FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &

IN THE COUNTY COURT at Clerkenwell & Shoreditch sitting remotely by CVP video

Tribunal reference	**:**	**LON/00AZ/LSC/2021/0257**
Court claim number	**:**	**G28YY714**
Property	**:**	**8 Greyfriars, Wells Park Road, Sydenham, London, SE6 6RJ**
Applicant/Claimant	**:**	**Constant Estates Limited**
Representative	**:**	**Mr Jonathan Wragg of Counsel instructed by PDC Law**
Respondent/Defendant	**:**	**Bluegate Housing Limited**
Representative	**:**	**Ms Wendy Mathers of Counsel instructed by Bude Nathan Iwanier LLP**
Tribunal members	**:**	**Judge N Hawkes** **Mr R Waterhouse LLM MA FRICS**
In the County Court	**:**	**Judge N Hawkes sitting as a District Judge**
Date of decision	**:**	**1 February 2022**

DECISION

This decision takes effect and is 'handed down' from the date it is sent to the parties by the Tribunal office:

Summary of the decisions made by the Tribunal

(1) Any applications for costs pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 shall be made within 28 days of the date of this decision.

(2) The Tribunal's case management determinations are set out in the body of this decision.

Summary of the decisions made by the Court

(1) It is ordered by consent that:

1. The Claimant is permitted to file and serve an Amended Claim and Amended Particulars of Claim in the form which appears at page 4 of the hearing bundle.

2. The Defendant is permitted to file and serve an Amended Defence in the form which appears at page 41 of the hearing bundle.

3. The Claimant do pay the Defendant's costs of and occasioned by the Amended Particulars of Claim, to be assessed on the standard basis if not agreed.

(2) The Claim is dismissed.

(3) Any application for County Court costs shall be made in writing within 28 days of the date of this decision (full details of the costs claimed should be provided).

(4) Any representations in response shall be filed and served 14 days thereafter.

(6) Any reply, if so advised, shall be filed and served 14 days thereafter (limited to 2 pages).

The background

1. The Applicant/Claimant is the freehold owner of Greyfriars, Wells Park Road, London SE26 6RJ ("Greyfriars"). The Respondent/Defendant is the leasehold owner of Flat 8 at Greyfriars ("the Flat").

2. Proceedings were originally issued by the Applicant/Claimant against the Respondent/Defendant on 29 October 2020 in the County Court under Claim Number G28YY714 claiming the following sums:

Building Insurance, Ground Rent & Service Charges:	£4,736.33
Administration Charges:	£250
Contractual Costs:	£840

3. A Defence was filed on 9 November 2020 and, on 4 February 2021, Deputy District Judge Martynski made the following order: "*Transfer to the First Tier Tribunal*".

4. After the proceedings had been 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).

5. Directions were given by the Tribunal on 21 September 2021 leading to a final hearing on 6 January 2022.

6. By an application notice dated 29 November 2021, the Applicant/Claimant applied for permission to amend the Particulars of Claim. This application was not determined in advance of the hearing.

The hearing

7. The final hearing took place by CVP video on 6 January 2022.

8. The Applicant/Claimant was represented at the hearing by Mr Jonathan Wragg of Counsel, instructed by PDC Law, and the Respondent/Defendant was represented by Ms Wendy Mathers of Counsel, instructed by Bude Nathan Iwanier LLP.

9. The Tribunal heard oral evidence of fact from:

    a. Mr Max Grizaard, who gave evidence on behalf of the Applicant/Claimant; and

    b. Mr Aron Steinberg, who gave evidence on behalf of the Respondent/Defendant.

10. The Tribunal is at the present time not generally carrying out physical inspections due to the coronavirus pandemic. Neither party requested an inspection and, in all the circumstances of this case, the Tribunal did not consider it to be necessary or proportionate to carry out an inspection.

