FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

HMCTS code (audio, video, paper)		**V: CVPREMOTE**
Case reference	:	**CAM/00CR/LBC/2022/0011**
Property	:	**Flat 203, Castle Court, The Minories DY2 8PG**
Applicant	:	**Residential Freeholds Ltd**
Representative	:	**Mr Paul Simon, solicitor, of Darlington Hardcastles**
Respondent	:	**Mr John Charles Loynton**
Representative	:	**Mr Craig Kelly, solicitor of CSK Legal Ltd**
Date of Application	:	**7 July 2022**
Type of application	:	**Application for an order that a breach of covenant or condition has occurred**
The Tribunal	:	**Tribunal Judge S Evans** **Mrs Sarah Redmond MRICS**
Date/ place of hearing	:	**15 November 2022,** **By cloud video platform**
Date of decision	:	**21 November 2022**

DECISION

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Covid-19 pandemic: description of hearing

This has been a remote video hearing which was not objected to by the parties. The form of remote hearing was V: CVPREMOTE. 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 before us were in an Applicant's bundle, a Respondent's bundle, 2 statements of costs and a Skeleton Argument from the Respondent.

DECISION

(1) The Application is dismissed.

(2) The Tribunal determines that is just and equitable to extinguish the Respondent's liability to pay any of the Applicant's litigation costs of these proceedings, pursuant to paragraph 5A of Schedule 11 of CLARA 2002.

REASONS

Introduction

1. By its application the Applicant seeks a determination of breach of covenant or condition pursuant to s.168(4) of the Commonhold and Leasehold Reform Act 2002 ("CLARA 2002"). The relevant statute law is in Appendix 1.

Background

2. The background facts are as follows:

3. The case concerns Flat 203 Castle Court, The Minories, DY2 8PG ("the Property").

4. On 12 February 2016 planning permission was granted for user of the building in which the Property is situated as a residential (C3) class.

5. On 29 August 2018 the Applicant's predecessors in title granted a 250 year Lease from 1 January 2017 of the Property to the Respondent Mr Loynton. The Lease was registered on 5 September 2018.

6. The following were express terms of the Lease, so far as material:

   "1.20 Any obligation in this Lease on the Lessee not to do something includes an obligation not to permit or allow that thing to be done and an obligation to use best endeavours to prevent that thing being done by another person".

   …

3. The Lessee for the mutual protection of the Lessor and the Lessees of the properties hereby covenants:

3.1 With the Lessor to observe and perform the obligations on the part of the Lessee set out in the 6th Schedule and Parts I and II of the 7th Schedule."

"The Seventh Schedule

Covenants by the Lessee

Part I

Covenants enforceable by the Lessor

...

4. To pay all costs, charges and expenses (including legal costs and fees payable to a surveyor) reasonably incurred by the Lessor in the enforcement of any covenant on the part of the Lessee or in contemplation of any proceedings or service of any notice under section 146 and 147 of the Law of Property Act 1925 including the reasonable costs charges and expenses aforesaid of and incidental to the inspection of the Demised Premises the drawing up of Schedules of dilapidations and notices and any inspection to ascertain whether any notice has been complied with and such costs, charges and expenses shall be paid whether or not forfeiture for any breach shall be avoided otherwise than by relief granted by the court.

....

14. Not to do or permit or suffer any act or omission which may render any increased or extra premium payable for the said insurance of the development or any part thereof or which may make void or voidable any such insurance or the insurance of premises adjoining the development and so far as the Lessee is liable here under to comply in all respects with the requirements of the insurers with which the development or any part thereof may for the time being be insured.

...

16. Not to do or permit or suffer to be done any act, matter or thing on or in respect of the Demised Premises which contravenes the provisions of the Town And Country Planning Act 1990 or any enactment amending or replacing it and to keep the Lessor indemnified against all claims, demands and liabilities in respect of any such contravention.

17. To comply with and make every reasonable endeavour to ensure that all persons living in or visiting the development on their authority shall comply with the covenants in Part II of the 7th Schedule.

....

