FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AW/LBC/2022/0060**
Property	**:**	**Flat 1, 12 Lexham Gardens, London W8 5JE**
Applicant	**:**	**Littleheath Limited (substituted for 12 Lexham Gardens RTM Co Ltd)**
Representative	**:**	**Mr Khurshid Zaman**
Respondent	**:**	**Ms Evonne Brown**
Representative	**:**	**In person**
Type of Application	**:**	**Determination that a breach of covenant has occurred (Commonhold and Leasehold Reform Act 2002, s 168(4))**
Tribunal Members	**:**	**Tribunal Judge Prof R Percival** **Mr A Harris LLM, FRICS, FCIArb**
Date and venue of Hearing	**:**	**26 January 2023** **Remote**
Date of Decision	**:**	**3 February 2023**

DECISION

The application and procedural background

1. The Applicant seeks a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the Respondent has breached a covenant or condition of the lease.

2. The 2002 Act and the Landlord and Tenant Act 1985 may be found at the following urls, respectively. Section 20C of the 1985 is relevant:

   https://www.legislation.gov.uk/ukpga/2002/15/contents
   https://www.legislation.gov.uk/ukpga/1985/70

3. Initially, the application was made by 12 Lexham Gardens RTM Company Limited ("the RTM Company").

4. The Respondent applied to strike out the application by an emailed application on 28 November 2022. Provision was made for a reply by the Applicant, and the application was referred to the Tribunal to consider at the outset of the hearing.

5. On 23 January 2023, at the request of the Tribunal as currently constituted, the Tribunal office sent the parties a copy of the Upper Tribunal judgment in *Eastblock Block A RTM Co Ltd v Otubaga* [2022] UKUT 319 (LC), a decision handed down on 29 November 2022. In that case, the Deputy President found that an RTM company, not being a landlord with the right to forfeit, could not make an application under section 168(4) of the 2002 Act.

6. We also directed that the inspection (which had been scheduled for 10.00 am) be vacated and that at a remote (CVP) hearing on 26 January 2023, we would hear the question of the Tribunal's jurisdiction as a preliminary issue. The issue raised by *Eastblock* was distinct from that the Respondent sought to raise on her strike out application.

7. Shortly thereafter, an application was made in emails by Mr Zaman for the freeholder, Littleheath Limited, be substituted as Applicant for the RTM Company. We directed that this application would be considered as part of the preliminary issue to be considered on 26 January. Mr Zaman stated that he was authorised to act as the representative of Littleheath. At the request of the Tribunal, he produced a stationers' power of attorney document dated 2008 signed by the only director of Littleheath, Mr Luis DeSousa, appointing Mr Zaman as his attorney in relation to (inter alia) "all matters relating to Littleheath Ltd".

The property

8. Flat 1 is a studio basement flat in a converted house, containing in all ten flats. Flat 1 is held on a long lease by the Respondent. The Respondent sub-lets the flat on short term tenancies (as do, apparently, all or nearly all of the leaseholders).

9. Ms Brown bought her leasehold interest in 2015 from Mr Gibbs, who had acquired his in 2006.

10. As stated, the freeholder is Littleheath. The evidence was that Littleheath is owned by Worldwidecom Limited, which also owns the leasehold interest in four of the flats. Ms Brown's evidence included (via hyperlinks) the Companies House records of the relevant companies (and we had consulted the record for Littleheath ourselves when requesting details of Mr Zaman's authorisation to represent that company). Mr Zaman was a director in the past (sometimes for more than one period) of all these companies. The current Companies House records show that he last resigned from his directorship of Worldwidecom on 16 June 2020, and from his directorship of Littleheath on 26 April 2021. He remains a director of the RTM Company. It appears to be accepted that Mr Zaman owns Worldwidecom.

11. The RTM Company was incorporated in December 2013. We were not given the date on which it acquired the right to manage.

The lease

12. The lease is for a term of 125 years from 1990 (the date of the lease). Below we outline the main provisions in issue.

13. By clause 3 of the lease, the lessee covenants to observe and perform the obligations and regulations set out in both parts of the fifth schedule and the ninth schedule.

14. The extent of the demise is set out in the second schedule. Included is the covering on the external walls, all of the internal, non-structural walls, and the internal surfaces. Expressly included are doors and door frames and window glass. Expressly excluded are "the window frames fitted in the external walls of the Property and of the Demised Premises".

15. Paragraph 2 of the fourth schedule reserves the right of the lessor to enter on reasonable notice to carry out the lessor's obligations under the sixth schedule. That schedule (with clause 4) contains the lessor's repairing obligations (although the drafting is unclear as to the nature of the obligation) in respect of the structure etc, excluding demised

premises, to decorate externally every four years, to clean and light the common parts and other usual covenants.

