FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AY/LBC/2021/0010**
HMCTS code (paper, video, audio)		**V:VIDEOREMOTE.**
Property	**:**	**Flat 4, 366 Kennington Road, London SE11 4DB.**
Applicant	**:**	**366 Kennington Road Limited.**
Representative	**:**	**Carpenter & Co, Solicitors** **Mr. S. McIlwaine.**
Respondent	**:**	**Ms. Mary Rolfe-Silvester**
Representative	**:**	**Mr. R. Granby of Counsel.**
Type of application	**:**	**Application for costs, following the acknowledgement of the respondent that she was in breach of covenant.**
Tribunal member(s)	**:**	**Tribunal Judge Hamilton-Farey** **Mr. A. Lewicki**
Venue	**:**	**Remote**
Date of decision	**:**	**11 June 2021**

DECISION ON COSTS

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to/not objected to by the parties. The form of remote hearing was V:VIDEOREMOTE. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that the Tribunal were referred to are contained within a single

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and supplementary bundle provided by the applicants and respondents. In addition, the applicants have produced a schedule of costs on which they seek the tribunal's determination.

The tribunal's decision and reasons:

1.The tribunal determines that no costs should be awarded to the applicant in relation to this application.

2. The tribunal determines that the respondent should pay the reasonable surveyors fees, although these have not been quantified.

3. The tribunal determines that no sums a1re payable to the respondent in relation to this application.

Reasons for the decision:

The Application:

1. By an application dated 20 January 2021, the applicants sought a determination that the respondent leaseholder was in breach of her lease.

2. Directions were issued by the tribunal on 19 March 2020 that required the parties to exchange documents and prepare themselves for a hearing on 1 June 2021.

3. The applicants had served a S.146 Notice under the Law of Property Act 1925 on the applicants on or around 4 December 2020, even though they were aware that Notice would not have been validly served because no application had been made to the tribunal to determine the breach of covenant.

4. On 14 January 2021, prior to the application being made, the tenant admitted the breach via an e-mail in which she said *'You will be aware that things did not kick off well because of poor communication, especially on my part. I now realise that I should have communicated my proposed plan in advance and agreed these with my fellow shareholders…..I therefore cannot see why there should be any need to go to arbitration at this stage. I would like to formally request that the structure can remain and of course, I will offer to pay for the survey report and future, reasonable costs of resolving this situation by consent'*

5. By a letter of 15 January, again before the application was made, the applicants wrote to the respondent. The final paragraph of their letter reads, '*If however, the requisite consents are furnished to our clients (and our legal and surveyor's costs paid) within the next three*

months, then they may be willing to reconsider their position on removal of this unauthorised structure'.

6. The applicants had also had a structural survey carried out of the respondent's alterations and the surveyor, Mr. Philip Glowinski and on 7 January 2021 he reported that there were no structural issues with the alterations and no danger of collapse to either the structure or the building itself.

7. The applicants subsequently withdrew their application and now seek their costs, either contractually, or under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, which are set out in the appendix to this decision.

8. The applicants were represented at the hearing by Mr. McIlwaine of Carpenter and Co, Solicitors. The respondent by Mr. Richard Granby of Counsel. Also in attendance was Pip-Lee Woolf a friend of the respondent.

The Law:

9. Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 is set out in the Appendix to this decision.

The applicants' case:

10. It is submitted that the Respondent acted unreasonably by failing to make the concession prior to the application, thus leading the applicants to incur costs of £3,321.00. A schedule of costs was presented to the tribunal prior to the hearing.

11. In the alternative the applicants say that even though they had not served their S.146 correctly, they should be entitled to their costs on a contractual basis as the lese provided for the costs of service a S.146 Notice.

12. The applicants also say that it would have been unnecessary to make an application to this tribunal if the respondent had conceded earlier and that the respondent had acted unreasonably by leaving the concession so late.

13. Mr. McIlwaine also said that it had not been unreasonable of the applicants to serve the S.146 Notice, and that the threats of re-entry were also reasonable , given the applicants real fear that the illegal structure could cause damage and/or collapse.

14. He also said that the e-mail from the respondent was not unconditional and that in any event this could have crossed in the post with the application being made; that the respondent had not taken up with offer in the letter of 15 January 2021 and I fact the structure still remained in position.

