FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LBC/2024/0013**
Property	**:**	**Flat 10 30 Harley Street, London W1G 9PW**
Applicant	**:**	**Harleyqueen Properties Ltd**
Representative	**:**	**Mr Stephen Woolf instructed by Infields & Co. Solicitors**
Respondent	**:**	**Mr Royston Kenneth Graham**
Representative		**Mr Lorenzo Leoni**
Type of application	**:**	**Determination of an alleged breach of covenant**
Tribunal members	**:**	**Tribunal Judge Niamh O'Brien** **Tribunal Member A Flynn MA MRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of Hearing	**:**	**30 September 2024**
Date of Decision	**:**	**1 October 2024**
Date of Costs Decision	**:**	**26 November 2024**

DECISION

Decisions of the Tribunal

(1) The Tribunal does not make a costs order pursuant to Rule 13 of the First Tier Tribunal (Property Chamber) Rules 2013.

The Application

1. Following the Tribunal's determination dated 1 October 2024 the Applicant made an application for a costs order under Rule 13(1)b of the First Tier Tribunal (Property Chamber) Rules 2013 (the 2013 Rules). The Applicant also seeks a summary assessment of those costs and has filed and served a costs schedule totalling £48,245. The Respondent has filed submissions in opposition to the application.

2. The Applicant's position is that the Respondent has behaved unreasonably in the following respects;

    (i) He gave dishonest evidence in respect of the breach of his covenant to keep his demise in repair, and persisted in his defence to the application for a declaration of breach despite being aware that pipes serving his flat were in disrepair;
    (ii) He refused to accept he was in breach of the clause in his lease prohibiting subletting without consent until he was giving evidence at the hearing.

3. The essential basis for the application is that the Respondent knew all along that he was in breach of his lease and acted unreasonably in defending the proceedings. The Applicant in its submissions asserts that the Respondent is the owner of 100s of leasehold properties and as he had the benefit of legal representation, should not be afforded the benefit of any doubt.

The Response

4. In his submissions in response Mr Leoni for the Respondent points out that the Applicant did not clarify its case until it served the witness statement of Ms Woollacott shortly before the hearing and reminds the Tribunal that the Applicants greatly narrowed the matters upon which they sought a determination on the day of the hearing itself. Mr Leoni notes that many of the complaints made regarding the behaviour of the Respondent relate to his conduct as a leaseholder whereas the only behaviour which is relevant to the Rule 13 application is his behaviour as a litigant in the proceedings. Mr Leoni submits that given that the breaches had been on any view unambiguously waived by the acceptance of rent and service charges after the Applicant had notice of them, that the proceedings were pointless and asks us to infer that the main point of the proceedings was to generate and recover costs. We observe however that breach of the obligation to keep in repair is a continuing breach and consequently we cannot conclude that that the proceedings served no practical purpose. Furthermore even if the breach of the subletting clause

was waived, the fact that there has been a finding of breach will have disabused the Respondent of any notion that he could continue to rely on an assurance given decades ago that the management company would not strictly enforce that clause.

Rule 13(1)b: The law and relevant authorities.

5. The tribunal may make an order under Rule 13(1)b of the 2013 Rules where it is satisfied that a party has acted unreasonably in bringing defending or conducting proceedings.

6. In *Willow Court Management Co v Alexander [2016] UKUT 290(LC*) the Upper Tribunal held the determination of an application under costs under or Rule 13 should be addressed in three stages at the conclusion of the case (at para 28):

> "*if there is no reasonable explanation for the conduct complained of the behaviour will property be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed. A discretionary power is then engaged and the decision maker moves to a second stage of the inquiry. At that stage it is essential for the tribunal to consider whether, in the light of the unreasonable conduct it has found to have been demonstrated , it ought to make an order for costs or not; it is only if it decides that it should make an order that a third stage is reached when the question is what the terms of the order should be*"

7. In *Lea v GP Ilfracombe Management Company Ltd [2024] EWCA Civ. 1241* the Court of Appeal held that the acid test is with the conduct in question permits a reasonable explanation:

> "[15] *A good practical rule for the tribunal to consider is; would a reasonable person acting reasonably have acted in this way? Is there a reasonable explanation for the conduct in issue?"*

8. In the latter case the Court of Appeal expressly rejected the submission that the pursuit of an unrealistic or unachievable outcome should be regarded as unreasonable behaviour for the purposes of Rule 13.

9. We do not consider that the behaviour of the Respondent in these proceedings in respect of the allegations of breach pursued at the hearing was such as to amount to unreasonable behaviour. Firstly while we did not accept the Respondent's oral evidence that he believed that the Applicant had repaired the central heating pipes in 2021 and/or in 2023, we consider that this was an example of him 'clutching at straws' rather than deliberate and calculated dishonesty. We also note that the document which finally laid to rest any notion that the heating pipes

in his flat were not in a state of disrepair was the report prepared by Quotehedge which was not disclosed to the Respondent until the morning of the hearing.

10. As regards the allegations of subletting without consent, the only finding that the Tribunal made in this regard related to the recent tenancy agreement entered into by the Respondent which commenced after the email of 9 October 2023. That tenancy agreement commenced in September 2024, long after the proceedings were issued. We accepted Mr Graham's evidence that at some point in the distant past he had been told that the building management would not strictly enforce the subletting provisions in his lease.

11. We consider that while the Respondent's defence to those two allegations of breach was on any view weak, his conduct as a litigant was not so poor as to amount to unreasonable conduct within the meaning of *Willow Court*.

12. Even if we had found that his conduct was unreasonable, we would have declined to exercise our discretion in this case for two reasons. Firstly a significant number of the allegations of breach were abandoned by the Applicants at the start of the hearing, indicating that the Respondent was justified in not admitting them. Secondly it seems to us likely, although we have not heard argument on the point, that some or all of the costs of these proceedings are in principle recoverable from the Respondent as an administration charge pursuant to Clause 5(24)a of his lease in any event.

Name : Judge O'Brien Date 25 November 2024

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).