FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/45UH/LAC/2019/0022
Property	:	Flat 3, 17 Winchester Road, Worthing, Sussex BN11 4DJ
Applicant	:	Mr Kevin Leake
Representative	:	
Respondent	:	D K Majo Estates Ltd
Representative	:	Mr B Maltz
Type of Application	:	Administration charge
Tribunal Member(s)	:	Judge D. R. Whitney Mr B. Simms FRICS
Date of Hearing and venue	:	24th February 2020 at Havant Justice Centre
Date of decision	:	23rd March 2020

DECISION

Background

1. The Applicant seeks a determination of his liability to pay and the reasonableness of certain administration charges incurred in respect of dealing with an application for consent to alterations and pursuing a claim for breach of covenant. The Applicant also seeks an order pursuant to section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

2. Directions were issued on 18th October 2019 which were revised on 21st October 2019 [82-85].

3. The Applicant attended the hearing and represented himself. The Respondent was represented by Mr Maltz of counsel with Mr Darren Winter and Mr John Winter in attendance as officers of the Applicant company.

4. The Application follows proceedings bought against the Applicant by the Respondent to determine a breach of covenant pursuant to section 168 of the Commonhold and Leasehold Reform Act 2002. These proceedings under case reference CHI/45UH/LBC/2018/0033 were determined by decision dated 8th April 2019 [87-104] following a hearing on 26th March 2019. Mr Leake represented himself at this hearing and Mr Maltz appeared for D K Majo Estates Ltd.

5. The tribunal in that decision determined that certain breaches of lease had been proved but not all those claimed. The tribunal ordered the Applicant to reimburse 50% of the tribunal fees paid by D K Majo Estates Ltd.

6. Subsequently Mr Leake made an application under Rule 13 of the Tribunal Rules seeking an order that D K Majo Estates Ltd should pay certain costs he had incurred and various other orders. The tribunal declined to make an order pursuant to Rule 13. An order pursuant to Section 20C was granted as the landlord did not oppose the same. Mr Leake invited the tribunal to determine whether or not the landlord's costs could be recovered as an administration charge under the terms of the lease. The tribunal declined to do so for reasons given in its decision dated 30th May 2019 [105-109].

7. References in [ ] are to page numbers within the bundle supplied. Both parties provided skeleton arguments and copies of various authorities relied upon.

The Law

8. The relevant law is set out in Part 1 of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

Hearing

9. Mr Leake at the start of the hearing admitted that any costs incurred prior to 1st November 2019 he would be liable for if the lease is valid but he continued to challenge the reasonableness of the costs sought. Mr Leake contends that he is not satisfied the lease is valid as he does not believe he has signed the lease.
10. Mr Leake contended that under the decision before the tribunal previously the Respondent in this case had been largely unsuccessful. He stated they sought determinations in respect of 9 breaches. He had already admitted he had installed windows without consent. Only two items were found to be a breach of lease and in his submission the landlord had already waived its right to forfeit his lease and had no contemplation that they were going to forfeit.
11. Mr Leake stated that the freeholder had submitted that he should not recover his costs in respect of his Rule 13 application which was refused. He suggested there was an imbalance of rights if the freeholder could recover its costs from him as an administration charge in the circumstances of this case.
12. Mr Leake will seek to rely upon emails at [32 & 34]. These are emails between Mr Leake's then solicitor and Helm Estate Services Ltd ("Helm"), the Respondents managing agent. In Mr Leake's submission these show that Mr Darren Winter, as a director of Helm and the Respondent knew of the issue relating to the flooring in or around June 2018.
13. Mr Leake will contend that in February and March 2018 he telephoned Helm and left messages for Mr Winter to which he admitted in the previous proceedings not responding to. Further in or about September/October 2017, following the Applicants purchase of the flat, during its refurbishment Mr Winter visited the same and would have seen that the floor was not carpeted.
14. Mr Leake contends when he purchased the flat it was with a new lease and a hard floor was in place. He will suggest that this is a once and for all breach and not a continuing breach. As a result there was a wavier and the Respondent landlord could not have contemplated forfeiting his lease.
15. Mr Leake does not accept that an application under section 168 of the Commonhold and Leasehold Reform Act 2002 contemplates forfeiture of a lease as suggested by Mr Maltz at paragraph 10 of his skeleton argument. Likewise obtaining a judgment does not of itself mean forfeiture will follow. In his opinion obtaining a determination does not show any intent to serve a notice pursuant to section 146 of the law of Property Act 1925.
16. Mr Leake referred the tribunal to various pieces of the correspondence within the bundle including a letter from the Respondent solicitors dated 2nd October 2018 [17-20]. He suggests the correspondence shows what is in the Respondents contemplation and that the Respondent accepted certain items of breach could be remedied by the granting of licences. Further the Respondent accepted rent after they knew of

