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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BD/LBC/2018/0070**
Property	:	**Flat 12 (and garage 13) Wellington Court, 14 Wellington Road, Hampton Hill TW12 1JS**
Applicant	:	**Wellington Court Freeholders Limited**
Representative	:	**Mr Gary Hodkinson Counsel**
Respondent	:	**Ms Camilla Jane Cameron McInnes**
Representative	:	**None**
Type of Application	:	**S168(4) Commonhold and Leasehold Reform Act 2002 – to determine whether a breach of covenant or condition in the lease has occurred**
Tribunal Members	:	**Judge John Hewitt** **Ms Sue Coughlin** **Mr Paul Clabburn**
Date and venue of Determination	:	**15 November 2018** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**23 November 2018**

DECISION

The issue(s) before the tribunal and its decision(s)

1. The issues before tribunal were whether a number of alleged breaches of covenant has occurred.

2. Set out below are the alleged breaches with our decision indicated.

Clause	Covenant	Has a breach occurred?
1.(ix)	Use. Not at any time during the said term to carry on upon the Demised Premises or any part thereof any trade business or manufacture nor use the same for any illegal or immoral purpose nor do or commit or permit to be done thereon any act or thing that may be or grow to be a nuisance damage or disturbance to the Lessor or his tenants or lessees of adjacent or neighbouring property ... nor to use the Demised Premises other than a single private residence and to use the garage as a private garage and for no other purposes	Yes
1.(x)	Planning. Not to do or permit or suffer to be done or omitted any act matter or thing in on or in respect of the Demised Premises which shall contravene the provisions of the Town and Country Planning Acts ...	No evidence was given that a breach has occurred
1.(xiv)	Alienation. (i) Not to assign transfer underlet or part with possession of **part** only of the Demised Premises (as distinct from the **whole**) in any way whatsoever (ii) Not to assign underlet or part with possession of the **whole** of the Demised premises save in compliance with the provisions of sub-clauses (iii) and (iv) of this clause ... (iii) Not to assign or part with possession of the Demised Premises as a **whole** without the consent in writing of the Lessor first obtained and such consent shall not be unreasonably withheld Provided that the Assignee ... (iv) Not to sublet the Demised Premises as a **whole** without the consent in writing of the Lessor first obtained	(i) Not relied on by applicant (ii) Not relied on by applicant (iii) Not relied on by applicant (iv) Relied on by applicant but breach not made out
1.(xvi)	To Register. To procure that every ... mortgagee ... shall within one calendar month after the execution of such ... mortgage ... give notice in writing in duplicate with particulars thereof and produce the instrument or a certified copy thereof ... to the	Yes, but the applicant says the breach was remedied before the hearing

	Lessor's Solicitors for registration.	
1.(xx)(a)	Costs. To pay to the Lessor all costs ... which may be incurred by the Lessor in or in contemplation of any application to the Lessor for any consent ...	No jurisdiction
1.(xxiii)	Regulations. To perform and observe and strictly comply with the restrictions stipulations regulations and other matters referred to in the Fifth Schedule hereto or any reasonable rules and regulations relating to the common parts and grounds as may be reasonably imposed by the Lessor in substitution for the same or in addition thereto for the better management of the Property	No

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for our use at the hearing.

Procedural background

3. The application dated 30 August 2018 [1] was made pursuant to s168(4) Commonhold and Leasehold Reform Act 2002 (CLRA 2002) in which the applicant sought a determination that a number of breaches of covenant set out in the lease of the Property had occurred.

4. Directions were given on 12 September 2018 [12]. The directions made clear that at 10:00 on 15 November 2018 an inspection of the property would be carried out and that the hearing would start at 12:00 noon at 10 Alfred Place. The directions were sent to both parties. As regards the respondent the directions were sent to an address used by the respondent on her correspondence with the applicant's solicitors.

   Direction 4 required the applicant to file with the tribunal four copies, and to serve on the respondent one copy, of a bundle of material documents by 8 October 2018. In fact the applicant's solicitor sent all five copies of the bundle to the tribunal. Following an email from the case officer the applicant's solicitors sent a copy of the bundle to the respondent under cover of a letter dated 9 October 2018. A copy of that letter is on file.

