, on the application of either the tenant or the landlord, make such order as it thinks fit with respect to the performance or discharge of any obligations arising out of that notice."

43. Section 56(3) reads as follows:-

"A tenant shall not be entitled to require the execution of any such new lease otherwise than on tendering to the landlord, in addition to the amount of any such premium and any other amounts payable by virtue of Schedule 13, the amount so far as ascertained –

(a) of any sums payable by him by way of rent or recoverable from him as rent in respect of the flat up to the date of tender;

(b) of any sums for which at that date the tenant is liable under section 60 in respect of costs incurred by any relevant person (within the meaning of that section); and

(c) of any other sums due and payable by him to any such person under or in respect of the existing lease;

and if the amount of any such sums is not or may not be fully ascertained, on offering reasonable security for the payment of such amount as may afterwards be found to be payable in respect of them."

44. The Landlord conceded during the course of the hearing that the ground rent had been tendered by the Tenant.

Tenant's case

45. The Tenant notes that the Landlord relies on section 56(3) of the 1993 Act in arguing that the Tenant is not yet entitled to be granted a new lease.

46. The Landlord has now accepted that the ground rent has been tendered. The administration charge, in the Tenant's submission, is not payable and in any event is not caught by section 56(3). As regards the other sums, it has been clear between the parties that the premium and the section 60 costs would be paid on completion of the new lease.

47. Specifically in relation to the section 60 costs, the Tenant's solicitor requested a breakdown of these but in an email dated 3rd May 2019 the Landlord's solicitor refused to provide this. She did later provide a breakdown, on 18th June 2019, but by then the costs had nearly doubled and also included the £770.00 administration charge which, in the Tenant's submission, is not payable and does not form part of the Landlord's section 60 costs. Then the following day the Landlord's solicitor gave a different figure for section 60 costs, this sum being conditional on completion by 24th June 2019, which in any event was very short notice and was set as the completion date in the knowledge that the Tenant's solicitor was not in the office on Mondays. There were also various other impediments to achieving completion by that deadline.

Landlord's case

48. Section 56(3) states that a tenant is not entitled to require the execution of a new lease until certain sums have been paid or – to the extent that

any such sums have not been fully ascertained – until reasonable security for payment has been offered.

49. In this case only the ground rent has been tendered. The Tenant has not tendered the premium or the section 60 costs or the £770.00 administration charge. The Tenant has provided no signed statement that there are cleared funds in his solicitor's account and nor has his solicitor provided a letter confirming that the money is available. No security has been offered for the disputed amounts. Until these sums are paid or (to the extent applicable) reasonable security for payment has been offered the Landlord is not obliged to grant the new lease. The Tenant can easily resolve this impediment to completion.

50. In support of his position the Landlord cites the Upper Tribunal decision in *Friends Life Limited and another v M.L. Jones (2014) UKUT 0422 (LC)*.

51. Any section 48(3) order should be conditional on the premium and the section 60 costs being paid. The Landlord would also like the ground rent to be paid again, this time by bank transfer, on condition that he destroys the cheque already tendered. This is due to the Landlord's solicitors' policy of not accepting cheques. In addition, further ground rent is payable on 25th December and therefore the Tenant needs to pay an apportioned amount of this. The £770.00 administration charge also needs to be added if payable. The Landlord also wants the Tenant to undertake to remove the UN1 notice from the title following completion.

52. If the Tribunal finds that there has been a breach of covenant then the Landlord would also like the Tenant to be ordered to provide the Landlord with a copy of the insurance policy for the period 1st January to 4th February 2019.

53. The Landlord proposes that all of the above conditions be complied with within 14 days.

Tenant's response

54. As regards the alleged failure to offer security for costs, no security was requested and the parties' common intention was for all outstanding sums to be paid on completion. In relation to the provision of insurance information, the Tenant does not understand why the grant of a new lease should be conditional on the provision of a copy of an expired insurance policy.

55. If the Court is not willing simply to order the unconditional grant of the new lease the Tenant requests up to 28 days for compliance but will try to comply within 14 days.