these issues and if they were genuinely contemplating forfeiture then they should not have accepted the same.

17. Further Mr Leake suggests he had remedied the issue relating to carpeting the flats within 5 weeks of reaching an agreement with the respondent as to what he was required to do. This was a reasonable time to deal with such a matter and the breach was remedied.
18. Turning to the short term letting. Mr Leake contends that the Respondent at paragraph 15 of its statement of case [173] accepts the breach is capable of remedy yet Mr Maltz says irremediable.
19. Mr Leake does accept prior to 1st November 2018 the landlord was contemplating forfeiture but does not accept this extends to everything they said and did.
20. Turning to the amounts claimed Mr Leake suggested that it was not reasonable for counsel to have been instructed and it would have been cheaper for Mr Everett of the respondent's solicitors to attend and represent at the previous hearing.
21. Mr Leake summarised his case that in his opinion there was no contemplation or ability to forfeit his lease. Further the costs incurred are themselves excessive. Turning to the breakdown some items have been redacted so cannot see what work was undertaken. Much of the correspondence claimed for was without prejudice and he does not accept any of this can be in contemplation of forfeiture.
22. Much of the work he suggests could have been undertaken by a more junior fee earner at a lower cost. He also challenges the right to recover any costs after the hearing. In respect of counsels fee he feels this is too high and he should not pay for travel and sundry expenses. The landlord should have obtained closer representation. He asks the tribunal to use its judgement to look at all of the items in detail.
23. Mr Maltz then asked various questions of Mr Leake.
24. In respect of the emails [32&34] Mr Leake accepted these were part of a longer conversation relating to predominantly the alterations he was undertaking. Mr Leake did not know why in relation to the email [32] he had not included the whole chain. Mr Maltz suggested it was because Mr Winter stated within the email that he had not agreed to wooden flooring. Mr Leake in response to questioning said he was satisfied his call to helm gave the Respondent imputed knowledge of the wooden flooring.
25. Mr Leake accepted that he had said some regrettable things to Mr Winter but he had very quickly apologised and these apologies were not in the bundle. Mr Leake contended he had been unable to exhibit these apologies as his computer had been damaged and he had lost the same.
26. Mr Leake confirmed the carpeting was done in August 2019. The delay was due to trying to agree with Mr Winter what he should do. Mr Leake contended he made a without prejudice proposal prior to proceedings which should have satisfied Mr Winters requirements. Mr Leake contended Mr Winter did not co-operate to tell him what he wanted.
27. Mr Leake did accept he had challenged that he ought to be allowed to sublet his flat via AirBnB. He stated he was advised that he was entitled to let his flat in this way. He stated he was disputing what his lease said.