   Direction 5 required the respondent to send to the tribunal the name(s) of the sub-tenants or occupiers of the property by 8 October 2018. The respondent has failed to comply with that direction.

   Direction 6 required the respondent to file with the tribunal four copies, and to serve on the applicant one copy, of a bundle of material documents by 22 October 2018. The respondent has not filed the bundle with the tribunal and the applicant's solicitors have informed the tribunal the respondent has not served a bundle on them.

5. At 10:00 on Thursday 15 November 2018 the members of the tribunal attended at the property. We were met by Mr Thomas Crusham who

introduced himself as a director of the applicant. Mr Crusham accompanied us and pointed out garage 13. The garage door was locked. There was no sign of the respondent. Mr Crusham directed us to the door of flat 12. We knocked on the door in case the respondent was there waiting for us. There was no response to our knocks.

In the course of this exchange and in connection with arrangements for the hearing we enquired of Mr Crusham whether he was proposing to attend the hearing. He told us that he had made a witness statement but that it contained errors and he was not proposing to attend the hearing.

The development, the title structure and the lease

6. The development comprises 17 two-bedroom maisonettes in a purpose built block set in communal grounds, probably constructed in or around the 1960s.

There are two adjacent blocks of garages.

All of the flats have been sold off on long leases and it appears that each lease demises a flat and a garage.

7. The freehold title is registered at HM Land Registry. On 23 October 2000 the applicant was registered as proprietor [56]. The schedule of leases which forms part of the Charges Register records the grant of the 17 long leases of the flats/garages.

We understand that the shares in the applicant are held by all, or at least a majority, of the long lessees.

8. The lease of flat 12 and garage 13 was granted on 4 February 2002 for a term of 999 years from 24 June 2000 at the yearly rent of a peppercorn (if demanded). The lease is registered at HM Land Registry and on 8 April 2005 the respondent was registered as proprietor [49]. The Charges Register records that on 8 August 2017 a charge dated 4 August 2017 was registered and that the proprietor of the charge was Godiva Mortgages Limited [50].

9. We have already set out the covenants identified by the applicant as being material to these proceedings. It may be helpful to explain:

Clause 1 defines the 'Demised Premises' to be the property described in the First Schedule. That schedule defines it be: *"ALL THAT the maisonette situate on the first and second floors of the Building and shown ... on the plan annexed hereto together with the entrance door to the maisonette and garage numbered 13 including: ...* [specific details which are not material].

Clause 1(xxiii) imposes an obligation on the tenant to comply with the Regulations set out in the Fifth Schedule [45]. Most of the regulations concern conduct and such matters as noise, hanging out of laundry, not leaving rubbish in the common parts, control of TV aerials and similar matters often to be found in leases of residential properties. Paragraph 4 provides: *"Not to sublet the Demised Premises unless and until all the reasonable conditions of the Lessor have been complied with".*

As we understand it those conditions are now:

1. Tenant: Rules and Regulations Sheet dated July 2017 [123]; and
2. Rules and Regulations on Sub-letting dated July 2017 [118].

The hearing

10. The hearing was due to commence at 12:00 noon. By 12:10 the applicant and its representatives were ready to proceed but the respondent was not present. In the absence of a telephone number for the respondent a call could not be made to her to ascertain if she was on the way.

11. The tribunal had regard to rule 34.

    We were satisfied that reasonable steps had been taken to notify the respondent of the hearing. The directions giving details of the hearing were sent to the respondent at 54 Bushy Park Road, Teddington TW11 9DG, an address used by the respondent on an agreement for the grant by her of a sub-tenancy dated 2 July 2017 [138] and on a letter by her to the applicant's solicitors in reply to a letter from them dated 22 August 2018. Whilst the respondent's letter is not itself dated, it bears a date stamp: *29 AUG 2018* which we infer is the date on which the solicitors received the letter.

    In addition to the tribunal sending out the directions, which included the time and date of the hearing, on 9 October 2018 the applicant's solicitors wrote to the respondent at the 54 Bushy Park Road address sending their bundle which contained a further copy of the directions.