Decisions and reasons

Breach of covenant issue

56. The relevant parts of clause 13 of Lease, as amended by the Deed of Variation dated 30th June 1987, read as follows:-

"Forthwith to insure and at all times during the said term to keep insured against loss or damage by fire the demised premises … to the full reinstatement value thereof … in the joint names of the Lessor and Lessee … and whenever required to produce to the Lessor or its agents the Policy for every such insurance and the receipt for the last premium thereof …".

57. We have considered the written and oral submissions on behalf of both parties and the supporting copy documentation.

58. On the question of whether the Tenant has insured the Property since 2011, the hearing bundle contains a copy of an email from the Tenant's insurance brokers TR Youngs Insurance Brokers dated 3rd October 2019 confirming that the Property has been insured since 2011. The Landlord has not tried to suggest that the insurance brokers are being untruthful, and therefore in the absence of any credible evidence that the Property was not in fact insured at any point during this period we are satisfied that it was.

59. The evidence indicates that the Landlord requested evidence of insurance in 2012, towards the end of 2018, and in 2019, but not at other times. The evidence also shows, in our view, that the Tenant complied with the Landlord's request in 2012 and that the Landlord acknowledged this to be the case. Part of the Landlord's case seems to be that in relation to the years between 2013 and 2018 the Tenant is or was in breach of clause 13 of the Lease by virtue of his having failed to produce when asked (i.e. in 2018 and/or 2019) copies of insurance policies for previous years.

60. In partial support for the above argument, the Landlord notes the decision in *Johnston v Leslie & Godwin Financial Services Ltd* to the effect that the duty to retain insurance documents is a continuing one. However, in our view this is to miss the point. The issue is not how long one should hold on to insurance documents but rather whether a failure to produce policy documentation for previous years constitutes a breach of clause 13 of the Lease. As for the Landlord's argument that there could be circumstances in which it would be useful to have sight of expired policies, again it does not follow that the failure to produce copies of expired policies is a breach of clause 13. The relevant part of clause requires the tenant to produce "the Policy" and in our view it is clear that the intention is to oblige the tenant to provide a copy of the

then current policy, not a copy of a different policy which may have expired 1 or even 10 years previously. Much clearer language would be needed for this covenant to create an obligation on the tenant to hand over a copy of any expired insurance policy, especially given the consequences that can flow from a tenant being adjudged to have been in breach of a lease covenant.

61. Did the Tenant fail to produce a copy of the policy when so requested in 2018 and in 2019? The evidence indicates that no request was made until 19th October 2018. The Tenant's version of events thereafter, which has not been effectively challenged by the Landlord, is that the Landlord then wrote to him in November 2018 to widen his request to include the insurance papers for the last 3 years but gave no explanation for this wider request despite it being questioned by email. The Tenant also states that in December 2018 assurances were given on behalf of the Tenant that the Property was properly insured, following which the Landlord did not make any further requests for insurance policy documentation, although the Tenant did in fact provide the Landlord with a copy of his current policy at the Tribunal hearing on 6th February 2019. The Tenant then later updated the policy and provided the Landlord with details.

62. Taken as a whole, the evidence does not in our view show that the Tenant failed to produce a copy of the insurance policy when requested. On the separate but related question as to whether the Tenant failed to produce a "complete" copy, the word "complete" is not mentioned in clause 13 and the Landlord has not satisfied us that the information actually supplied by the Tenant was defective, or sufficiently defective that it failed to constitute producing a copy of the policy. As to whether the Tenant has failed to insure the Property "against loss or damage by fire", the Landlord accepts that it has been insured against loss or damage by fire since 22nd May 2019 but questions whether it was insured against this risk prior to then. However, we do not accept that it follows from the absence of clear written proof on this specific point that the Tenant has in fact been in breach of this aspect of the covenant in clause 13. First of all, there is evidence that the Property was insured, and we have never seen a building insurance policy in which "fire" is an excluded risk. Secondly, the Tenant has provided some evidence by reference to standard wording that fire risk would have been included. Ultimately the Landlord is just relying on an assumption based at most on a belief or an assertion that the Tenant was being unhelpful in response to his requests for information, and we do not accept that this is a sufficient basis for a determination that a breach of covenant has occurred. We also do not accept that it can reasonably be inferred from the updating of the policy that fire risk was not previously covered.