28. Mr Maltz then presented the case for the Respondent.
29. He started by explaining whilst the lease did not contain any express provision for the recovery of the costs of granting consent section 19(2) of the Landlord and Tenant Act 1927 (which he read out to all present) allowed the landlord to charge any costs incurred in granting such consent. Mr Maltz referred the tribunal to the relevant invoice [121 &122] which sets out in detail the sums sought and the reasons for the same. Further the invoice gives credit for the £60 paid by Mr Leake and not in dispute. Mr Maltz suggested that all of these costs were reasonable having regard to matters as demonstrated by the correspondence within the bundle.
30. Mr Maltz suggests that proceedings prior to service of a section 146 notice may all be in contemplation of forfeiture. Whilst he accepted the prospect of forfeiture was remote and generally most freeholders are seeking compliance with the lease terms this of itself does not diminish the contemplation that forfeiture will be pursued. We are in this case concerned with an application under Section 168 which is consistent with a contemplation of forfeiture.
31. Mr Maltz referred the tribunal to [189] being a letter from Coole Bevis, the Respondents solicitors, to A R Brown & Co, the then solicitors for Mr Leake. The letter was headed "Without prejudice save as to costs" and Mr Maltz contends it was only privileged in respect of the earlier application and specifically made clear it may be relied upon as to any question as to costs. The letter makes clear that unless there is a resolution then the Respondent would seek a determination from the tribunal pursuant to section 168. Mr Winter in his evidence will corroborate this and whilst he accepts it can be said Mr Winter's evidence is self serving this is consistent with what actually took place.
32. As a result of the fact that these are costs associated with a section 168 application and Mr Winter is here personally to give evidence distinguishes this case from that in Barrett v. Robinson [2014] UKUT 0322 (LC).
33. Mr Maltz suggests the tribunal should look at the section 168 application as one set of proceedings. The tribunal he suggests should look at the totality and not the individual breaches.
34. In respect of the issue as to whether the sub-letting via AirBnB was capable of remedy Mr Maltz stated he could find no specific authority but in his submission if this was a breach of the sub-letting covenant it was irremediable and he suggests a continuing breach.
35. In respect of the flooring Mr Maltz suggests this was a continuing breach until it was remedied in August 2019. Even if it was a once and for all breach he submits that it was clear the Respondent did not have notice until June 2018.
36. Mr Maltz suggests it was reasonable to have a senior lawyer instructed as weas clear from the correspondence. All of the correspondence was part of the process of litigation including any without prejudice correspondence. Mr Maltz relied upon Robinson and others v. Oram and another [2011] EWCA Civ 1258 and in particular paragraph 20 of the judgement of Sir Andrew Morritt.
37. His submission is that all costs are recoverable as a result of clause 3(D)(iii) which states:

To pay all reasonable expenses including Solicitor's costs and Surveyor's fees incurred by the Lessor for the purpose of or incidental to or in contemplation of the preparation and service of a notice under Section 146 of the Law of Property Act 1925 or incurred in or in contemplation of proceedings under Section 146 or 147 of that Act notwithstanding forfeiture is avoided otherwise than by relief granted by the Court

38. Mr Maltz explained in respect of his earlier fee note [216] the advice after the hearing was to consider possible grounds of appeal as some concerns over the decision. In fact the decision was not appealed. The redactions to the time schedule [200] were made Mr Maltz believed as they contained privileged advice.
39. At this point Mr Leake requested a short comfort break to which the tribunal agreed. The tribunal adjourned from 12.20 until 12.25.
40. Upon resumption Mr Maltz called Mr Darren Winter to give evidence.
41. Mr Winter confirmed he was a director of the Respondent. He was referred to his statement [177-179]. Mr Winter confirmed that paragraph 6 at [178] was incorrect. He now accepted the flooring came to his attention in June 2018 although he only instructed his solicitors in respect of this breach on October 2018. Save for this he was satisfied that his statement was true and accurate.
42. Mr Leake then cross-examined Mr Winter.
43. Mr Winter stated the error in his witness statement was not in his opinion a big mistake. It was an honest mistake and he does not believe this has an impact.
44. Mr Winter acknowledged that Mr Leake did apologise for his threatening and offensive emails.
45. Mr Winter confirmed he was not legally qualified but was a member of IRPM.
46. In respect of telephone calls to helm it uses a messaging service which takes messages. He explained generally he does not reply to telephone messages as prefers to have things in writing. He had never spokne on the telephone with Mr Leake and so did not have any imputed knowledge in respect of the flooring.
47. In respect of a letter [189-190] this was written by the solicitors it did not mention the flooring mainly because the AirBnB sub-letting was a more pressing concern.
48. In re-examination Mr Winter was referred to [185] being an earlier letter which listed the specific concerns including the flooring. The later letter [189-190] refers to this earlier letter.
49. Mr Winter confirmed he had instructed Mr Everett, partner at Coole Bevis solicitors, for about 10 years. He had not received any ball park estimate of the costs. He recalled Mr Everett recommended Mr Maltz to him.
50. Mr Winter concluded giving evidence and the tribunal adjourned slightly earlier than normal at 12.20 to allow Mr Leake time to prepare his closing submissions.
51. The hearing resumed at 1.45pm.