    In these circumstances and noting this was an application concerning an alleged breach of covenant and that the respondent had not engaged with the tribunal at all, we considered it was in the interests of justice to proceed with the hearing in the absence of the respondent.

12. The applicant was represented by Mr Gary Hodkinson of counsel. Mr Hodkinson was accompanied by Mr Nigel Nobes, lessee of flat 2 and a director of the applicant and by Mr Dominick Heseltine, lessee of flat 10 and a shareholder.

13. Mr Hodkinson handed in a skeleton argument which had been prepared by him and a schedule of costs which had been prepared by his instructing solicitors.

14. In opening Mr Hodkinson said that he proposed to call Mr Nobes to give oral evidence in accordance with his witness statement and that he sought to rely upon the hearsay evidence of Mr Crusham as set out in his witness statement (as corrected). Mr Hodkinson was informed of what Mr Crusham had told the members of the tribunal earlier in the day. Mr Hodkinson did not know the reason why Mr Crusham was not present at the hearing and he had no evidence to put in that might excuse his attendance. In these (difficult) circumstances, Mr Hodkinson decided, realistically, not to pursue his

application to rely upon the hearsay evidence of Mr Crusham. Instead he proposed to rely, as best he could, on the evidence of Mr Nobes.

The correspondence in the applicant's bundle

15. Before summarising Mr Nobes' oral evidence it may be helpful to make reference to some of the correspondence contained in the applicant's file. It is plain from some correspondence from the respondent that some background factual matters are not in dispute.

16. In order to set the scene we record that the principal complaints of the applicant are that:

- garage 13 is being used for business purposes by a builder who makes regular visits to load and unload building materials to and from the garage and his van;
- the respondent failed to procure that her mortgagee gave notice of a charge within the time limit provided for; and
- a sub-letting of flat 12 was effected which was not in compliance with the applicant's new rules and regulations

[60] 13.07.2015 Email from Setfords (the applicant's then solicitors) to the respondent's solicitor concerning the re-mortgage and reminding her of the need to give a formal notice on completion;

[62] 24.05.2017 Letter/email from the applicant signed by Mr Nobes to the respondent raising the issue of the 'trade business use' of the garage and enquiring if it had been rented out;

[63] 24.05.2017 Email from the respondent to Mr Nobes in which she says:
'Thanks Nigel, it's not actually rented out.
My brother in law who is a builder uses it (Tim). I don't need it, but he does and has done since I moved out. From what I understand he goes there about once per week to drop off or collect stuff. It's not being used commercially, just for storage.
I know he went to clear things out the other day and put things back, which I am sure caused more noise and disturbance than normal. But this is a one off.
I apologise on his behalf, if this caused problems for the residents and it won't happen again. Please let me know any other problems?' [sic]

[65] 24.05.2017 Email from Mr Nobes to the respondent asserting that the described use is a commercial use and that the lease is quite clear that the garage is a private garage and for no other purpose. Mr Nobes made a request that the garage cease to be used as a commercial operation.

[66] 24.05.2017 Email from the respondent to Mr Nobes in which she says:
"Thanks Nigel, it is only commercial if you are making money. Which I am not. I am certain I am in my rights to loan my garage to a family member for storage.
They are doing no commercial activities in there. Everyone using the garages has a job, so this isn't classed as commercial use if they store their stuff there?

I welcome a conversation with your solicitor, I know my rights as a property owner and how you define commercial use.

[68] 18.07.2017 Email Setfords to the respondent which recounted that the directors had experienced some lessees failing to comply with lease terms, particularly with regard to sub-letting and they considered it helpful to set out new procedures clearly so there is no misunderstanding. The email invited the respondent to make a formal application for consent if she was intending to let her flat. Attached to the email were:

- Board minutes; [69]
- Rules and Regulations; and [70]
- Requirements to sub-let [71-72]

[70] 04.08.2017 Email Setfords to the respondent. In general terms the matters complained of were sub-letting without consent and the trade/business use of the garage. A number of requirements were set out. The point was made that if those requirements were not met, legal proceedings would be taken.