11. In accordance with an agreement reached by the parties during a short adjournment, the Court ordered by consent that the Claimant is permitted to file and serve an amended claim and Amended Particulars of Claim in the form which appears at page 4 of the hearing bundle; the Defendant is permitted to file and serve an Amended Defence in the form which appears at page 41 of the hearing bundle; and it is ordered that the Claimant do pay the Defendant's costs of and occasioned by the

Amended Particulars of Claim, to be assessed on the standard basis if not agreed.

12. An Amended Statement of Sums Claimed lists the sums claimed as follows:

Invoice and Date claimed	**Description**	**Period of Arrears**	**Balance**
9 December 2014	Ground Rent	25.12.14 – 24.6.15	£249.50
15 June 2015	Buildings Insurance	25.12.14 – 25.12.15	£218.92
10 December 2015	Ground Rent	25.12.15 – 24.616	£249.50
15 June 2016	Buildings Insurance	25.12.15 – 24.12.16	£256.07
9 December 2016	Ground Rent	25.12.16 – 24.06.17	£249.50
12 June 2017	Buildings Insurance	25.12.16 – 24.12.17	£261.92
5 December 2017	Ground Rent	25.12.17 – 24.6.18	£249.50
7 December 2018	Ground Rent	25.12.18 – 24.6.19	£249.50
15 June 2015	Ground Rent	25.6.15 – 24.12.15	£249.50
15 June 2016	Ground Rent	25.6.16 – 24.12.16	£249.50
12 June 2017	Ground Rent	25.6.17 – 24.12.17	£249.50
10 June 2018	Ground Rent	25.6.18 – 24.12.18	£249.50
20 October 2019	Ground Rent	25.6.19 – 24.12.19	£249.50
n/a	PDC Instruction Fee	n/a - n/a	£250.00
n/a	PDC Law Additional Costs	n/a - n/a	£840.00
n/a	Court Fees	n/a - n/a	£455.00
n/a	Solicitor's Fees Issuing Claim forms	n/a - n/a	£100.00
Total Claimed			**£4,876.91**

13. At the commencement of the hearing, Mr Wragg informed the Court and Tribunal that the claim for administration charges in the sum of £250 is no longer pursued. Further, Ms Mathers accepted on behalf of the Respondent that the Tribunal does not have jurisdiction under section 27A of the Landlord and Tenant Act 1985 to determine the reasonableness of the service charges relating to buildings insurance because these have been agreed.

14. In accordance with an agreement reached by the parties during a short adjournment, the Tribunal ordered by consent that the Tribunal's Directions dated 21 September 2021 be varied to extend time for the service of documents by the parties so as to enable the parties to rely upon documents served up to and including the date of the hearing.

15. The parties agreed to proposed directions that any applications for costs pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules") or pursuant to the Civil Procedure Rules ("the CPR") will be made within 28 days of the date of this decision.

The Tribunal's determinations

16. As stated above, the administration charges in the sum of £250 are no longer pursued. Further, the charges relating to insurance have been agreed and payment has been tendered. Any applications concerning costs will be made following the issue of this decision. Accordingly, there are, at present, no issues for the Tribunal to determine.

The Court's Determinations

17. The only issues which remain to be determined by the Court are the Claimant's claim in respect of ground rent and any applications concerning costs.

18. The Defendant has put the Claimant to proof that the ground rent sought from the Defendant is lawfully due.

Whether the Defendant is liable to pay the ground rent claimed in these proceedings

19. Section 166 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") provides as follows (emphasis supplied):

166 Requirement to notify long leaseholders that rent is due

(1) A tenant under a long lease of a dwelling is not liable to make a payment of rent under the lease unless the landlord has given him a notice relating to the payment; and the date on which he is liable to make the payment is that specified in the notice.

(2) The notice must specify—
(a) the amount of the payment,
(b) the date on which the tenant is liable to make it, and
(c) if different from that date, the date on which he would have been liable to make it in accordance with the lease, and shall contain any such further information as may be prescribed.

(3) The date on which the tenant is liable to make the payment must not be—
(a) ***either less than 30 days*** *or more than 60 days after the day on which the notice is given, or*
(b) before that on which he would have been liable to make it in accordance with the lease.