16. Paragraph 7 of part I of the fifth schedule requires the lessee to permit the lessor (and those authorised by it) "at all reasonable times by appointment" to enter "for the purposes of viewing and examining the state of repair of the Demised Premises or the Property". The property is defined as 12 Lexham Gardens (first schedule, paragraph (iv) and paragraph 5 of the particulars).

17. Paragraph 9 of the same part provides that, if the lessee defaults on the obligations to repair, decorate and maintain the demised premises, the lessee must permit the lessor to enter to undertake the repair, decoration and maintenance at the lessee's expense.

18. By paragraph 10 of the same part, the lessee covenants to permit the lessor "at all reasonable times upon prior notice in writing" to enter the demised premises for the purpose of repairing, maintaining or renewing any part of the property that is undemised. The obligation is expressed as extending to work in relation to conduits, gutters etc serving the property as a whole (which are in any event not included in the demise as set out in the second schedule). There is a proviso that the lessor must make good damage to the demised premises.

19. Paragraph 12 forbids the making of any alterations or additions in or to the demised premises without consent.

20. Paragraph 17 of the same part requires the lessee to give notice of (inter alia) subletting within 21 days, with a certified copy of (in effect) the tenancy agreement, and paying a "registration fee" of £15 plus VAT. The paragraph states that the notice, and certified copy, is to be given to "the lessee's solicitor". The "lessor's solicitor" must have been intended.

21. The covenant in paragraph 1 of part II of the fifth schedule reads as follows:

> "To keep the Demised Premises and all additions thereto and the landlord's fixtures and fittings and sanitary water and central installed in window glass condition heating and gas and electrical apparatus or affixed to the Demised Premises and the thereof in good and substantial repair and condition"

22. Paragraph 2 of Part II requires decoration every fifth year of the interior of the demised premises.

23. Paragraph 3 requires the lessee to make good damage caused by the default of the lessee to any part of the Property or the landlord's fixtures and fittings.

24. By paragraph 5(b) of the seventh schedule ("provisions agreed between the lessors and the lessee"), makes provision for the serving of notices or other writing on the lessee.

25. By paragraph 6, the lessee covenants to observe the restrictions and regulations in the ninth schedule. That schedule includes a prohibition on the lessee decorating the exterior of the demised premised (paragraph 4). Paragraph 12 requires the lessee not to reside in the demised premises, or permit any other person to reside there, unless the floors are covered with carpet, or, in the case of the kitchen, bathroom and lavatory, vinyl flooring.

The issues and the hearing

26. Mr Zaman represented both the RTM Company and the freeholder, Littleheath. Ms Brown represented herself. In addition to Mr Zaman and Ms Brown, we heard evidence from Mr Gibbs, Ms Brown's predecessor in title.

27. At the start of the hearing, we determined, with the agreement of the parties, to first consider, as preliminary issues, the application to substitute Littleheath for the RTM Company, and the Respondent's strike out application, and in the light of our conclusions, to then consider how, if at all, to proceed.

The preliminary issues: substitution of the applicant

28. In the event, both parties supported the application to substitute. We considered whether it was appropriate to do so, and concluded that it was. We considered that it was both necessary and appropriate to make the order, and in keeping with the overriding objective of the Tribunal (Rule 3, Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the 2003 Rules").

29. We order under rule 10 of the 2003 Rules that Littleheath Limited by substituted for the RTM Company.

30. Mr Zaman adopted the materials previously provided by the RTM Company when it was the apparent Applicant.

The preliminary issues: strike out

31. In the original application, the alleged breaches, and the terms of the lease they were said to breach, were as follows:

(1) Failure to provide access to the flat, contrary to fourth schedule, paragraph 2 and fifth schedule, part 1, paragraphs 7, 9 and 10.

(2) Damage to fixtures and fittings by drilling holes through the window frames of the front sash window to provide for cables to enter the flat, contrary to fifth schedule, part II, paragraphs 1 and 3.

(3) "A boiler flue was drilled through the front wall, it has been removed after warning from the Landlord but subsequent repair/redecoration carried out by lessee not of acceptable standard", stated to be contrary to the ninth schedule, paragraph 4.

(4) Failure to provide certified copies of tenancy agreements agreed with sub-tenants, contrary to fifth schedule, part I, paragraph 17.

(5) Covering the interior floor with laminate or wood, contrary to ninth schedule, paragraph 12.

(6) Placement of an alarm and video camera on the exterior on the landlord's property. Removal of alarm and video camera, but subsequent redecoration not of an acceptable standard, contrary to ninth schedule, paragraph 4 and fifth schedule, part I, paragraph 12.

32. However, in his witness statement, Mr Zaman also alleged other breaches, particularly that the Respondent had breached the requirement in the fifth schedule, part I, paragraph 17 when she acquired the leasehold interest. He did not press these points.