[79] 04.08.2017 Email the respondent to Setfords in reply to the above email. The respondent explained that before she received the minutes and the new rules and regulations she had signed a new contract with her tenants, and she had done so on the basis of the previous rules that she was aware of. {The tenancy document is dated 02.07.2017 and a copy is at [135-158]}.
The respondent also stated:
"The garage is not being let out, it is on loan to my brother in law, whilst he is a builder, no trade of work gets done there.
I have already told Nigel this, and spoke to them to make sure they know to be quiet on their weekly trip to collect things."

[88] 07.08.2017 Email the respondent to Setfords. The respondent refers to the tenancy agreement dated 02.07.2017 and that she had rented out the flat for a number of years and had *'stuck to the same thorough process when picking my tenants'*. The respondent again said *'it was not until 18th July 2017 that I received the updates you mention."* The respondent attached a copy of the tenancy agreement dated 02.07.2017 and offered to provide copies of the references she took.

[109] Undated Invoice 12/2017 issued by the applicant to the respondent:
"Landlord's Annual Fee for Sub-letting of Property at Flat 12 (this does not include garage 13) Fee due £480.00."

[111] 31.08.2017 Letter Setfords to the respondent enclosing the above invoice and a set of forms for the respondent to complete in relation to the sub-letting of the flat. Also enclosed were three invoices addressed to the applicant but said to be payable by the respondent:

24.08.2017	Breach of subletting	£420.00	[113]
24.08.2017	Notice fee – sub-letting	£180.00	[114]
24.08.2017	Mortgage registration	£ 48.00	[115]

[121] Undated Notice of mortgage prepared by Setfords and addressed to Setfords and to be signed by the respondent giving notice of a mortgage entered into by the respondent and Bank of Scotland Plc dated 13 July 2015.

[200] 07.02.2018 Letter Setfords to Godiva Mortgages informing it of several alleged breaches of covenant on the part of their borrower, enclosing copy documents and seeking their comments.

[199] 08.03.2018 Letter Godiva Mortgages to Setfords acknowledging the above letter and stating it has written to the borrower.

[197] 02.05.2018 Letter Setfords to Godiva Mortgages complaining that outstanding payments have not been received and that the breaches complained of continue and inviting the bank to remedy them.

[196] 10.05.2018 Letter Godiva Mortgages to Setfords noting the threat of forfeiture proceedings and reserving its right to take appropriate steps to protect its security, depending on the outcome of the proceedings.

[131] 22.08.2018 Letter Palmers Solicitors - now acting for the applicant - to the respondent complaining of alleged breaches as regards sub-letting without consent, use of the garage in connection with a construction business and failure to give notice of a re-mortgage to Godiva Mortgages Limited. The letter required the breaches to be remedied within seven days failing which the solicitors were instructed to commence proceedings without further notice.

[132] Undated Letter the respondent to Palmers (received 29.08.2018) in reply to the above letter. So far as material the letter stated:
"Garage number 13 is not being sub-let; my brother in law uses the garage to store some materials in it. I also still have things in storage in the garage.
I have now informed the Wellington Court [F]reeholders of the re-mortgage. This was in fact the solicitors fault that Godiva used for the re-mortgage and not my own. It was their responsibility to inform them. Please take this matter up with them.
The flat has been rented out since 2010, whilst i[t] has always had the same lease, there were several rules in that lease, that were never abided by. And a culture of live and let live was applied to those who lived there.
I note the new rules; have been amended to suit Directors ...
I appreciate these amendments to the lease/new rules will be adhered to for the future new tenancies.
As I know I am in the right, with the points stated above. I am sure you will agree that I do not feel that I need to take any further action from my side. [sic in several places]

Mr Nobes oral evidence

17. Mr Nobes produced his witness statement [135] and confirmed the contents were true. Mr Nobes formally introduced into evidence the above correspondence. At [170 -171] there are a series of photographs which Mr Nobes said were taken by him. He says they show the same white van on site in May and August 2017 collecting/delivering materials which Mr Nobes said were to/from garage 13. Mr Nobes told us that his flat, flat 2, is quite close to the garage block and he has a good view of the block from his windows.