52. Mr Leake explained that the works to the windows were a repair and not an improvement. He said he spoke to Mr Winter.
53. He submits that forfeiture was not always in the contemplation of the Respondent and that is proved by the facts of the case. He says it is common ground that any right to forfeit over the windows was waived. He reminds the tribunal that in November 2019 by email he did admit that costs properly incurred (and he did not agree the amount claimed was reasonable) prior to 1st November 2018 were costs he was responsible for.
54. He suggests that none of the correspondence produced states that the freeholder was contemplating forfeiture.
55. Mr Leake accepted that the documents do not show that Mr Winter was aware of the flooring prior to his accepting ground rent. However he must have been aware the floor was improperly floored when he visited in September 2017 which in the previous tribunal he described the property as being like a building site. Mr winter was aware he telephoned Helm and that placed a burden upon Mr Winter to investigate and amounts to imputed knowledge.
56. He submits it is for the tribunal to determine the question of waiver.
57. In his submission Mr Winter has acted unreasonably. In his submission the primary issue over the AirBnB was remedied on 1st November 2018. In respect of the flooring any right to forfeit was waived and neither the Respondent or their solicitor never said they were acting in contemplation of forfeiture. The only reference is the witness statement which contained mistake and he submits Mr Winter's memory was hazy.
58. Mr Leake dispute the costs are recoverable under the lease. He is content to leave the issue of paragraph 5A to the tribunals discretion.
59. Mr Maltz indicated that if his client was successful they would be seeking to recover the costs of this hearing as an administration charge. He suggested the tribunal might wish to make directions if it found in his clients favour so that this could be dealt with on paper.
60. Mr Leake agreed that this would be a convenient way of dealing with the matter. Mr Leake seeks reimbursement of the heating fee as he said the matter was only listed due to the Respondent. The tribunal pointed out to Mr Leake the matter was listed for an oral hearing pursuant to the tribunal directions and not at the request of either party.

Decision

61. The tribunal thanks the Applicant and counsel for the Respondent for their measured and helpful submissions.
62. The tribunal has considered carefully all matters contained within the bundle, the parties' respective skeleton arguments and evidence given at the hearing.
63. The first point to determine relates to the lease. At [124-127] is a deed of surrender and new lease. Effectively a lease extension by reference to the earlier lease dated 30th September 1988 [128-167]. The extended lease within the bundle is not dated and therefore may not be a complete copy. The original lease within the bundle is the lease which

contains the relevant clauses including the one quoted above. The version within the bundle is a Land Registry official copy and this tribunal finds Mr Leake is bound by the terms of the same.