33. The basis of the Respondent's application to strike out the application was that all of the alleged breaches were historic in nature, and had been settled as a result of a settlement agreement made on 27 May 2017, following mediation in the context of an application to the Tribunal at that time.

34. Mr Zaman had not referred to this settlement at any point.

35. The settlement includes the following clause:

> "All retrospective litigation, accusations of breach of leases whether actioned or implied, to cease immediately. A clear definitive statement that as of the date of the signed mediation agreement, all flats are agreed by Littleheath Ltd to be in full compliance with their lease agreements and there is a clear unambiguous and unequivocal statement from LITTLEHEATH LTD that there absolutely no ground for any legal claims against Lessees on ALL FLATS for claims of breaches of leases as of the date of May 25th 2017"

36. It appears from the document that it was originally drafted by a director of the RTM Company. Mr Zaman's signature appears on the agreement, as signifying agreement by Worldwidecom Ltd and Littleheath.

37. Mr Zaman did not contest that the document was a binding settlement agreement.

38. By the conclusion of the submissions, our understanding was that Ms Brown had agreed that her strike out submission was limited to breaches that occurred before 27 May 2017 (having modified her original contention that all of the alleged breaches pre-dated the settlement); and Mr Zaman did not contest that he was not at liberty to pursue breaches earlier than that date.

39. Under Rule 9 of the 2003 Rules, we may strike out "part of a case". We strike out any allegation of a breach which was said to occur before 27 May 2027 under Rule 9(2) and 3(c) and (e).

Preliminary issues: should we proceed or adjourn?

40. Having adjourned for consideration, we indicated our decisions on both the application to substitute and the strike out application. We then invited submissions on whether we should continue to hear the substantive application, or adjourn to allow further evidence or submissions.

41. Initially, Ms Brown argued that, given the substitution of the Applicant, she wanted to adduce further evidence. In particular, she said, she would like to adduce evidence relating to the history of the property before the establishment of the RTM. When we suggested to her that such matters were unlikely to be directly relevant to the determination of whether a breach of covenant had occurred since May 2017, she agreed. Ms Brown thereafter changed her position and agreed it would be advantageous to hear the substantive application immediately.

42. Mr Zaman was in favour of hearing the substantive application.

43. We did so.

The hearing: what is covered by the strike out?

44. Before considering the relevant alleged breaches, it is appropriate to summarise the evidence we heard about a zoom meeting between Mr Zaman and Ms Brown on 20 May 2022, and subsequent events.

45. The meeting, which had been organised with the assistance of another of the leaseholders, appeared to both parties to have been helpful. As an immediate result, Ms Brown sent an email to Mr Zaman, on 23 May 2022. Following her reciting that she found the meeting very useful and productive, and thanking Mr Zaman for "fixes" to issues between them, the key passage reads as follows:

> "During the meeting I agreed to put in writing the remedial action I am willing to undertake to remedy Flat 1's possible breach of the lease. I request authorisation from the Freeholder for the following:

> i) removal of any camera which you believe is located on the external wall above the front door to Flat 1 (I have not noticed this camera previously and I believe that it must be defunct as it is not attached to any receiving equipment connected to Flat 1; alternatively, it may be a decoy camera erected by a previous owner. Whatever the background, it serves no purpose to myself or my tenant. I will arrange to have it removed and any damage to the wall made good).
>
> ii) removal of the old vent which is surface-mounted on the external wall under the bay window of Flat 1 and any damage to the wall made good;
>
> iii) removal of defunct cables entering Flat 1 via the bay window frame and the frame made good.

46. Relations, however, broke down again shortly after the meeting, in early June. Ms Brown's evidence was that at the end of the meeting, Mr Zaman suggested the purchase of her flat, which would remove the issues relating to breach of covenants. On her account, he said that the history of litigation involving the leaseholders, freeholder and the RTM Company had reduced the market value of the property. Her evidence was that some preliminary negotiations took place, but she declined to go forward by the first week of June. Thereafter, she said, Mr Zaman again became hostile and initiated these proceedings.

47. Mr Zaman agreed in oral evidence that he had opened a discussion of the purchase of the flat. We had taken his written material (specifically, the response to the Applicant's strike out application) to have denied that discussion, but it is somewhat ambiguously worded, and may have only been a denial of the offer to waive breaches of covenant if she did sell. The potential purchaser was someone he knew, not himself or Worldwidecom. He agreed that negotiations broke down in early June.

48. The Respondent, in her strike out application, had said that she had recorded the meeting. She had not told Mr Zaman of the recording, to which he now objected. We did not ask to hear the recording, or see a transcript.