18. Mr Nobes also told us that he has witnessed the same van using garage 13 about three times per week. He said the van was there on 13 November 2018 between 08:00 and 09:30 loading up materials from the garage, including a cement mixer, scaffolding components, iron grids and other items. He said the van blocked a number of garages of residents who were doing the school run and the van had to move several times to allow others in/out.

19. Mr Nobes told us that he has been a director of the applicant since 2010. He said with honesty that the applicant has no evidence the garage has been sub-let but he says that since at least May 2017 it has been used for trade and commercial purposes.

20. Mr Nobes gave satisfactory answers to a number of questions put to him by members of the tribunal. Mr Nobes stated that he was aware of a re-mortgage in 2015 but that formal notice had not been given to the applicant. Mr Nobes said that at that time the applicant was aware that the respondent was sub-letting.

21. Mr Nobes went on to say that since about 2010 there have been four flats sub-let and none of them got prior written consent before doing so. Following some difficulties directors decided to tighten up the procedures – hence the new rules in July 2017.

Discussion and findings

22. We found Mr Nobes to be an honest and measured witness, a person we could rely upon with some confidence. We accept his evidence.

Trade use/disturbance (Clause 1.(ix))

23. On the evidence before us we find as a fact that since about May 2017 there has been regular use of the garage by the respondent's brother in law for the storage of building materials and equipment used in the building trade. The respondent has said in correspondence that visits to load/unload materials are weekly. We prefer the evidence of Mr Nobes and find that in general the frequency is more like two/three times per week. We also find that the loading/unloading can sometimes be noisy which causes a disturbance to lessees and residents. Further whilst on site the van impedes access to to/from other garages and the free movement of traffic in front of the garages which also amounts to disturbance to other lessees ad residents.

24. The respondent has not filed and served a statement of case opposing the application. We have however, given consideration to what the respondent has said in correspondence. It is not denied that the garage is regularly used to store building trade equipment and the van is regularly loaded/unloaded on site. The respondent argues that she can store whatever she wishes in the garage and because she allows her brother in law to store his business materials there free of charge, that does not amount to a commercial use.

25. We have to construe the lease on the basis of the factual background or matrix that existed in February 2003 when the lease was granted. We have to give the words used their normal and natural meaning in context. The lease does not use the expression 'commercial use' or 'commercial purposes'. Those

expressions may have a number of different meanings in different contexts or circumstances but we are not concerned with those. Whether the respondent does or does not receive any benefit or remuneration for allowing the storage of builders' materials is not to the point.

26. The expression we have to focus on is *"...not to carry on upon the Demised Premises or any part thereof any trade business or manufacture ... not do or permit to be done thereon any act or thing that may grow to be a nuisance damage or disturbance to the Lessor or his tenants or lessees of adjacent ... property ... and to use the garage as a private garage and for no other purpose"*

We find these words are clear and unambiguous. We find that a breach of this covenant has occurred because:

26.1 The respondent has freely allowed garage 13 to be used for a trade or business purpose;

26.2 That use has caused a disturbance to other lessees and residents, both as regards noise and the obstruction of the areas in front of the garages whilst loading/unloading takes place;

26.3 That use is not a use of the garage as a 'private garage'.

Planning (Clause 1.(x))

27. The allegation was that permitting garage 13 to be used for a trade or business use amounted to a breach of planning control.

No evidence of breach of planning was adduced by the applicant. Mr Hodkinson accepted that but invited the tribunal to infer that a private garage on a residential development in a residential area was more likely than not to amount to a breach of planning control. We resist that invitation.

Recital (3) in the directions [13] is in very clear terms:

The tribunal will reach its decision on the basis of the evidence produced to it. The burden of proof rests with the applicant. The tribunal will need to be satisfied:

(a) that the lease includes the covenants relied on by the applicant; and

(b) that, if proved, the alleged facts constitute a breach of those covenants.

The applicant has been professionally advised and represented throughout these proceedings. The recital makes it clear that the applicant must prove its case and must produce evidence to support its case.