(4) If the date on which the tenant is liable to make the payment is after that on which he would have been liable to make it in accordance with the lease, any provisions of the lease relating to non-payment or late payment of rent have effect accordingly.

(5) The notice—
(a) must be in the prescribed form, and
(b) may be sent by post.

(6) If the notice is sent by post, it must be addressed to a tenant at the dwelling unless he has notified the landlord in writing of a different address in England and Wales at which he wishes to be given notices under this section (in which case it must be addressed to him there).

(7) In this section "rent" does not include—
(a) a service charge (within the meaning of section 18(1) of the 1985 Act), or
(b) an administration charge (within the meaning of Part 1 of Schedule 11 to this Act).

(8) In this section "long lease of a dwelling" does not include—
(a) a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (c. 56) (business tenancies) applies,
(b) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 (c. 5) in relation to which that Act applies, or
(c) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (c. 8).

(9) In this section—
"dwelling" has the same meaning as in the 1985 Act,
"landlord" and "tenant" have the same meanings as in Chapter 1 of this Part,
"long lease" has the meaning given by sections 76 and 77 of this Act, and
"prescribed" means prescribed by regulations made by the appropriate national authority.

20. The Claimant's submissions in respect of section 166 of the 2002 Act are summarised at [18] to [20] of the Claimant's skeleton argument as follows:

"18. The Defendant does not appear to suggest that ground rent demands were not served but that those that were served did not comply with the 2002 Act and the 2004 Regulations [42/10]. The amended defence gives little away as to what the breaches might be but paragraph 9 of the Defendant's amended statement of case [91/9] states that the demands were sent on the 20th October 2019 and paragraph 10 notes that the dates for payment were stated to be the 22nd October 2019. Thus, it might be suggested that the Defendant was not given the requisite 30 days' notice required by the Regulations.

19. In his witness statement Mr Steinberg acknowledges receipt of the demands [162/13] but unhelpfully, does not say when the demands were received. However, he does not set out a positive case that the demands were received less than 30 days before the date for payment.

20. At paragraph 7 of its statement of case [100] the Claimant confirmed that the Section 166 notices at pages 34-43 [118-127] were sent in respect of the ground rent due. In his witness statement Mr Grizzard confirms that the section 166 notices in respect of ground rent were served in September 2019. Insofar as the Defendant

maintains that the demands did not comply with the 2002 Act or the Regulations it is wrong. "

21. The Defendant's submissions in respect of section 166 of the 2002 Act are summarised at [13] to [15] of the Defendant's skeleton argument as follows:

"13. Repeated requests of the Claimant to specify the dates of service of the section 166 notices, the means of service and the identity of the persons effecting service of the notices have been made (see [304], [42], [91]).

14. The documentation supplied by the Claimant suggested that the notices had been served on 20 October 2019 [206], this was made plain in the Defendant's statement of case [91, §9] and not contradicted in the Claimant's response.

15. The witness statement of Mr Grizaard asserts for the first time that the notices were served in "September 2019". No further particulars are given as to precisely when or how the section 166 notices were served nor by whom. In the circumstances it cannot be shown that the requirements of section 166(3) of the 2002 Act are met in respect of the notices. "

22. The Court heard oral evidence from Mr Max Grizaard on behalf of the Applicant. Mr Grizaard gave evidence that he is a photographer by trade and that he was appointed a Director of the Claimant company approximately two to three weeks before his father passed away on 23 September 2018. He stated that the Claimant company operates as a family business with a long-term business partner, Mr John Coates. References to "M Grizaard" on service charge demands are references to Mr Max Grizaard's father.

23. With the Court's permission, Mr Wragg referred Mr Grizaard to a screenshot which was admitted in evidence on the day of the hearing, having been sent to the Court by e-mail at 18.03 hours on 5 January 2022. Mr Grizaard gave evidence that the screenshot shows a Dropbox file containing ground rent notices for the period 2013 to 2019. He stated that the screenshot shows that the demands were created on 15 September 2019. He gave evidence that the demands would have gone out by regular second-class post within 1-2 days of being created. He did not identify any facts or matters relied upon in support of this assertion.