49. We invited submissions and evidence on the factual issue of which alleged breaches of the lease were covered by our ruling.

50. In respect of the alarm and the camera, Mr Zaman said that he could not say whether their erection was before or after May 2017. Ms Brown's evidence was that she was unaware of the camera. She had not erected it, and assumed it had been erected by a previous tenant (see her account in the email recorded at paragraph [46] above). The alarm was on the Applicant's property, not hers (as was agreed), she did not erect it, and assumed it had been erected by a previous tenant, or someone else.

51. Mr Zaman has produced no evidence, and does not even claim, that the alarm and camera were erected after May 2017 by the Respondent. We find that, if they are breaches, they precede the May 2017 settlement.

52. Mr Zaman agreed that the flue had been put in place (ie by means of a hole in the wall of the flat) before May 2017. It was agreed that, following the May 2022 zoom meeting, the Respondent had had the flue removed, and her contractor had filled in the hole.

53. His original application appeared to be objecting to the quality of repair (as he did in this witness statement and oral evidence), but the lease term cited was that prohibiting the lessee from decorating the exterior of the flat. Mr Zaman produced two photographs, one said by Mr Zaman to have been taken in June 2022, and a second November 2022. The first shows the flue removed, and a square area around the repair appears to have been painted white. We did not hear evidence as to the dimension of the square, but judging by the photographs is appears to be something in the order of 400 or 500 mm square. The November 2022 photographs shows the same area, over which a skim of mortar or render has been applied. The mortar or render largely obscures the painted square, and continues beyond it to the left and above. It has not been decorated.

54. Mr Zaman oscillated in his oral submissions between complaining that the Respondent's repair had been of poor quality, and the breach complained of paragraph 4 of the ninth schedule, the prohibition on decoration.

55. Ms Brown said she did not know exactly what her contractor had done. She did not know whether the contractor had painted the wall during the period between June and November 2022, or whether what appeared to be white paint was some other finish.

56. We are satisfied that there was no breach of covenant relating to the repair of the flue hole.

57. First, if there had been a breach by the Respondent in respect of the flue, and she had rectified that breach, she would have been obliged by paragraph 3 of part II of the fifth schedule to have made good the damage. "Making good" would include finishing a repair such that the property of the Applicant (here, the external wall) was in a proper decorative state. Such making good cannot be considered to be the sort of external decoration at which paragraph 4 of the ninth schedule is aimed. It would, indeed, be absurd to suppose that the parties would have intended that, in making good damage caused by a lessee, the lessee would make good up to the point of adding the final layers of paint, and then stop.

58. However, there was no breach by the Respondent to be rectified. Any breach in fitting the flue was prior to the May 2017 settlement and covered by it (in fact, Mr Gibbs' witness statement makes it clear that the flue was already in place when he bought the leasehold in 2006). We do not think that the Respondent's email of 23 May 2022 was agreement that there had been breaches. She refers loosely to remedying "Flat 1's possible breaches of the lease", and requesting authorisation to do the works set out (see paragraph [45] above). The breaches are only "possible" and they are "Flat 1's", not her own. She requests authorisation to do the work, which would not be necessary if there were, indeed, breaches. The tone of the email is one of compromise in the hope of better relations. It would be very surprising if, as a matter of fact, Ms Brown was admitting a breach that preceded the May 2017 settlement, of which she was clearly aware.

59. But even if she had admitted a breach, she would have been wrong to do so. Accordingly, the "remedying" is not a requirement of the lease. Rather, it is the voluntary assumption of a task as part of an informal compromise. There is nothing to suggest that *not* painting the wall was part of that informal assumption of an obligation. But even if it were, (and it is a difficult assumption to make), and the apparent painting of a square of wall following the repair was a breach of a legal obligation (another difficult assumption) arising out of that transaction, it certainly was not a breach of the *lease*.

60. Finally, Mr Zaman insisted that the installation of laminate wood flooring in the flat was a post-May 2017 breach.

61. To provide the context, it was Mr Gibbs evidence that he had secured the consent of the freeholder in respect of laminate flooring in the flat, on the basis that it was a basement flat, so the rationale for sound deadening floor coverings did not apply.

62. Ms Brown's evidence was that she had not changed the laminate flooring.

63. However, Mr Zaman produced a photograph taken through the window of the flat (through the more or less horizontal slats of the internal Venetian blinds). This, he said, showed that the flooring "looked newer" than May 2017.

64. We have looked at the photograph. From it, one can tell little more than that the floor covering is brown.

65. The burden in this application is on Mr Zaman to satisfy us that a breach has occurred. If we were faced with two witnesses of equal reliability, one of whom said they thought that, looking through a window, a laminate floor "looked newer", and another who stated

categorically that she had not replaced the flooring, we would accept the latter unhesitatingly. We did consider whether we might come to another conclusion if we inspected the property (for which, see paragraphs 117 below), and concluded that it would be unlikely in the extreme that we could look at a laminate floor and be sufficiently sure that it had been installed since May 2017, and that Ms Brown was lying.