22. (a) Not to at any time during the said term to sublet the whole or any part of the Demised Premises except by an Assured Shorthold Agreement of the whole of the Demised Premises or by any other tenancy agreement whereby the tenant does not obtain security of tenure on the expiry or earlier termination of the term

(b) Not at any time during the said term separately to assign, transfer or part with the possession or occupation of any part or parts of the Demised Premises but only to assign, transfer or part with possession thereof as a whole and not to assign, transfer or part with possession or occupation of the Demised Premises during the last seven years of the term without the prior written consent of the Lessor (such consent not to be unreasonably withheld or delayed).

23. Within one month after the date of any and every assignment, transfer, mortgage, charge, underlease or tenancy agreement (including any immediate or derivative underlease or tenancy agreement) of the whole of the Demised Premises for any term assignment of such underlease or grant of probate or letters of administration, order of court or other matter disposing of or affecting the Demised Premises or devolution of or transfer of title to the same to give or procure to be given to the Lessor notice in writing of such disposition or devolution of or transfer of title to the same with full particulars thereof and in the case of an underlease a copy thereof for registration and retention by it AND at the same time to produce or cause to be produced to them a certified copy of the document effecting or (as the case may be) evidencing such disposition or other matter AND to pay or cause to be paid at the same time to the Lessor a fee of not less than 30 pounds (£30.00) in each case together with Value Added Tax thereon in respect of any such notice save that where the tenancy agreement is an Assured Shorthold Tenancy of 12 months or less confirmation of the new tenant is to be given to the landlord by either the tenant or their agents and no fee referred to in this paragraph 23 will be payable.

...

Part II

Covenants Enforceable by the Lessor and Lessees of the Properties

1. Not to use or suffer to be used the Demised Premises for any purpose whatsoever other than as a private residence for occupation by a single family and in particular not to carry on or permit or suffer to be carried on in or from the Demised Premises any trade, business or profession Provided That this will not prevent the Property from being shared between professionals

....

7. Not to use or permit or suffer the Demised Premises to be used for any illegal, immoral or improper purpose and not to do or permit or suffer on the

Demised Premises any act or thing which shall or may be or become a nuisance, damage, annoyance or inconvenience to the Lessor or to the Lessees or occupiers of the properties or any of them or to all owners or occupiers of any neighbouring Property…."

7. On 17 April 2019 the Respondent, using a letting agent, granted to one Modestas Stoskus an Assured Shorthold Tenancy of the Property from 17 April 2019 to 16 October 2019, at a rent. The agreement included a covenant at clause 3.1 not to use or suffer the P:roperty to be used for any illegal or immoral purpose, noting that unauthorised taking or possession of controlled drugs is considered to be illegal for the purpose of that clause.

8. In addition there were express terms of the tenancy as follows:

   (1) A covenant by the tenant not to use the Property other than as a private residence: see clause 3.4;

   (2) A covenant by the tenant not to permit or suffer to be done on the Property anything which may be, or likely to cause, a nuisance or annoyance to a person residing, visiting or otherwise engaged in a lawful activity in the locality: see clause 3.7.

9. On 18 September 2019 the Applicant's predecessor in title emailed the Respondent's lettings agent (Lamont) to request them to disclose which active tenancies they managed.

10. On the following day Lamont replied, listing all the flats in the building which they managed. One of the flats notified was the Property, and the agents disclosed the dates of the above assured shorthold tenancy, and accordingly its duration of 6 months.

11. On 17 October 2019, after the end of the initial 6 month term, Mr Stoskus remained in occupation, the tenancy becoming statutory periodic tenancy pursuant to section 5 of the Housing Act 1988, on the same terms as the initial fixed term of six months, save that the tenancy was now a monthly periodic tenancy.

12. In March 2020 the agent for the then landlord emailed Lamont, the Respondent's letting agent, to ask if they managed the Property. The letting agent responded the same day with the name "Modestas" and that person's mobile telephone number.

13. On 24 November 2020 the Applicant became the freeholder of the building.

14. On 30 October 2021 the Applicant took out an insurance policy with Zurich in relation to the building in which the Property is situated. The certificate of insurance notes that the "insured" under the policy is the Applicant; and that

it is understood and agreed that the interest of various lessees in the building insured may be noted at the request of the insured, but only in respect of the parts of the premises demised by the lease to the individual tenant.