24. When asked, during cross-examination, whether he was involved with the Claimant company before he became a director, Mr Grizaard said "not at all". He also agreed that he had no knowledge of any demands served before September 2019.

25. When asked whether he could speak with certainty about the demands created on 15 September 2019, it became apparent that Mr Grizaard was looking at some personal notes. He readily put his notes away

when asked to do so and the Court is satisfied that Mr Grizaard was unaware that he should only have been looking at the trial bundle. Mr Grizaard agreed with Ms Mathers that the fact he was looking at notes meant that he had limited recollection.

26. Mr Grizaard informed the Tribunal that the ground rent notices would have been sent out by an employee of the Claimant named Minnie Herzog whose work was overseen by Mr Coates. Ms Herzog is no longer employed by the Claimant and Mr Grizaard stated that he has no personal contact with her. He also said that Mr Coates is 82 years old and located on the Isle of Scilly. When it was originally thought that the hearing would be conducted in person, Mr Grizaard "took over the role" of giving evidence.

27. Mr Grizaard accepted that the screen shot does not show when the notices were sent out and that, in stating that they would have been sent out 1-2 days after they had been created, he was relying upon the usual practice of someone other than himself. When it was pointed out that 15 September 2019 was a Sunday, Mr Grizaard stated that they worked "at all times" and that they did not leave things lying around. However, he did not explain the basis for making these assertions when he had had no day to day involvement in the operation of the Claimant company. Later in his evidence, Mr Grizaard accepted that he had neither sent the demands out nor seen the demands being sent out.

28. Mr Grizaard was asked to read paragraph 11 of his witness statement where he states:

"The Respondent alleges that the section 166 notices do not comply with The Landlord and Tenant (Notice of Rent) (England) Regulations 2004 (SI2004/3096). The Respondent fails to detail why they believe the notices do not comply and the Application avers all notices are compliant."

29. Mr Grizaard accepted that he has no property law expertise; that there is no legal basis of which he is aware underpinning this statement; and that he is not qualified to give expert evidence as a lawyer. Mr Grizaard also accepted that paragraph 13 of his signed witness statement is not written in his own words.

30. The Court heard oral evidence from Mr Steinberg on behalf of the Respondent. Mr Steinberg is employed by Ribell Limited ("Ribell"). Ribell are managing agents employed by the Defendant to manage the Flat.

31. Before confirming the accuracy of his written evidence, Mr Steinberg stated that he wished to correct an error at paragraph 13 of his witness statement. Paragraph 13 provides:

"The demands which have been disclosed in these proceedings by the Claimant/Applicant to date are the demands that have been forwarded on to Ribell by Bluegate. [Having taken instructions from

Mr Brian Blau, director of Bluegate, I can confirm that Bluegate has not received any further demands for ground rent.]"

32. Mr Steinberg stated that this should read that the demands which have been disclosed by the Defendant are the demands which have been forwarded on to Ribell by the Defendant. On being cross-examined, Mr Steinberg stated that the witness statement was prepared by a solicitor and, on looking through it, he had misread the Clamant for the Defendant.

33. Mr Steinberg gave evidence that demands were sent to the Defendant's registered office, which is an accountant's address, and then passed to Ribell to make payments of service charge. Ribell was not responsible for making payments of ground rent. He accepted that two demands for the year 2018-19 were received but stated that it is otherwise "hard to confirm 100% what was received" in relation to the ground rent demands.

34. In closing, Ms Mathers stated that service has been in issue from the start because the pleadings put the Claimant to strict proof of service. She also referred the Court to an email dated 21 October 2021 from the Defendant's solicitor to the Claimant's solicitor which states:

"You also sent me an email on 13 October 2021 and the second attachment was Ground Rent and Insurance Demands. The actual demands from Constant Estates starting at 16 February 2013 did not have the Section 166 Notices with them but then subsequently Notices were produced without a covering letter and seemingly all sent on the same day, although it is not clear when you say that was. Were they sent on 22 October 2019? I need this information so that I can prepare my client's case."