63. The Landlord submits that the Tenant blocked the Landlord from discussing the insurance with the broker or obtaining copy policy documentation direct and maintains that this is a breach of the Lease. We disagree with this assessment. First of all, clause 13 does not place

any obligation on the Tenant to allow the Landlord to do this, and secondly there are perfectly respectable reasons for an insured party not to want his landlord to contact his broker direct. In any event, clause 13 does not require the Tenant to facilitate communication between the Landlord and the broker.

64. Insofar as the Landlord is arguing that the Property has not been insured in its full reinstatement value, there is no proper evidence to support such an argument. As for the submission that the Tenant has invalidated the policy, there is simply insufficient evidence to support this submission.

65. Turning now to the aspect of the covenant which requires the Tenant to insure *"in the joint names of the Lessor and Lessee"*, the evidence indicates that the Tenant did not insure in joint names until 22nd May 2019. Prior to that, at most, the Landlord's interest was noted on the insurance policy but he was not named as joint insured. The Tenant states that the Landlord wrote to him in 2012 stating that the Tenant needed to note/register the Landlord's interest and submits that by doing so the Landlord waived the specific requirement to insure in joint names. The Tenant relies on the decision in *Doe on the demise of Knight v Rowe (1826) 2 C&P 246* as authority for the proposition that a requirement to insure in joint names can be waived by a landlord.

66. The fact that a requirement to insure in joint names can be waived does not mean that the Landlord's actions amounted to a waiver in this case. In addition, there are two different types of waiver, and *Swanston Grange (Luton) Management Ltd v Langley-Essen* is clear authority for the proposition that the First-tier Tribunal's jurisdiction extends to making a determination that a landlord has waived the right to sue for breach of covenant but does not extend to making a determination that a landlord has waived its right to forfeit the lease. In *Swanston Grange* HHJ Huskinson stated that for a tenant to rely on waiver to prevent the landlord from relying on a covenant the tenant would have to show an unambiguous promise or representation that the landlord does not intend to insist on its legal rights thereunder and that the tenant had altered its position to its detriment on the strength of such a promise or representation. That is clearly not the case here, as all that the Tenant can point to are a couple of loosely worded statements from 2012 requiring the Tenant to ensure that the Landlord's interests are protected on the insurance policy. This falls far short of an *"unambiguous promise or representation that the landlord does not intend to insist on"* its technical legal right to be named as joint insured, especially as the statements were not made by an insurance expert or by a lawyer or anyone else who could be presumed to weigh their words carefully and to be crystal clear about the difference between noting a landlord's interest and making the landlord joint insured.

67. It is clear that there is a significant difference between noting a landlord's interest and making the landlord joint insured, and this point has been confirmed by the Upper Tribunal in *Denise Green*. In conclusion, therefore, a breach of clause 13 of the Lease has occurred in that the Tenant did not insure the Property *"in the joint names of the Lessor and Lessee"* until 22nd May 2019. None of the other alleged breaches has occurred.

Administration charge

68. The Landlord's position is that, if there has been a breach of covenant, the charge for time spent by his solicitors for chasing compliance by the Tenant with that covenant is recoverable under the Lease by virtue of clause 3 of the Deed of Variation dated 30th June 1987.

69. We have considered the wording of the Lease itself, the two Deeds of Variation and the Deed of Rectification, although it is common ground that the changes introduced by the first Deed of Variation and by the Deed of Rectification do not have any bearing on this issue.

70. As noted above, clause 3 of the Deed of Variation reads as follows:

"The Lessee hereby covenants with the Lessor to enter into a covenant with the Lessor to keep the Lessor indemnified against all proceedings costs demands and expenses arising out of the enforcement of the said covenant by the Lessee or by the Lessor at the request of the Lessee".

71. Clause 3 could have been drafted more elegantly, and we note in particular that it is not expressed as a covenant to indemnify the Lessor (i.e. the landlord) but rather as a covenant "to enter into a covenant" to indemnify the Lessor. However, one key point is that it is clear from reading the Deed of Variation as a whole that clause 3 needs to be read and understood in the context of the whole document, or at least of those parts which are relevant to the matters covered by clause 3.