15. The Policy itself contains the following relevant wording:

(1) On p.14:

"*You or your*
The person, people of the company stated in the schedule as the insured.";

(2) On p.45:

"*R3 Illegal cultivation of drugs*
In the event of any loss, destruction, damage, cost or expense as insured hereby resulting from the illegal cultivation of drugs in a residential premises or a residential portion of a commercial premises by your tenant, lessee or licensee it is a condition precedent to our liability to make payment under this policy that you have:
(a) carried out comprehensive internal and external surveys of the premises at least every three months prior to the damage and maintained a written log of such inspections
(b) obtained written references for the tenant prior to the letting proceeding
(c) recorded details of the tenants bank account details and verified same by collecting at least one payment via such means."

16. On 10 February 2022 it appears that the Applicant may have become aware of the subletting of the Property, because the Applicant's managing wrote to the Respondent requesting that he apply for consent to sublet. He replied on the following day to say that he disagreed that he required consent, because this was an assured shorthold tenancy only.

17. At some point in the week before 23 June 2022 a fire crew had cause to attend the Property following a flood in or from the Property.

18. On 23 June 2022 an e-mail was sent to Ethan Freilich, who (the Applicant informed the Tribunal) was a managing agent for the Applicant. The email was sent by a Melanie Grainger, a non-practising solicitor and fire safety inspector for West Midlands Fire Service. The email stated (so far as is material):

"Dear Ethan,

Thank you for your e-mail. I can confirm that I personally visited site this morning with two colleagues following a report from a crew who

attended a flooding incident last week (caused by cannabis cultivation in flat 203). They advised us that the alarm panel was showing a fault."

19. The Respondent alleges, and there is no evidence to the contrary, that on 29 June 2022 he was contacted for the first time by his lettings agent about the water damage in the Property and about a police investigation into cannabis cultivation therein.

20. On 7 July 2022, and with no prior notification to the Respondent, this application was filed by the Applicant at the Tribunal.

21. on 21 July 2022 the Respondent's solicitors sent a section 21 notice to Mr Stoskus. The covering letter included the following words:

"We understand that the Police have recently investigated the growth of cannabis plants at the Property. Further, we are aware that substantial damage has been caused to the Property as a consequence of water flooding. Our client intends to take such steps as necessary to protect his interests. at this stage and without prejudice to the position that the Property has now been abandoned, we herewith serve a s.21 notice on behalf of our client as a prelude to the commencement of possession proceedings…"

22. At some point, the Respondent says, he was informed by the Police that the investigations had concluded, and the Respondent thereupon received the keys back to the premises.

23. His statement of case states that there has been no charge or conviction of any individual, insofar as the Respondent is aware, in relation to the allegation that cannabis has been cultivated at the Property.

Issues

24. The Applicant's statement of case dated 4 August 2022 alleges at paragraph 4 on page 4 (there is another paragraph 4 on page 2) that the Respondent has committed the following breaches of the Lease:

(i) On a date or dates unknown to the Applicant the flat was being used for cannabis cultivation (in breach of user and planning consent as (iii) below and the Misuse of Drugs act 1971) thereby causing damage to the development and/or the flat (the extent of which as at the date hereof remains to be quantified and further particulars shall be adduced as soon as available and which the Respondent is liable to make good) and/or has been sublet in whole or in part and/or on such basis assigned/transferred and/or parted with possession or occupation to person or persons unknown in the absence of any consent and/or due notice and/or payment upon the giving of such notice which may be required.

(ii) Further on or about 23 June 2022 the fire inspector attended the flat following a report from a crew who attended a flooding incident the previous week caused by cannabis cultivation [pages 56-57].

(iii) Further on 12 February 2016 the Metropolitan Borough Council of Dudley determined that the use of the development could be changed to residential use from office use [page 58].

(iv) Further it is a condition precedent of the applicable insurance policy [excerpt at page 59] and the terms of which apply to the Respondent that he would carry out comprehensive internal and external surveys of the flat at least every three months prior to the damage and maintain a written log of such inspections and obtained *(sic)* written references for the tenant prior to the letting proceedings and recorded details of the tenants bank account details verified same by collecting at least one payment via such means and in default of which the Applicant cannot claim for any loss destruction damage cost or expense as insured which resulted from the illegal cultivation of drugs in residential premises by the defendant's *(sic)* tenant lessee or licensee."