35. Further, at paragraph 9 of its Statement of Case the Defendant states:

"The purported notices under section 166 of the Commonhold and Leasehold Reform Act disclosed by the Claimant/Applicant, were all stated to have been sent on 20 October 2019. The Claimant/Applicant is put to strict proof as to the means of and date of alleged service of all demands relied upon in the Claim."

36. Ms Mathers noted that Mr Grizaard is a photographer with no personal knowledge of the preparation of the documents shown in the screenshot and no knowledge of property law. Further, he was not involved in the day to day running of the Claimant company. Whilst stressing that this was not a personal criticism, Ms Mathers submitted that, as a consequence, Mr Grizaard was unable to give any useful evidence in this case.

37. Further, Mr Grizaard's witness statement is not expressed in the first person and, at paragraph 4, he seeks to draw arguments together when the function of a witness statement is to give primary evidence of fact. Ms Mathers submitted that, as the hearing was remote, direct evidence

could have been provided by Mr Coates. Alternatively, Mr Grizaard could have adduced hearsay evidence provided by Mr Coates.

38. Ms Mathers stated that the screenshot which is relied upon by the Applicant does not show copies of the documents referred to in it, it is not proof of service, and it does not address the manner and means of service.

39. She said that Mr Grizaard's evidence was that the screenshot "probably" showed the ground rent demands and that, although there are ways of authenticating electronic documents, the native documents have not been provided. The screenshot records 15 September 2019 as the date the documents were "modified" rather than created and, without a witness who can explain the process of generating demands, little weight should be placed on the screenshot.

40. Ms Mathers stated that Mr Grizaard gave evidence both that the documents would have been sent out by second class post 1-2 days after they had been generated and that they would have been sent out by second class post 2-3 days after they had been generated. Little weight can be placed on Mr Grizaard's evidence concerning the usual day to day practice but, in any event, if sent out by second class post 3 days after 15 September 2021 the notices would have been served out of time.

41. Mr Wragg stated that Mr Steinberg has changed his position, having originally accepted that the demands had been received by the Defendant. He stated that the assessment of the evidence is a matter for the Court and he invited the Court to find, on the balance of probabilities, that the demands would have been received by the Defendant by 22 September 2019. He said that there was no reason to believe that this would not have happened.

42. The Court is not satisfied on the balance of probabilities that the Claimant has discharged the evidential burden of establishing that the requirements of section 166(3) of the 2002 Act have been met in respect of the service of the ground rent notices.

43. The Court accepts the submissions made by Ms Mathers concerning the limited weight which can be placed on the screenshot. With no knowledge of the day to day running of the Claimant company, Mr Grizaard was not able to give any clear or direct evidence concerning the process which was followed when generating the ground rent notices.

44. Mr Steinberg has at no point given evidence that notices were received in time to meet the 30-day requirement contained section 166(3) of the 2002 Act. Mr Grizaard did his best to assist the Court but he accepted, as he was bound to do, that he had had no personal involvement in the day to day running of the Claimant company.

45. No persuasive evidential basis was put forward for Mr Grizaard's assertion that the ground rent notices would have been sent out by second class post 1-2 days after Sunday 15 September 2021. He provided no clear explanation for the assertions which he made concerning the general practice adopted in the Claimant's office. Mr Grizaard did not claim to have any direct knowledge of these matters and he did not rely upon any specific hearsay evidence. Mr Grizaard did not, for example, state that Mr Coates or Ms Herzog had provided him with the material information.

46. Further, as noted above, Mr Grizaard's signed witness statement contains other matters which he readily accepted are beyond his knowledge and expertise. His evidence was hesitant, which is understandable given his lack of involvement in the running of the Claimant company. In all the circumstances, the Court is not satisfied that Mr Grizaard can state with any degree certainty when the ground rent notices were served and does not consider that weight can be placed upon his evidence.