No explanation was advanced as to why the applicant had not provided any evidence to support this allegation. We infer that upon the applicant acquiring the freehold interest in 2000 it would have satisfied itself as to the position on planning. The applicant ought to have the relevant documents in its archive. If

not, an approach could have been made to the local planning authority for assistance.

28. In the absence of any supporting evidence and in the absence of an explanation as to why there is no supporting evidence the tribunal is not willing to draw an inference that a breach of planning control has occurred.

Alienation (Clause 1.(xiv) (iv))

29. Mr Hodkinson clarified a typographical error in the application form and that it had been intended to rely on clause 1.(xiv) (iv). He said this was obvious from the use of the expression *'... Demised Premises as a whole...'* . We accept that.

30. The 'Demised Premises' comprise both flat 12 and garage 13. Mr Hodkinson and Mr Nobes both accepted that there is no evidence that garage 13 has been sub-let. The respondent has made it clear in correspondence that whilst she has sub-let flat 12, the letting does not include garage 13. The tenancy agreement at [138] refers to the flat only, there is no reference to any garage.

31. The clause relied upon by the applicant refers to a subletting of the **whole.** Mr Hodkinson acknowledged that the applicant could not make out this alleged breach. Mr Hodkinson drew attention to clause 1.(xiv)(i) which is an absolute prohibition on sub-letting **part** in these terms:

"Not to assign transfer underlet or part with possession of part only of the Demised Premises (as distinct from the whole) in any way whatsoever".

Mr Hodkinson said that whilst there was clear evidence from the respondent on her own admission that the July 2017 tenancy is a sub-letting of part and thus a breach of clause 1.(xiv)(i), the applicant had not cited that clause in its application form and given the absence of the respondent Mr Hodkinson did not consider it apt to make an application part-way through the hearing to amend the application form to include an alleged breach not previously identified.

32. In these circumstances and on the evidence before us we cannot find that a breach of clause 1.(xiv)(iv) has occurred.

To register the Godiva mortgage (Clause 1.(xvi))

33. It was clear from the correspondence, especially the respondent's letter at [132] that the respondent accepts that she did not procure notice of the mortgage to the applicant within the time period provided for. The respondent appears to blame the solicitors who acted on the re-mortgage transaction but no evidence to support that was provided. Moreover, that is not to the point. The obligation on the lessee is to procure that notice was given.

34. In these circumstances we find that a breach of clause 1. (xvi) has occurred because the respondent did not procure that notice of the grant of the mortgage was given within the stipulated period.

35. We also record that Mr Hodkinson informed us that notice has now been given and that the breach has now been remedied.

Costs – administration charges (Clause 1.(xx)(a))

36. This alleged breach concerns the allegation that the respondent has not paid several charges associated with the July 2017 sub-letting. We infer these are the charges mentioned in the documents at [109] and [111].

There may or may not be an issue as to whether the July 2017 revision to the rules and regulations to impose the annual fee of £480 is a revision which the lease empowers the applicant to make, but we need not get into that.

If that fee (and any other costs claimed) are payable they are administration charges within the meaning of paragraph 1(1) of Schedule 11 to CLRA 2002.

S169(7)(b) of CLRA 2002 makes it plain that nothing in s168 affects a failure to pay *"an administration charge (within the meaning of Part 1 of Schedule 11 to this Act."*

Thus whether the costs or charges claimed are fixed or variable administration charges this tribunal does not have any jurisdiction to determine that non-payment of them is a breach of covenant which has occurred.

We therefore decline to make a determination that a breach of this clause has occurred.

Compliance with regulations (Clause 1(xxiii))

37. The original complaint was that the respondent had not complied with the new rules and regulations with regard to the July 2017 sub-letting. Evidently these were adopted in principal by the applicant at a meeting of directors held on 12 June 2017 [69] and prepared in final form on a date in July 2017 and sent to the respondent under cover of an email dated 18 July 2017 [68].