The hearing

25. The Tribunal asked the parties to address it, issue by issue. At one stage, Mr Kelly suggested the Respondent might orally affirm his statement of case, and proffered him for cross-examination on it. Mr Simon informed the Tribunal that he had not come prepared to cross-examine the Respondent, and that he did not intend to ask him any questions. The Tribunal indicated that the Respondent, if called, would not be allowed to stray outside of his statement of case unless there were good reason. Accordingly, the Tribunal proceeded, with the agreement of the parties, on the basis of representations only on the documentary evidence.

26. The Tribunal asked Mr Simon:

(1) To clarify what the Applicant alleged was the act(s) or omission(s) which constituted the alleged breaches in paragraph 4(i) to (iv) of the Applicant's statement of case (see above);

(2) To specify which clause(s) or paragraph(s) of the Lease was being breached in relation to each of those matters;

(3) To direct the Tribunal to the evidence on the papers which evidenced the alleged act(s) or omission(s).

Determination

Allegation (i)

27. Mr Simon clarified that the alleged act was the cultivation of cannabis in the Property, and no other act.

28. He clarified that the Applicant alleged that this constituted a breach of Schedule 7, Part II, paragraphs 1 and 7 of the Lease (and thereby clause 3.1).

29. He relied on the first paragraph of the email set out in paragraph 18 above.

30. He said that a single cannabis plant would not have caused flooding. He accepted there was no evidence of who had cultivated any cannabis. He said it was the Applicant's case that either the Respondent committed the breach of the relevant paragraphs himself, or that he permitted or suffered the breach of covenant.

31. When pressed by the Tribunal to be more precise on how the Respondent either "permitted or suffered" the breach, Mr Simon submitted that the Respondent had allowed it to take place; he had let the Property to a sub tenant and during the period he did not inspect it - or if he did, he did not note the cannabis.

32. When asked whether the Applicant had evidence that the Respondent had not inspected the Property, Mr Simon accepted it did not. He also accepted he could not say what would have been found on any inspection. He did not have direct evidence of the nature and extent of the cannabis cultivation. But he said this was not a case of a pipe bursting and the occupier was found to be cultivating cannabis; the person was cultivating the cannabis to the extent that it took over the Property.

33. When asked what evidence there was of a trade or business being operated from the Property, Mr Simon said he had no evidence other than the fact the cultivation had caused flooding.

34. He alleged that the cultivation of cannabis was not only illegal, but also immoral and for an improper purpose.

35. Mr. Kelly on behalf of the Respondent opened his response by saying that his client did not accept there was cannabis use at all in the premises; that he cannot admit and cannot deny the same. In the Respondent's written case it is stated that the Respondent had not seen any drugs in the flat; indeed it had not even been advised to him by the Police that there were; and there was no evidence of any arrest, charge or other action taken in relation to the matter. As regards the water damage, the Respondent states the cause is unclear.

36. Mr Kelly emphasised that the letter written by the Respondent to the subtenant which accompanied the section 20 notice was not an admission that

cannabis had been cultivated at the Property; the letter was worded in terms which only said that the Police had recently investigated that matter.

37. The Respondent's skeleton argument also contends that the email of 23 June 2022 is but a second-hand reference, given that nobody from the fire service has been called to give evidence in the proceedings. Mr Kelly clarified to the Tribunal that his case was not that the email was inadmissible; instead, because it was double hearsay, the weight to be attached to the email was so low that the Applicant could not satisfy the Tribunal on balance of probabilities even that there had been cultivation of cannabis in the Property. He pointed out that he had no opportunity to cross examine the maker of the statement, so as to test the strength of the allegations.

38. Mr Kelly submitted that to have "permitted" the act of cultivation, if proven, the Respondent would have had to have granted his subtenant permission, of which there was no evidence; and to have "suffered" the breaches, the Respondent would have to have known of the breaches, and to have failed to take steps to address them.

39. In the Tribunal's determination, there was in all likelihood a cultivation of cannabis in the Property in or about mid-June 2022. We are prepared to accept this was the case, on balance of probability, on the basis of the email of 23 June 2022 and the fact the Police had changed the locks to the Property and conducted an investigation, which the Respondent admits.

40. However, we are not satisfied as to the nature and scale of this cultivation. There is no evidence of the size of the operation, and the use of the word "cultivation", whilst it may suggest something large, is not determinative. It is possible to cultivate a single plant. It is correct that the email of 23 June 2022 states that the cultivation caused "flooding", but neither the extent of the flooding nor the damage caused is evidenced anywhere on the documents before us.