15. He confirmed that his clients were seeking the full costs as per the schedule.

The Respondent's Case:

16. Mr. Granby said that the whole application had been misconceived, and that it was not clear the applicants understood the relevant law, or the costs that could be recovered and in what circumstances. The respondent sought her own costs of £600.00 although no schedule had been produced in time for the hearing.

17. He said that the parties were not in the Tribunal because the structure had not been removed, but because of a lack of understanding of Landlord and Tenant law.

18. With respect to the S.146 Notice, he said that this had not been validly served because it was a pre-requisite of the legislation that a determination of a breach of covenant by this tribunal be made, or that the respondent had admitted the breach prior to the Notice being served. In this case the Notice had been served before either of the events had taken place.

19. He said that in those circumstances the applicants were not entitled to their costs of the preparation and service of the S.146 under the lease.

20. With respect to an award under rule 13, he said that his client had not acted unreasonably and that having received the letter of 15 January which appeared to give her three months to obtain the relevant permissions it was reasonable for his client to suppose that she had a three-month period in which to obtain the relevant permissions.

21. He said that no demand for the costs claimed had been served with the relevant Summary of Rights and Obligations, and therefore nothing was payable.

22. He said that in the circumstances any costs would be limited by the tribunal rules and that Rule 13 only provided for costs where the respondent had acted unreasonably. The applicants might have had other remedies in the County Court but had not chosen to take them.

Reasons for our decision:

23. We find the applicants acted incorrectly in serving the S.146 Notice without the tribunal's determination or agreement by the respondent. They are not entitled, in our view, to costs of serving an invalid S.146 Notice and we therefore disallow any part of the costs claimed for this.

24. With respect to the Rule 13 Costs, we do not find that the respondent has acted unreasonably. These costs relate to the conducting of the proceedings in an unreasonable manner, and that 'conducting proceedings must include a party's conduct prior to an application being made to the Tribunal. If this was not the correct interpretation of Rule 13(1)(b), then it would make a nonsense out of the duty to strive to avoid proceedings and encourage the parties to take a pre-application position that could in 'good faith' be maintained after the application. It is suggested that this position is accepted in the decision of *Willow Court Management Company (1985) Limited v Alexander and others [2016] UKUT 290 (LC)* (Willow Court).

25. It is this tribunal's view that the applicants, correspondence of 15 January offered the respondent three months to obtain the relevant permissions and pay costs, and the applicants would then reconsider the consent issue. In our view, the respondent was entitled to rely on that correspondence and therefore had until March to go through the processes to obtain consent. It was therefore unreasonable for the applicants to commence proceedings before that three-month period had expired. The respondent had already admitted the breach by that stage, and it was not necessary for this application to be made. In the circumstances we do not make an award under Rule 13.

26. Given that the Tribunal found no unreasonable behaviour it was not necessary to go to the second or third stage as set out under Willow Court.

27. With respect to the respondent's own costs of defending the application, we consider that the applicants should pay a proportion of the costs said to have been incurred. We award the respondent £300 towards their £600 costs, which shall be paid by the applicants to the respondent within 28 days of today's date.

Tribunal:	Date:
Tribunal Judge Hamilton-Farey	11 June 2021

ANNEX - RIGHTS OF APPEAL

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

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

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

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

APPENDIX

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

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

(1) The Tribunal may make an order in respect of costs only—
(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;
(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—
(i) an agricultural land and drainage case,
(ii) a residential property case, or
(iii) a leasehold case; or
(c) in a land registration case.
(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.
(3) The Tribunal may make an order under this rule on an application or on its own initiative.
(4) A person making an application for an order for costs—
(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and

(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.
(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—
(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
(b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.
(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.
(7) The amount of costs to be paid under an order under this rule may be determined by—
(a) summary assessment by the Tribunal;
(b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");
(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.
(8) The Civil Procedure Rules 1998, section 74 (interest on judgment debts, etc) of the County Courts Act 1984 and the County Court (Interest on Judgment Debts) Order 1991 shall apply, with necessary modifications, to a detailed assessment carried out under paragraph (7)(c) as if the proceedings in the Tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply.
(9) The Tribunal may order an amount to be paid on account before the costs or expenses are assessed.