66. We so conclude, had we found the witnesses of equal reliability. We do not consider Mr Zaman and Ms Brown witnesses of equal reliability. It is opportune at this point to give our impression of the witnesses.

67. We found Ms Brown to be a straightforward and clear witness, who was capable of, and did, accept facts that were not in her interest. We think that in some respects, her judgements were at fault, but we did not doubt her honesty.

68. Mr Zaman was far from straightforward. Orally, he constantly shifted his position if he thought it might be in his interests to do so. Both orally and in his written evidence, he exaggerated in a way that was at least close to dishonesty, such as claiming that, in her email of 23 May 2022, the Respondent had admitted each and every breach of the lease alleged. Sometimes, he persisted with a bad point to the point of absurdity, as when claiming that it was important for the freeholder to know how many sub-tenants there were (an irrelevant consideration, anyway), because there was a realistic possibility that the Respondent might let this studio flat to five unrelated tenants so as to render it a house in multiple occupation.

69. Thus, our estimation of the witnesses reinforces our preference for Ms Brown's evidence as to the laminate flooring.

70. We turn to the allegation that a hole was bored in the window sill after May 2017.

71. The window frames are not demised. Mr Zaman relied on paragraphs 1 and 3 of part II of the fifth schedule to the lease. We do not think paragraph 1 bites, as it applies to the demised premises and the landlords fixtures and fittings. Mr Zaman claimed to rely on the reference in paragraph 3 to fixtures and fittings. While we do not think that appropriate (the window frames being integral to the building, not a fixture), the paragraph does also require the making good of all damage to the Property.

72. There were a number of cables entering the flat via holes in the window sill of the front sash window of the flat. This had been the case for some time – photographs exhibited to Mr Gibbs' witness statement showed cables entering through the window sill before the Applicant bought the

leasehold. The Respondent had, in her email of 23 May 2022, agreed to remove those that were defunct.

73. There was, however, one recent cable that entered through a hole in the window sill. Ms Brown's evidence was that she had been told about the cable by her tenant. Her tenant said that it was a cable for an internet connection, and that the operative who had installed it had used an existing hole.

74. Mr Zaman's principal argument was that we should conclude that the hole had been newly bored when the internet connection was installed. This, he said, we could and should infer from the fact that it had been installed. One should, he argued, expect an operative of a company installing a cable to drill his or her own hole.

75. In addition, Mr Zaman argued that the hole "looked new". He produced a photograph of the window sill, showing the entry of the cable in some detail. The cable does look new. One can see that by the fact that there an untarnished metal sleeve or connector close to the point at which the cable enters the window sill. The sill is in a poor decorative state, and largely covered by moss. The moss covers the margins of the hole through which the cable enters. We concluded that we could be quite satisfied, without seeing more, that the hole does not "look new". Proximate to the hole is at least one, and possibly more, old cables of a similar diameter to the new cable that has, or have, been cut, such that it or they no longer penetrate the window sill.

76. We reject Mr Zaman's argument. We do not think that there should be any assumption that, presented with an existing but unused hole through a window sill, the operative of a company providing internet access would nonetheless insist on drilling another hole.

77. We also accept Ms Brown's evidence of what her tenant said. We have no idea as to the reliability of the tenant, but see no obvious reason why she should lie. But we rely primarily on our rejection of Mr Zaman's proposed inference, and on the appearance of the hole in the photograph.

78. Accordingly, Mr Zaman has not persuaded us that any hole has been bored in the window sill since May 2017.

The hearing: access for inspection and notice of tenancy agreements

79. There remained two issues which, both parties agreed, still arose for decision, the allegations clearly being of breaches that did take place after May 2017.

80. First, by paragraph 7 of part I to the fifth schedule, the lessee covenants to permit the lessor at all reasonable times by appointment to enter the

demised premises to view the state of repair. Mr Zaman also sought to rely on paragraph 9 and 10, but neither are relevant.

81. Mr Zaman claimed that there had been "multiple times" when the freeholder had given notice of an inspection which the Respondent had not allowed. However, on questioning by the Tribunal, he mentioned one instance that was not evidenced in the bundles, and two that were. These, he said, were the multiple examples of breach to which he was referring.

82. We are not prepared to consider an alleged breach only mentioned orally in evidence in the hearing, without any documentary support. Mr Zaman has had every opportunity to provide evidence of it in advance. Had he done so, the Respondent could have sought to have answered it He has not.