41. For the above reasons, we are not satisfied that the cultivation of this cannabis was undertaken as a trade or business. For that reason we find no breach of paragraph 1 of Part II of Schedule 7 in that regard.

42. Moreover, even though we are satisfied that cannabis was probably present in the Property in mid-June 2022, we are not satisfied that the Respondent personally cultivated it. There is no evidence on which we could make such a finding.

43. Further, we are not satisfied that the Respondent "permitted or suffered" a breach of paragraphs 1 and/or 7 of Part II of Schedule 7, for the following reasons.

44. We prefer the Respondent's submissions, based on *Berton v Alliance Economic Investment Co Ltd* [1922] 1 KB 742, to those of the Applicant. In that case the Court of Appeal quoted from previous authority that the words "permitting or suffering" do not bear the same meaning as "knowing of and being privy to"; the meaning of them is that the defendant should not concur in any act over which he had a control: see p. 755, per Bankes LJ.

45. Atkins LJ agreed, adding at p.759:

> "It is not suggested that there is any difference between the words "permit" and "suffer" in this context, and I treat them is having the same meaning. It is clear that a person under a covenant not to use premises in a particular way cannot commit a breach of the covenant except by his own act or that of his agent. The same is true of a covenant not to permit… It is not sufficient to show that the premises have been used in a way which would constitute a breach of the covenant; it must further be shown that the user is by the defendant or his agent, or that it is permitted by the defendant or his agent… To my mind the word "permit" means one of two things, either to give leave for an act which without that leave could not be legally done, or to abstain from taking reasonable steps to prevent the act where it is within the man's power to prevent it. Acts which fall short of that, though they be active sympathy or assistance, do not amount to permission, at any rate in the covenants with which we are dealing."

46. We note that *Berton* was cited with approval by the House of Lords in Earl of *Sefton v Tophams Ltd* (No.2) [1967] 1 AC 50.

47. In the Tribunal's determination, in the instant case, there is no evidence that the Respondent gave permission to Mr Stoskus to commit any act in breach of the Lease.

48. Moreover, we agree that, in order to have to take reasonable steps to prevent an act where it is within a person's power to prevent it, the person must have some knowledge of the act. In this case, the Respondent did not. But even if we are wrong on that, and actual knowledge was not required on the part of the Lessee, the Respondent in our consideration had undertaken his best endeavours to prevent any breach, by including within his tenancy agreement to Mr Stoskus the obligations imposed on the tenant at clauses 3.1 and 3.7.

49. We disagree with the Applicant that best endeavours included periodic inspection of the Property by the Respondent; but even if it did, there is no evidence before us as to what any inspection would have revealed, noting that the Respondent would have had to give 24 hours' notice to the subtenant of any proposed inspection, by virtue of clause 2.16.1, unless there was an emergency. We accept the Respondent's uncontroverted evidence that the first he knew about any flood or cannabis in the Property was 29 June 2022. He did not know of any emergency before then. Within 3 weeks or so of knowing,

he had acted extremely swiftly by serving notice requiring possession on Mr Stoskus, even though the Property had already been abandoned.

50. For sake of completeness, we reject the Applicant's contention that Schedule 7, Part I, paragraph 17 and/or clause R3 of the policy of insurance together imposed an obligation on the Respondent to inspect the Property at various periods, whether annually, or every 3 months, or otherwise. The Respondent was not a party to the contract of insurance. There is no evidence he had knowledge of its terms at the material time. In the absence of the policy Schedule, we accept the Respondent's submission that the insured, as per the definition of "you" and "your" under the policy, must be the same person as named in the policy certificate, i.e. the Applicant. The Respondent was at best an interested party who might be noted on the policy, and there was no evidence before us that he had been duly noted. We also accept the Respondent's submission that there is no free-standing obligation on the Respondent to do all which the Lessor is obliged to do under the Lease and the insurance policy.

51. For all these reasons, we agree that the Respondent had no duty to comply with the requirements in clause R3 of the insurance policy. We also find no breach of Schedule 7, Part I, paragraph 17 in terms of alleged failure to inspect periodically. Whilst such a step might be prudent, it was not a requirement of the Lease, we determine.