72. Recital (4) notes that the Lease contains certain repairing and insuring covenants on the part of the Lessee (i.e. the tenant) in relation to the Property and a covenant to contribute towards the cost of maintaining and repairing the common parts of the Building. Recital (6)(i) and (ii) then states as follows:-

"At the request of the Lessee the Lessor has agreed

(i) to obtain covenants from the Lessee under the other lease identical (mutatis mutandis) to those contained in Clauses 4 5 6 7 and 13 of the Lease (as amended hereby and hereinafter called "the said covenants")

(ii) when called upon by the Lessee at the expense of the Lessee forthwith to enforce the said covenants but without the Lessor itself parting with the benefit thereof or the right to enforce the same".

We note that recital (6)(i) refers to "Lessee" with a capital "L" but we consider this to be a mere typographical error and that it should read *"to obtain covenants from the lessee under the other lease …".*

73. Recital (7) then states as follows:-

"The Lessee in return has agreed with the Lessor to enter into a covenant with the Lessor to keep the Lessor indemnified against all proceedings costs demands and expenses arising out of the enforcement of the said covenant by the Lessee or by the Lessor at the request of the Lessee".

74. It is clear that recital (7) is a reference to clause 3 of the Deed of Variation. Its language is mirrored by the language in clause 3 and it is self-evident that clause 3 contains the covenant that according to recital (7) *"The Lessee in return has agreed with the Lessor to enter into".*

75. What seems also clear is that the covenant referred to in recital (7) in the phrase *"enforcement of the said covenant"* is the covenant or covenants being referred to in recital (6). We accept that the recital (6) uses the phrase *"the said covenants"* whilst recital (7) refers to *"the said covenant"* in the singular, but again it seems clear from the context that this is merely another typographical error.

76. Therefore, the covenant referred to in recital (7) and then reflected in clause 3 is a covenant on the part of the Lessee (the tenant) to indemnify the Lessor (the landlord) against costs etc arising out of the enforcement of the covenants referred to in recital (6). Those covenants are the obligations of the lessee under the other lease, and the purpose of clause 3 – in the light of the recitals – is to enable the Lessor (the landlord) to be indemnified/reimbursed if the Lessee (the tenant) asks him to enforce the obligations of the lessee under the other lease and the Lessor then incurs expenditure in enforcing those obligations.

77. It follows that clause 3 of the Deed of Variation is not an indemnity or a right of reimbursement in respect of costs incurred by the Lessor/landlord in enforcing the Lessee's/tenant's own obligations under the Lease, and therefore the administration charge is not recoverable under the Lease. As regards the Upper Tribunal decisions in *Fairhold Freeholds* and in *Alexander Christoforou*, these are simply not relevant to the present case in that they address different points.

County court issue – section 48 of 1993 Act

78. It is now accepted by the Landlord that the ground rent due as at the date of the hearing has been tendered and the Tribunal has determined that the £770.00 administration charge is not payable. Based on the parties' respective submissions that just leaves the premium of £19,758.00, the section 60 costs which have been determined at £2,405.00 and the ground rent for the period from 25th December 2019 up to the date of completion of the new lease.

79. The Tenant asserts that it was the parties' common intention for all of the outstanding sums to be paid on completion but the Tenant has not provided sufficient evidence to support this assertion and I am not persuaded on the balance of probabilities that this is the case.

80. We note the frustrations expressed on behalf of the Tenant as to the difficulties experienced in trying to obtain a cost breakdown and as to the tight deadline for completion previously proposed by the Landlord's solicitor, but section 56(3) of the 1993 Act is perfectly clear. The Tenant has not tendered the premium or the section 60 costs, both of which are now final figures and therefore do not still need to be ascertained, and nor has he even – through his solicitor – confirmed that cleared funds are available. In the circumstances the Tenant is not entitled to require the execution of the new lease.