47. Having considered and weighed up all of the available evidence, the Court is not satisfied that the Claimant has established on the balance of probabilities that the 30 day requirement contained in section 166(3) of the 2002 Act has been met. The Court is not satisfied that it is likely that the ground rent notices were served in time. The Court therefore finds that the Defendant is not liable to pay the ground rent which forms the subject matter of these proceedings and the Claim is dismissed.

48. Having dismissed the Claim, it is not necessary for the Court to determine the other issues which have been raised concerning the ground rent notices. However, having heard detailed argument the Court observes that, were it necessary to make a determination, the Court would have accepted Ms Mathers' submissions that the section 166 notices are defective.

The proviso at clause 1 of the Lease

49. Having dismissed the Claim, it is not necessary for the Court to comment upon a dispute concerning the true construction of a proviso at clause 1 of the Defendant's lease. However, the Court was urged by both parties to set out its views and agreed to do so notwithstanding that these views are *obiter dicta*, that is not necessary for the Court's decision.

50. The Claimant's submissions concerning the proviso are set out at [21] to [33] of the Claimant's skeleton argument as follows:

"21. To understand the meaning of the proviso it is necessary to understand the rating system and the legislation in respect of renting in place at the time of the grant of the lease.

The rating system

22. The lease is dated the 8th October 1975 and rates at that time were governed by the Ratings Act 1967. The Act was a consolidating Act and extended to 119 Sections and 14 schedules. It contained the following provisions:

(i) for there to be a General Rate (Section 2);

(ii) for the ascertainment of rateable value (Section 19);

(iii) for a valuation list (Section 67);

(iv) for alterations to the valuation list (sections 69 to 87);

(v) appeals to local valuation courts and to the Lands Tribunal (Sections 76 and 77)

23. Section 19(3) set out how the rateable value should be ascertained as follows:

'(3) The net annual value of any other hereditament shall be an amount equal to the rent at which it is estimated the hereditament might reasonably be expected to let from year to year if the tenant undertook to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent.'

24. Section 67(1) placed an obligation on valuation officers to maintain and amend valuation lists:

'(1) For the purposes of rates, there shall be maintained for each rating area a valuation list prepared, and from time to time caused to be altered, in accordance with the provisions of this Part of this Act by the valuation officer.'

25. The 1967 Act was repealed in its entirety by the Local Government Act 1988 with effect from the first April 1990.

The Rent Act 1968

26. The legislation in force at the date of the lease (8th October 1975) was the Rent Act 1968.

27. Section 1 of the Act provided for Protected Tenancies.

28. Section 2(1)(a) provided for exceptions to the creation of a protected tenancy as follows:

'(1) A tenancy is not a protected tenancy if—

(a) under the tenancy either no rent is payable or, subject to section 7(3) below, the rent payable is less than two-thirds of the rateable

value which is or was the rateable value of the dwelling-house on the appropriate day …'

29. Section 6(1)(a) provided for the ascertainment of the rateable value as follows:

'(1) Except where this Act otherwise provides, the rateable value on any day of a dwelling-house shall be ascertained for the purposes of this Act as follows:—

(a) if the dwelling-house is a hereditament for which a rateable value is then shown in the valuation list, it shall be that rateable value

The proviso

30. The proviso is in the following terms:

'PROVIDED ONLY that such rent shall not exceed an annual amount equal to £1 below the figure calculated from time to time on the rateable value as provided in the Rent Acts with the intention that this Lease shall never be brought within the Rent Acts or any succeeding legislation.'

31. At the time of the lease 'the rateable value as provided in the Rent Acts' was a value that:

(i) was calculated in accordance with Section 19(3) of the 1967 Act (i.e. the rent at which it is estimated the hereditament might reasonably be expected to let from year to year);

(ii) was in a valuation list that was maintained (Section 67(1));

(iii) was in a valuation list that was capable of amendment (Section 67(1));

(iv) was capable of being appealed to a local valuation court and the Lands Tribunal.

32. The whole of the 1967 Act was repealed in 1990. The transaction giving rise to the recalculation of the rent in this matter occurred in October 2012 – some 22 years after the 1967 Act was repealed. By that time it was impossible to calculate the rent at which the property reasonably be expected to rent, or to maintain or amend the valuation list or to make representations to the valuation officer or to appeal an obviously out of date valuation.