83. The two instances that remain were in April and June 2022.

84. The first notice of an inspection was in a letter from (we were told) Mr Lazarev of Lazarev Cleaver, solicitors, dated 20 April 2022. The letter is effectively a letter before action in respect of breaches of covenant. It starts by stating that the firm was acting on behalf of the RTM Company (and its managing agents) in relation to possible breaches of covenant. After setting out some of the lease provisions and the alleged breaches, there is a heading "next steps". Under that heading, the solicitor states "Our client proposes to carry out an inspection on 25 April 2022 at 14.00 pm. Please confirm by return that you will allow our client's agent and/or representative access to the premises".

85. Thereafter, Ms Brown responded by questioning whether, as was stated in letter, the firm had the authority to act for the RTM Company. In an email disclosed by Mr Zaman, Mr Lazarev refers to advising Mr Zaman (apparently, before the letter to Ms Brown) to have a formal board resolution approving the instruction of the firm, given that Ms Brown was also a director.

86. Mr Zaman convened a board meeting, and secured approval for the appointment of Mr Zaman to take legal action against lessees in breach of their leases on 9 June 2022 (by seven votes to four, Mr Zaman having five votes, one of the terms of the May 2017 settlement).

87. Ms Brown argued that Lazarev Cleaver did not have authority to write the letter of 20 April 2022 before the board meeting's resolution on 9 June, and that therefore no notice was given of the inspection.

88. Mr Zaman argued that he did have the authority to appoint Lazarev Cleaver himself, and that the resolution of the board was not necessary.

89. We were not provided with the articles of association of the RTM Company, but they must mirror those required by the model articles set out in the schedule to the RTM Companies (Model Articles)(England) Regulations 2009.

90. One of the objects of the Company is to take part in legal proceedings. The directors are responsible for the management of the company, and can exercise its powers (Article 8), and, by Article 12, the "general rule about decision-making by directors is that any decision of the directors must be either a majority decision at a meeting or [a unanimous decision]". The directors may delegate any of the their powers as they may think fit (Article 10).

91. We interject at this point that, as is now clear, the RTM Company was never capable of making an application under section 168(4) of the 2002 Act in any event. As a result, it might be argued that any exercise of a purported power to do so was nugatory, and its delegation void. This was not, however, a submission made to us, nor a point we put to the parties, and no doubt the question is arguable. We prefer, therefore, to rely on the reasoning set out below.

92. On this basis, the directors did delegate their power to initiate proceedings for breach of covenant, but that was on 9 June 2022. Once this issue had been raised, as it was in the exchange of documents in accordance with the directions, it is clearly incumbent upon the Applicant to show that Mr Zaman did, as he asserts, have authority, before 9 June to initiate legal proceedings by instructing the solicitors to do so. He has not done so.

93. Further, he has revealed that his solicitors advised him, earlier than their letter of 20 April 2022, that it would be advisable that the board should resolve to give Mr Zaman this authority. That strongly suggests that, if he did have some delegated authority from the directors (even if he has not given any evidence of it), that it did not clearly give Mr Zaman authority to initiate proceedings on behalf of the RTM Company.

94. Accordingly, we accept Ms Brown's submission that Lazarev Cleaver did not have authority to initiate proceedings, and accordingly did not have authority to give notice of an inspection as a "next step" to be taken. There is nothing to indicate that Lazarev Cleaver had separate, independent authority to give notice of an inspection, beyond the purported authority in connection with breach of covenant proceedings. So when Lazarev Cleaver gave notice of an inspection, that was not an act of the RTM Company, and the Respondent was entitled to disregard it.

95. Even if we are wrong to conclude that Lazarev Cleaver did not have authority to give the notice, we consider that there would still have been

no breach. We asked Mr Zaman if he had attended the flat on the date specified in the letter. He said he had no specific recollection of having done so, but, first, that he was "99% sure" that he would have been in area of the flat, as the freeholder used a storage cupboard in that area which he regularly visited; and, secondly, that he "would have" knocked on the door at the time specified for the inspection. We do not think that a mere hypothetical assertion as to what he believed his conduct would have been is sufficient to make us conclude that it is more likely than not that he did, in fact, do so, given our general attitude towards Mr Zaman's evidence.

96. If he did not seek to assert his right to inspect (on the hypothetical basis that he had the right) by attending at the flat and knocking on the door or ringing the bell, then there would be no breach: *New Crane Wharf Freehold Limited v Dovener* [2019] UKUT 98 (LC).

97. The second documented claimed breach of paragraph 7 of part I to the fifth schedule relates to an email to Ms Brown from Mr Zaman's personal email account on 24 June 2022, a Friday. The time stamp on the email is 13.29. The email includes a request to Ms Brown to give Mr Zaman access to the flat on Monday 27 June at 3.00 pm.