38. On 2 July 2017 the respondent granted a sub-tenancy of the flat for a term from and including 29 July 2017 to 28 July 2019 [138]. Mr Hodkinson accepted that this tenancy was granted by the respondent before the applicant had given her notice of the new rules and regulations. In these circumstances Mr Hodkinson said the applicant could not make out a case that this sub-letting was granted in contravention of the new rules and regulations. There was no evidence before us as to what rules and regulations were in force for compliance by the respondent on 2 July 2017 when the tenancy was granted. In these circumstances Mr Hodkinson withdrew this alleged breach. Thus we are not required to make a determination in respect of it.

Costs of the proceedings

39. We have recorded in paragraph 13 that at the commencement of the hearing Mr Hodkinson handed in a schedule of costs. It is in the sum of £6,090.60 and appears to concern the applicant's costs of the proceedings.

40. Mr Hodkinson told that he had handed it in because his instructing solicitors had instructed him to do so. Mr Hodkinson confirmed that he was not asking

the tribunal to make an order that the respondent pays the amount of costs set out in the schedule. He said he recognised that the tribunal had a limited jurisdiction as regards orders for the payment of costs.

41. Mr Hodkinson said that the applicant reserved its position to recover its costs from the respondent in accordance with the relevant provisions of the lease.

Judge John Hewitt
23 November 2018

The Statutory Provisions

Commonhold and Leasehold Reform Act 2002

168.- No forfeiture notice before determination of breach

(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2) This subsection is satisfied if—

(a) it has been finally determined on an application under subsection (4) that the breach has occurred,

(b) the tenant has admitted the breach, or

(c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

(3) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(4) A landlord under a long lease of a dwelling may make an application to the appropriate tribunal[1] for a determination that a breach of a covenant or condition in the lease has occurred.

(5) But a landlord may not make an application under subsection (4) in respect of a matter which—

(a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(b) has been the subject of determination by a court, or

(c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(6) For the purposes of subsection (4), *"appropriate tribunal"* means—

(a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) in relation to a dwelling in Wales, a leasehold valuation tribunal.

169.- Section 168: supplementary

(1) An agreement by a tenant under a long lease of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under section 168(4).

(2) For the purposes of section 168 it is finally determined that a breach of a covenant or condition in a lease has occurred—

(a) if a decision that it has occurred is not appealed against or otherwise challenged, at the end of the period for bringing an appeal or other challenge, or

(b) if such a decision is appealed against or otherwise challenged and not set aside in consequence of the appeal or other challenge, at the time specified in subsection (3).

(3) The time referred to in subsection (2)(b) is the time when the appeal or other challenge is disposed of—

(a) by the determination of the appeal or other challenge and the expiry of the time for bringing a subsequent appeal (if any), or

(b) by its being abandoned or otherwise ceasing to have effect.

(4) In section 168 and this section *"long lease of a dwelling"* does not include—

(a) a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (c. 56) (business tenancies) applies,

(b) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 (c. 5) in relation to which that Act applies, or

(c) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (c. 8).

(5) In section 168 and this section—

"arbitration agreement" and *"arbitral tribunal"* have the same meaning as in Part 1 of the Arbitration Act 1996 (c. 23) and *"post-dispute arbitration agreement"*, in relation to any breach (or alleged breach), means an arbitration agreement made after the breach has occurred (or is alleged to have occurred),

"dwelling" has the same meaning as in the 1985 Act,

"landlord" and *"tenant"* have the same meaning as in Chapter 1 of this Part, and

"long lease" has the meaning given by sections 76 and 77 of this Act, except that a shared ownership lease is a long lease whatever the tenant's total share.

(6) Section 146(7) of the Law of Property Act 1925 (c. 20) applies for the purposes of section 168 and this section.
(7) Nothing in section 168 affects the service of a notice under section 146(1) of the Law of Property Act 1925in respect of a failure to pay—

(a) a service charge (within the meaning of section 18(1) of the 1985 Act), or

(b) an administration charge (within the meaning of Part 1 of Schedule 11 to this Act).

Schedule 11 ADMINISTRATION CHARGES

Part 1 REASONABLENESS OF ADMINISTRATION CHARGES

Meaning of "administration charge"

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(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) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

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

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule *"variable administration charge"* means an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must 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.