33. The proviso is now defunct and is incapable of operating in the way the parties intended at the time of the grant of the lease. Accordingly, the ground rent is not capped as the Defendant suggests and is recoverable in full."

51. The Defendant's submissions concerning the proviso are set out at [23] to [33] of the Defendant's skeleton argument as follows:

"23. As set out in paragraphs 12-34 of the Defendant's statement of case [91]-[96] the ground rent capable of being claimed under clauses 3 and 1(a) of the Lease is subject to a cap. The Claimant's statement of case does not dispute the construction of clause 1(a) of the Lease put forward by paragraphs 12-34 in the Defendant's statement of case, however, it is noted that the witness evidence of Mr Grizaard suggests that 'this provision is no longer in force'.

24. Clause 1(a) provides for a ground rent of £40 per annum and goes on to provide:

*"and if at any time during the term hereby granted the demised premises shall be soled [sic] or assigned for a consideration exceeding in value the consideration hereinbefore mentioned and paid by the Lessee… PAYING ALSO by way of further or additional rent… a clear yearly sum… computed at the rate of Fifty pence per annum in respect of each complete sum of One hundred pounds by which such consideration … shall exceed the aforesaid amount of the consideration paid on the execution hereof to the intent that such last mentioned further or additional rent shall be calculated from time to time on the highest sum previously paid for… the demised premises… **PROVIDED ONLY that such rent shall not exceed an annual amount equal to £ l below the figure calculated from time to time on the rateable value as provided in the Rent Acts with the intention that this Lease shall never be brought within The Rent Acts or any succeeding legislation**." (emphasis added)*

25. The Claimant purchased the Lease for £105,000 on 11 October 2012 [13]-[14]. The initial premium paid on grant of the Lease was £13,150. The excess amount upon which ground rent could potentially be charged, but for the proviso is therefore £91,850 which comprises 918 complete sums of £100, which would give a potential additional rent of £459 to be added to the existing ground rent of £40 to bring an annual ground rent (prior to the application of the proviso) of £499.

26. The Lease was granted in 1975, accordingly it was subject to the provisions of the Rent Act 1968, and later the Rent Act 1977.

27. Section 5(1) of the Rent Act 1977, which remains in force, provides:

'(1) A tenancy [which was entered into before 1st April 1990 or (where the dwelling-house under the tenancy had a rateable value on 31st March 1990) is entered into on or after 1st April 1990 in pursuance of a contract made before that date] is not a protected tenancy if under the tenancy either no rent is payable or, […] the rent payable is less than two-thirds of the rateable value which is or was the rateable value of the dwelling-house on the appropriate day."

28. In order to not be brought within the Rent Acts and succeeding legislation the tenancy must remain at a rent which is less than two-thirds of the rateable value of the Demised Premises on the appropriate day (section 5(1) Rent Act 1977).

29. The appropriate day for the purposes of section 5(1) is set out in section 25(3) of the Rent Act 1977 which provides:

'(3) In this Act "the appropriate day" —

(a) in relation to any dwelling-house which, on 23rd March 1965, was or formed part of a hereditament for which a rateable value was shown in the valuation list then in force,
or
consisted or formed part of more than one such hereditament, means that date, and
(b) in relation to any other dwelling-house, means the date on which such a value is or was first shown in the valuation list."

30. The Defendant is unaware as to when the Property was constructed and therefore cannot say when it was entered onto the valuation list. However, the most recent rateable value for the Property is known. As set out in the witness statement of Mr Steinberg, Thames Water use the last recorded rateable value for a property when calculating water charges for unmetered properties. [163, §16-17 and 179]. The rateable value for the Property was £290 as at 1990 as set out in the bill dated [181].