98. Mr Brown argues that such notice is not reasonable. We agree with her, although (see the paragraph below) we do not agree with what she considers would be reasonable. Ms Brown works full time, and lives outside London, as Mr Zaman is aware. The flat is tenanted. What is a reasonable time for an inspection on notice will depend on the circumstances. Notice given in the afternoon of one working day for an inspection for (later) in the afternoon of the next following working day is not reasonable notice in these circumstances.

99. We add a rider that we hope may be for the benefit of the parties. We cannot and do not determine in advance what *would* be reasonable notice. But we very much doubt that Ms Brown's position is sustainable. Her view was that the only reasonable time for an inspection would be during the periods between sub-tenancies. Those would usually occur once a year or once every 18 months or so, she said. In general, however, and purely as an indication, we would have been likely to have found notice of a week or so, for a time during the working day, to be reasonable, absent any special difficulty notified to the freeholder. Insofar as Ms Brown said she had concerns for the wellbeing of her tenant during the course of an inspection, that, we suggest, is a concern that would have to be dealt with by, for instance, the absence of the tenant during the inspection, and if necessary attendance by some other third party on behalf of the Respondent. We emphasise again that nothing we say in this paragraph is authoritative.

100. Finally, we move on to consider the second of the two allegations of post-May 2017 breaches, that of paragraph 17 of part I of the fifth

schedule, which requires sub-tenancy agreements to be provided to the lessors.

101. It was Mr Zaman's evidence that he had offered the lessees the option of paying a £100 fee in advance every year, in consideration of which he would waive the obligation to provide a certified copy of the tenancy of a sub-tenant. It was common ground that it was agreed that the copies could be sent to the RTM Company rather than to the lessor's solicitors, as provided in the lease (the lease states "lessee's solicitors", but that is clearly a slip and Ms Brown took no point on it). He made a generalised allegation that Ms Brown had not provided copies of tenancies in his witness statement.

102. It was Ms Brown's evidence that she has sent copies of the tenancy agreement each time, and enclosed a cheque for £100, except on the last occasion, when she paid the fee by internet bank transfer. She provided evidence of the bank debit in respect of that payment. She was clear that she was adopting the practice set out in the lease of providing a copy of each tenancy, with a payment, rather than taking advantage of Mr Zaman's offer of a yearly fee of £100 in exchange for waiving the requirement to provide a tenancy agreement. She said, however, that she would adopt that practice hereafter.

103. Ms Brown's evidence was that she took elaborate steps to evidence her posting of the tenancy agreements, including filming herself posting the envelope. While it was agreed that service could be effected by the ordinary post, she also sent the tenancy agreements by registered post. Mr Zaman said that for a period, the freeholder's bank account had been frozen, so cheques could not be paid in. In any event, the freeholder had adopted the practice of not accepting payment at a certain point (although on one occasion, the agent had accidentally received the payment, but then returned it).

104. In respect of the latest occasion, Mr Zaman submitted that it had been sent with the wrong post code. This was on the basis of the post office receipt exhibited by Ms Brown in her bundle, which did, indeed, show an incorrect post code. On that occasion, however, the registered post package had not been successfully delivered, and so returned to Ms Brown after the third attempt. She was therefore in possession of the original envelope. Mr Zaman did not object to her showing it to us via her webcam, and it was clear that it had been sent to the right post code. Rather, there was an error on the Post Office receipt.

105. It was our understanding that, by the end of the hearing, Mr Zaman was no longer relying on a complete failure to provide a tenancy agreement. Rather, the focus of his objection was on the fact that Ms Brown redacted the name of the tenant and the rent on the copies of the tenancies that she sent. Accordingly, he argued that the version of the

agreement provided by Ms Brown did not satisfy the requirements of the lease.

106. We were provided with a copy of the current assured shorthold tenancy agreement, which did indeed have those details redacted. The period of the tenancy was specified, as were all the other substantive terms.

107. Ms Brown submitted that she so redacted the agreement because she considered that she might otherwise be in breach of the General Data Protection Regulations. She did not, however, feel able to give us detailed submissions as to why she thought that was the case.

108. We thus heard no detailed legal argument on the data protection point. We doubt that it is the case that she could not divulge the name of the tenant, however. In the first place, the tenancy agreement makes provision for the tenant to allow access by the superior landlord, if such access is required by the landlord's (ie Ms Brown's) lease. We think it likely that that means that it is necessary to divulge the name of the tenant for the purpose of the performance of a contract to which the data subject – the tenant – is a party. Alternatively, Ms Brown could have secured the tenant's consent to disclosure (see article 6 of the Regulations).

109. In the absence of a data protection justification, we considered whether the absence of the name and rent did indeed mean that the document could not count as a tenancy agreement for the purposes of paragraph 17.