Allegations (ii) and (iii)

52. At 11.58am (the hearing having started at 10am), the Applicant withdrew these allegations of breach, accepting they could not be breaches in themselves of any covenants in the Lease.

Allegation (iv)

53. Mr Simon clarified that the alleged act was the cultivation of cannabis in the Property, and no other act.

54. He clarified that the Applicant alleged this constituted a breach of Schedule 7, Part I, paragraph 14 of the Lease (and thereby clause 3.1).

55. He contended that the act of cultivation might render an extra premium payable, not for the year in question, but for a later year. He accepted he had no evidence the premium might be higher if the insurer discovered cannabis cultivation of the kind in this case (whatever that might be).

56. Mr Simon also contended that it was common sense the insurance might be void or voidable because of the cannabis cultivation.

57. He also submitted that the requirement to "comply in all respects with the requirements of the insurers" meant that the Respondent had to comply with clause R3 of the policy.

58. Mr Kelly for the Respondent contended that clause R3 of the policy was evidence that the insurer recognised that there may be properties used for the cultivation of illegal drugs, and the insurer had priced this in, because the insurer had looked to mitigate against having to pay out in such circumstances by imposing the three conditions within the clause. Therefore, the express terms of the policy themselves supported the Respondent's contention that the cultivation of drugs would not make the policy void or voidable, simply that the insurer would still recognise its enforceability but refuse to pay out if the three conditions were not satisfied.

59. Mr Kelly further submitted that the concluding words of paragraph 14 only applied when an act or omission had occurred which might render an increased premium to be payable or the policy to be void or voidable.

60. We prefer the Respondent's submissions. The cultivation of cannabis did not make the policy void or voidable, for the reasons contended. Further, there was no evidence before us that any premium might be higher as a result. Accordingly, we determine that the Respondent is not in breach of Schedule 7, Part I, paragraph 14 for those reasons.

61. However, we further determine that the Respondent did not permit or suffer any act or omission for the purposes of paragraph 14, for the same reasons as under issue (i).

62. Lastly, we agree that, on proper construction, the concluding words of paragraph 14 only come into play when the insurers are making investigations. The paragraph cannot be read as imposing the obligations of clause R3 of the insurance policy on the Respondent before any such investigations are undertaken.

<u>Other matters</u>

63. Given that under issues (i) and (iv) Mr Simon clarified that the alleged act was the cultivation of cannabis in the Property, and no other act, we do not need to determine whether there was a breach of covenant on the basis the Property "has been sublet in whole or in part and/or on such basis assigned/transferred and/or parted with possession or occupation to person or persons unknown in the absence of any consent and/or due notice and/or payment upon the giving of such notice which may be required."

64. However, we will still determine the issue, to the limited extent it was in play: Mr Simon's contention was only that paragraph 23 of Part I of Schedule 7 of the Lease imposed an obligation on the Respondent to provide notice in

writing to the Lessor within one month of the grant of any assured shorthold tenancy, but this had not been done. He contended that the saving clause in that paragraph, in so far as it read "confirmation of the new tenant is to be given to the Landlord by either the Tenant or their agents" was otiose, given that an AST was either an "underlease" or a "devolution", and so the opening requirements of the clause applied, so as to require the Respondent to act within a month of 17 April 2019 when Mr Stoskus was granted the subtenancy. Mr Simon accepted the AST was not a "disposition", but contended the AST was both an "underlease" and a "devolution" for the purposes of the paragraph.

65. The Tribunal rejects that submission. The paragraph uses the phrases "underlease" and "tenancy agreement" as separate concepts. We further consider the term "devolution" only applies where there is a grant of probate or letters of administration. The grant of an AST is therefore not a devolution, the Tribunal finds.

66. In our determination, the saving clause applies in this case. Given this was an AST of 12 months or fewer, the only requirement upon the Respondent was to give "confirmation of the new tenant" to the Landlord. In that regard, the saving clause does not state time to be of the essence.

67. As to the facts, they reveal that the Applicant's predecessors in title, as landlord, were notified of the date of the tenancy start and finish on 19 September 2019, and of the tenant's first name and telephone number on 16 March 2020, via both parties' agents.

68. We therefore determine on the facts that, before this application was filed, and even before the Applicant became landlord, the Respondent had complied with paragraph 23 of Part I of Schedule 7 to the Lease, and he is not in breach.