31. In order to fall outside the Rent Act 1977 the Property must have a ground rent which is no greater than 2/3 the rateable value of the Property. Using the figure of £290 for rateable value the operation of the proviso means that the ground rent must be a maximum of £192.33 per annum on the following basis:

£290 x ⅔ = £193.33 £193.33 - £1 = £192.33

32. For the avoidance of doubt, it is necessary to maintain the restriction contained within the proviso, not least because there is authority to the effect that 'if' [in section 5(1) of the Rent Act 1977] obviously means 'if and so long as'. Thus where a progressive rent rises during the tenancy from below the two-thirds limit to above that limit, the tenancy is outside the Acts until the increase takes effect, whereupon the Acts apply to it. This would be converse to the intention expressed in the wording of the proviso ***'that this Lease shall never be brought within The Rent Acts****'.*

33. Accordingly, the sums claimed in the defective notices under section 166 are impermissible under the Lease in any event."

52. The Court must identify the intention of the parties by reference to what a reasonable person having all the background knowledge which

would have been available to the parties would have understood them to be using the language of the proviso to mean. It must do so by focussing on the meaning of the relevant words in their documentary, factual and commercial context.

53. The Court accepts the Defendant's submission that the purpose of the proviso was to ensure that the Lease did not become a protected tenancy under the Rent Acts by capping the rent payable under the Lease. Thus, the proviso should be read as preventing any increase in the rent beyond the amount by which the Lease would cease to be treated as a tenancy at a low rent and thus become a protected tenancy.

54. The proviso should not be read as preventing any increase in rent beyond two-thirds of the rateable value of the demised premises at the date of the variation of the rent because this is not the ordinary and natural meaning of the words "*the rateable value as provided in the Rent Acts*". Section 5 of the Rent Act 1977 defines the relevant rateable value by reference to "the appropriate day". "The appropriate day" is defined in section 25(3) of the Rent Act 1977 as set above. "The appropriate day" is fixed in time.

55. In support of his submission that the proviso is defunct, Mr Wragg referred the Court to *Furlonger v Lalatta* [2014] L. & T.R. 14. However, by contrast with the present case, the proviso in *Furlonger* stated (emphasis supplied):

"3. … PROVIDED THAT any variation of the rent payable hereunder otherwise than in respect of rates services repairs or maintenance cannot lead to such sums exceeding an annual rent of two-thirds of ***the rateable value*** *of the demised premises comprised herein* ***at the date when the variation is made****."*

56. Accordingly, in the *Furlonger* case, the date for ascertaining the rateable value was not fixed in time with reference to "the appropriate day".

57. Mr Steinburg gave evidence, which was not challenged, that the most recent rateable value available to Thames Water is £290. The rateable value may well have been lower on the appropriate day. However, doing its best on the limited available evidence, the Court would have determined that the rateable value on "the appropriate day" was £290 in the absence of any other evidence, had such a determination been necessary for the Court's decision.

58. The Court prefers the Defendant's interpretation of the proviso and is not satisfied that the proviso is defunct.

Costs

59. At the conclusion of the hearing, the following directions agreed:

a. Any application for County Court costs shall be made in writing within 28 days of the date of this decision (full details of the costs claimed should be provided).

b. Any representations in response shall be filed and served 14 days thereafter.

c. Any reply, if so advised, shall be filed and served 14 days thereafter (limited to 2 pages).

Name: Judge N Hawkes **Date:** 1 February 2022

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 tribunal office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional tribunal 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. All applications for permission to appeal will be considered on the papers

5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.

Appealing against the County Court decision

1. A written application for permission must be made to the court at the Regional tribunal office which has been dealing with the case.

2. The date that the judgment is sent to the parties is the hand-down date.

3. From the date when the judgment is sent to the parties (the hand-down date), the consideration of any application for permission to appeal is hereby adjourned for 28 days.

4. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.

5. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers.

6. If an application is made for permission to appeal and that application is refused, and a party wants to pursue an appeal, then the time to do so will be extended and that party must file an Appellant's Notice at the appropriate County Court (not Tribunal) office within 14 days after the date the refusal of permission decision is sent to the parties.

7. Any application to stay the effect of the order must be made at the same time as the application for permission to appeal.

Appealing against the decisions of the tribunal and the County Court

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