110. The failure to provide name and rent amount to the exclusion of a small number of words. If a copy of a tenancy agreement were submitted, and a few words were accidentally omitted as a result of a photocopying slip, we think it would nonetheless amount to provision of a copy, unless the words excluded were of importance.

111. Whether the few words omitted mattered must depend, we consider, on the substantive commercial purpose and function of the term. As it relates to a sub-tenancy, what matters to the lessor are things such as that the sub-tenancy is not for a term longer than the lease and that it substantively incorporates the regulations imposed on the lessee by the lease insofar as they are relevant to a sub-tenant. Mr Zaman, in his witness statement, referred to the name as important in terms that suggested that the lessor had some veto over tenants. There is no such provision in the lease, of course. We see no utility at all in the lessor knowing the name of the sub-tenant, or the rent. We note in passing that Mr Zaman's alternative offer (£100 a year, and no copies) suggests that, as a matter of fact, the lessor is wholly uninterested in the contents of the sub-tenancy agreements.

112. Accordingly, we consider that the tenancy agreement provided by Ms Brown did not breach the covenant by reason of her redactions.

113. In both the application and his witness statement, Mr Zaman referred to the requirement that the tenancy be certified. While the issue of certification did not figure largely in the hearing, it was nonetheless part of Mr Zaman's case that the lease requirement was for a certified copy.

114. It is clear on its face that the copy of the tenancy is not certified.

115. We conclude, therefore, that the Respondent was in breach of paragraph 17 of Part I of the fifth schedule, but only by virtue of her failure to provide a copy of the tenancy that had been certified. The lease is silent as to who is to certify the lease, but in accordance with usual business practice, a certificate by a solicitor would certainly suffice.

116. We add a further non-authoritative rider. This is a minor and technical breach of covenant, which has in effect already been remedied by Ms Brown's decision to accept the Applicant's offer of waiver of the covenant in exchange for an annual fee.

Is an inspection necessary?

117. With the agreement of the parties, we reserved the question of whether to order an inspection until after we had considered the issues before us, on the basis that we would only order an inspection if we thought it necessary or desirable before coming to one or more conclusions. For the reasons we explain above, we found it possible to come to our conclusions on all issues without an inspection.

Application for orders under Section 20C of the 1985 Act and Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A

118. The Respondent applied for orders under section 20C of the 1985 Act that the costs of these proceedings may not be considered relevant costs for the purposes of determining a service charge; and an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 extinguishing any liability to pay an administration charge in respect of litigation cost in relation to the proceedings

119. We consider these applications on the basis that the lease does provide for such costs to be passed on either in the service charge or as an administration charge, without deciding whether that is the case or not. Whether the lease does, in fact, make such provision is, accordingly, an open question should the matter be litigated in the future.

120. An application under section 20C is to be determined on the basis of what is just and equitable in all the circumstances (*Tenants of Langford Court v Doren Ltd* (LRX/37/2000). The approach must be the same under paragraph 5A, which was enacted to ensure that a parallel jurisdiction existed in relation to administration charges to that conferred by section 20C.

121. Such orders are an interference with the landlord's contractual rights, and must never be made as a matter of course.

122. The success or failure of a party to the proceedings is not determinative. Comparative success is, however, a significant matter in weighing up what is just and equitable in the circumstances.

123. In this case, we have found one, minor and technical breach of a covenant, a breach that is obviously wholly immaterial to the Applicant, who waives the covenant in exchange for an annual fee for other lessees and is willing to do so for the Respondent. We have, however, rejected much more serious allegations of breaches. Some, at least, of the allegations of breach should never have been made (for instance, that there were breaches of wholly irrelevant covenants); and the conduct of the Applicant is open to criticism. It was, for instance, in inappropriate for Mr Zaman to have failed to mention at all the May 2017 settlement, and, in his witness statement, to have alleged that Ms Brown breached the covenant in paragraph 17 of Part I of the fifth schedule to the lease when (he alleged) Mr Cobb had not provided copies of the conveyance of the leasehold interest in 2015.

124. In these circumstances, we think it is clearly right to make the orders sought.

125. The Tribunal orders

(1) under section 20C of the 1985 Act that the costs incurred by the Applicant in proceedings before the Tribunal are not to be taken into account in determining the amount of any service charge payable by the Respondent; and

(2) under Commonhold and Leasehold Reform Act 2002, schedule 11, paragraph 5A that any liability of the Respondent to pay litigation costs as defined in that paragraph be extinguished.

Rights of appeal

126. 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 London regional office.

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

128. If the application is not made within the 28 day time limit, the 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 these reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

129. The application for permission to appeal must identify the decision of the Tribunal to which it relates, 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.

Name: Tribunal Judge Professor Richard Percival **Date:** 3 February 2023