81. As to what order, if any, should be made under section 48(3) of the 1993 Act, the Court has quite a wide discretion. First of all, having considered the parties' respective submissions, I consider that it would be disproportionate and inappropriate simply to make no order regarding completion of the new lease and that the proper approach is to make a conditional order. The question then arises as to what conditions are appropriate.

82. On the insurance issue, whilst the Tribunal has determined that there has been a breach of the Tenant's insuring obligations under the Lease, I do not accept that this is a reasonable or proper basis for making the completion of the new lease conditional on the Tenant providing a copy of the now expired building insurance policy for January/February 2019.

83. Further ground rent is now due and the apportioned ground rent for the period 25th December 2019 up to completion of the new lease will need to be paid. There is an issue as to whether the ground rent already tendered by cheque for the period prior to 25th December 2019 should be re-sent by bank transfer. If there were no other issues then I would not be inclined to order the Tenant to pay by bank transfer having already tendered a cheque, but in the circumstances it seems both reasonable and neater for all payments to be made by bank transfer on condition that the Landlord destroys that cheque at the relevant time.

84. The Landlord proposes a deadline for payment of 14 days, arguing that if the Tenant really is ready to complete then the funds should be available. The Tenant proposes 28 days whilst offering to try to provide funds within 14 days. In my view, even if the Tenant was ready to complete earlier it does not follow that he is or should be able to ensure the immediate availability of funds at all times thereafter, and it is perfectly normal for a person to need some notice in order to be in a position to release a sizeable amount of money to complete a transaction. Considering all of the circumstances I consider that 21 days is an appropriate amount of time to allow.

85. As regards the UN1 notice, I agree that it is reasonable to expect the Tenant to undertake to remove this after completion of the new lease.

86. Accordingly the parties shall complete the new lease within 21 days from the date of this decision provided that prior to that date the Tenant's solicitors have paid to the Landlord's solicitors (a) the premium of £19,758.00, (b) the section 60 costs of £2,405.00 and (c) the ground rent for the period up to completion including, in respect of the period prior to 25th December 2019, an amount equivalent to the amount already tendered by cheque (whereupon that cheque must be destroyed). The Tenant must also undertake to remove the UN1 notice after completion of the new lease.

Cost applications and/or any applications in respect of interest

87. Following *John Romans Park Homes Limited v Hancock* (unreported – Martin Rodger sitting as a Judge of the County Court), it is not possible to claim all the costs of proceedings under section 51 of the Senior Courts Act 1981.

88. The different costs rules in the County Court and the Tribunal apply.

89. So, where the Tribunal is dealing with Tribunal issues, the Tribunal 'no-costs' (save for rule 13 costs) considerations apply. However, a landlord may be able to claim costs under the lease as administration charges, and this may bring into play paragraph 5(A), Schedule 11, Commonhold and Leasehold Reform Act 2002.

90. As to costs that were incurred whilst the matter was (a) physically in the County Court or (b) at the Tribunal but being dealt with by the Tribunal Judge sitting as a Judge of the County Court, the Court rules apply.

91. If there is a contractual claim for costs of the County Court elements, the issue arises as to whether paragraph 5(A) of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 is relevant.

92. As discussed at the hearing, any cost applications (or any applications in respect of interest) must be submitted within **14 days** after the date of this decision and any response that a party wishes to make to any cost application made by the other party must be submitted within **28 days** after the date of this decision.

Name: Judge P Korn **Date:** 11th February 2020

ANNEX - RIGHTS OF APPEAL

Appealing against the tribunal's decisions

1. 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 date this decision is sent to the parties.

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 state the grounds of appeal, and state the result the party making the application is seeking.

Appealing against the decisions made by the Judge in his/her capacity as a Judge of the County Court

5. Any application for permission to appeal must arrive at the tribunal offices in writing within 28 days after the date this decision is sent to the parties.

6. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking.

7. If an application is made for permission to appeal and that application is refused, or if no application for permission to appeal is made but, in either case, a party wants to pursue an appeal, that party must file an Appellant's Notice at the County Court office (not the tribunal office) within 28 days of the Hand Down date.

Appealing against the decisions of the tribunal and the decisions of the Judge in his/her capacity as a Judge of the County Court

8. In this case, both the above routes should be followed.