69. Accordingly, we do not need to determine, and do not determine, the Respondent's case in the alternative that the Applicant is estopped by conduct from seeking to enforce paragraph 23 and/or by waiver, as set out in paragraph 11 of its skeleton argument, which for sake of brevity the Tribunal will not repeat.

Costs

70. The Respondent sought to make 3 applications for costs:

    (1) Under Rule 13 of the Tribunal Procedure (First Tier Tribunal)(Property Chamber) Rules 2013;
    (2) Under s.20C of the Landlord and Tenant Act 1985;
    (3) Under paragraph 5A of Schedule 11 to CLARA 2002.

71. The Applicant also sought to make an application for costs, until it was pointed out to Mr Simon that the Tribunal's jurisdiction is limited to statute and to Rule 13 of the Procedure Rules.

72. The Tribunal reminded Mr Kelly of that the UT guidance in *Willow Court Management v Alexander* [2016] UKUT 0290 (LC) as to the timing of a Rule 13 application, i.e. that is better considered after the Tribunal's written determination has been sent out. On being so reminded, Mr Kelly did not pursue such an application at the stage of the hearing, reserving his client's position for the future.

73. As to s.20C of the 1985 Act, Mr Simon expressly confirmed (and we can record) that the Applicant indicated to the Tribunal that it would not seek to recover the costs of these proceedings through the service charges. Accordingly, no section 20C order needs to be made.

74. As to paragraph 5A of Schedule 11 to CLARA 2002, Mr Simon expressed the Applicant's intention to seek its legal costs of these proceedings by virtue of paragraph 4 of Part I of Schedule 7 of the Lease as an administration charge. Mr Simon sensibly conceded that, if the Applicant failed on all its allegations of breach, it could not be said that contractually such costs were "reasonably incurred" for the purposes of paragraph 4 of Part I of Schedule 7.

75. The Applicant has failed on all its allegations, we have found. Nevertheless, we shall still consider whether it would be just and equitable to reduce or extinguish the Applicant's liability to pay an administration charge in respect of litigation costs.

76. There was no dispute that the Applicant's costs would be an "administration charge" because the Applicant contends that its costs of these proceedings, amounting to several thousand pounds according to its statement of costs, are "an amount payable…directly or indirectly….(d) in connection with a breach (or alleged breach) of a covenant or condition" in the Respondent's Lease.

77. However, Mr Simon contended that the Tribunal could not make a determination under paragraph 5A because no demand had been made by the Applicant for such costs. We disagree. The definition of "litigation costs" in paragraph 5A(3)(a) means costs incurred or to be incurred by the landlord in connection with proceedings of a kind mentioned in the table under the paragraph. All that is needed is the costs have been incurred or are to be incurred. The Applicant has incurred the costs by instructing Mr Simon's firm. The statement of costs supplied contains a declaration that the costs stated do not exceed the costs which the Applicant liable to pay.

78. The Tribunal determines that it is just and equitable to extinguish the Respondent's liability to pay any of the Applicant's costs of these proceedings, for these reasons:

(1) The Applicant has failed on all its allegations of breach;

(2) The Applicant failed to write any letter before application to the Respondent before filing this application;

(3) The Applicant did not withdraw allegations (ii) and (iii) until 11.58am on the day of the hearing.

Name: Tribunal Judge S Evans **Date**: 21 November 2022.

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the Tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix 1

Commonhold and Leasehold Reform Act 2002

168 No forfeiture notice before determination of breach

…

(4) A landlord under a long lease of a dwelling may make an application to the appropriate tribunal for a determination that a breach of a covenant or condition in the lease has occurred.

Schedule 11 , paragraphs 1, and 5A

Meaning of "administration charge"

(1)In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a)…

(b)…

(c)…

(d)in connection with a breach (or alleged breach) of a covenant or condition in his lease.

Limitation of administration charges: costs of proceedings

5A(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2)The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—

(a)"litigation costs" means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and

(b)"the relevant court or tribunal" means the court or tribunal mentioned in the table in relation to those proceedings.

Proceedings to which costs relate	***"The relevant court or tribunal"***
Court proceedings	The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court
First-tier Tribunal proceedings	The First-tier Tribunal
Upper Tribunal proceedings	The Upper Tribunal
Arbitration proceedings	The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court.