64. This tribunal is satisfied that in principal the lease and in particular the clause quoted in paragraph 37 above allows the Respondent to recover costs associated with forfeiture. We are satisfied that in following the decision of Robinson and others v. Oram and others the costs of proceedings associated with an application pursuant to section 168 may be costs recoverable under such a clause.
65. We heard evidence from both Mr Leake and Mr Darren Winter. Both in this tribunal's judgment gave their evidence truthfully and in a manner designed to help the tribunal. Whilst Mr Winter conceded this was not the only flat he managed the tribunal is satisfied that his evidence, subject to the error he corrected was truthful.
66. We are satisfied on the evidence produced and having regard to the letters, some of which referred to a section 168 application that it was at all times in the Respondents contemplation that the purpose of proceedings was to forfeit the lease. As Mr Maltz accepted such an outcome may be unlikely but that was the route the landlord was following. The first step is to make an application pursuant to section 168 for a determination of a breach since without this no valid section 146 notice may be served under the current statutory regime.
67. Mr Leake seems to suggest that pre action correspondence and without prejudice correspondence is not recoverable as not being part of proceedings in contemplation of forfeiture. This tribunal does not agree with this submission. All such work is part of the general litigation conduct. Both pre action correspondence and without prejudice correspondence is actively encouraged to try and see if disputes can be resolved or issues narrowed.
68. Mr Leake further suggests that any right to forfeit has been waived and as a result forfeiture could never have been undertaken. He appears to suggest that the Respondent knew or ought reasonably to have known this and so the costs are not recoverable. Again we find against the Applicant.
69. We do not think it is necessary for us to resolve whether or not there had been waiver of all breaches of covenant. As acknowledged to some extent by both parties the question of waiver is a complicated matter which ultimately would have been for the County Court to determine if forfeiture proceedings were required. In this case they were not. A determination that there were certain breaches was made by a differently constituted tribunal. Thereafter the Applicant and Respondent were able to agree a resolution and so no further proceedings were required.
70. It was right for the Respondent landlord in their application pursuant to Section 168 to rely upon any and all breaches which they felt may exist. This is what they did.
71. Plainly the issue relating to the flooring of the flat and carpeting of the same on the Applicants own evidence was not remedied until August 2019.
72. We are satisfied that in principle the costs incurred by the Respondent are recoverable.

73. Looking at the amounts we are satisfied that again in principle it is reasonable for costs after the tribunal determination relating to the Section 168 application should be recovered. Until the breaches were remedied to the Respondents satisfaction a section 146 notice may have been served.
74. We are satisfied that it was reasonable for the Respondent to instruct Mr Everett. He had been regularly instructed by the Respondent for about 10 years, he was their regular solicitor. It is clear reading the earlier decision and reviewing the correspondence that the matters between the parties were litigated with gusto. Mr Leake accepted he had pursued the issue of whether or not a letting via AirBnB was a breach of the lease. In this tribunals determination it was reasonable for Mr Everett as a senior solicitor to have conduct of such contested litigation.
75. We accept the Respondents submission that the instruction of counsel was reasonable. It is the case that solicitors will often instruct specialist counsel for such hearings.
76. Mr Leake asked this tribunal to review the costs themselves. We have done so. We are satisfied that the hourly rate adopted of £250 per hour plus vat is reasonable for Mr Everett. In terms of the quantum having regard to all the documents before us, including the previous decisions we are satisfied that the costs claimed are reasonable. This includes counsel's fees.
77. In respect of counsel's fee it is not simply a question of the time spent at the hearing but in preparing for the same. Likewise it is reasonable to take counsels advice on the decision when received and the possibility of any appeal.
78. The tribunal finds that the sum of £11,879.28 as demanded [117-118] is due and payable by the Applicant.
79. This leaves the balance of the fee sought for granting retrospective consent for the replacement of the windows. We accept Mr Maltz submission that such cost may be recovered as part of granting consent. We are satisfied having regard to the invoice [121-122] that a total sum of £165 for the work undertaken by Helm is reasonable. Credit needs to be given for the sum of £60 paid by Mr Leake leaving a balance to pay of £105.
80. Given the findings the tribunal declines to make an order pursuant to paragraph 5A. The application has failed.
81. As a result, as agreed with the parties we make the following directions for determining whether or not the Respondent may recover the costs of these proceedings and the reasonableness of the same.
82. The tribunal directs that the Respondent shall file and serve in a paginated bundle any submissions, witness statements and schedule of costs claimed by not later than 30th April 2020.
83. The Applicant may file any submissions in reply by 21st May 2020.
84. Thereafter as agreed by the parties the tribunal will make a paper determination in respect of the same.

Judge D. R. Whitney

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

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

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking