FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LBC/2020/0059**
HMCTS code (paper, video, audio)	**:**	**P: PAPERREMOTE**
Property	**:**	**Flat 41, Dorset House, Gloucester Place, London NW1 5AH**
Applicant	**:**	**Dorset House Residential Ltd**
Representative	**:**	**Dale & Dale, solicitors**
Respondent	**:**	**Ms G Somani**
Representative	**:**	**RLS Law, solicitors**
Type of application	**:**	**For a determination as to whether the Applicant should pay costs.**
Tribunal members	**:**	**Judge Brilliant**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**28 April 2021**

DECISION

Introduction

1. The Respondent is the long lessee of Flat 41, Dorset House, Gloucester Place, London NW1 5AH.

2. The Applicant is the freeholder and head lessee.

3. In late 2020 the Applicant applied to the Tribunal for a determination pursuant to s.168 Commonhold and Leasehold Reform Act 2002 that the Respondent was in breach of covenants in the lease.

4. On 18 December 2020, the Respondent's solicitors, RSL Law ("RSL") wrote to the Applicant' Solicitors, Dale & Dale ("Dale") stating that the application would fail and inviting the Applicant to withdraw from these proceedings.

5. Following further open correspondence, on 15 February 2021 Dale wrote to the Tribunal applying to withdraw.

6. By order dated 26 February 2021, Judge Vance gave the Applicant permission to withdraw.

7. The Respondent made an application for costs pursuant to r.13(1)(b)(ii) of the Tribunal Procedure (First–Tier Tribunal)(Property Chamber) Rules 2013. This provides that the Tribunal may make an order in respect of costs only if a person has acted unreasonably in bringing, defending or conducting proceedings in a residential property case.

8. The Respondent also made an application under s.20C Landlord and Tenant Act 1985.

9. In this decision I am deciding whether or not the Applicant should pay the Respondent its costs under r.13(1)(b)(ii) and, if so, how much those costs should be. I am also deciding whether an order should be made under s.20C.

The issues

10. In the substantive proceedings, and in the correspondence between the parties, the issues between the parties were as follows:

(1) There was no prior correspondence before the Applicant issued the s.168 application ("the prior correspondence issue").

(2) The Respondent allowed her own tenant to sublet contrary to clause 2(14)(ii) of the lease ("the tenant subletting issue").

(3) The Respondent failed to provide a direct deed of covenant from her subtenants contrary to clause 2(14)(iii) of the lease ("the deed of covenant issue").

(4) The Respondent failed to give the Applicant details of any subtenancy contrary to clause 2(14)(v) of the lease ("the giving details issue").

(5) The Respondent failed to produce a copy of the tenancy agreement contrary to clause 2(14)(v) of the lease ("the producing issue").

(6) The Respondent failed to pay the registration fee contrary to clause 2(14)(v) of the lease ("the registration fee issue").

(7) The Respondent allowed the flat to be used other than as a self-contained private residential flat contrary to clause 2(5) and paragraph 1 of the Third Schedule of the lease ("the user issue").

(8) The Respondent allowed the flat to be in the occupation of more than one family or household contrary to clause 2(5) and paragraph 1 of the Third Schedule of the lease ("the occupation issue").

(9) The Respondent was using laminate flooring in the flat contrary to clause 2(5) and paragraph 1 of the Third Schedule of the lease ("the flooring issue").

(10) the Respondent had carried out unlawful alterations to the flat will ("the alterations issue").

The facts

11. On 15 April 2020, the Applicant's then solicitors wrote to the Respondent's then solicitors asking for a copy of the tenancy agreement when the flat was going to be hello okay there when let.

12. On 20 April 2020, the Respondent replied that the flat was not at that date let, but she would let the Applicant's managing agent, Park-Aspen ("PA"), have a copy of the tenancy agreement once the flat was let.

13. On 22 July 2020, the Respondent emailed PA attaching a draft tenancy agreement which she proposed to sign. The proposed tenants were students coming to do postgraduate degrees.

14. The draft tenancy agreement was an 18 page AST with four tenants, Lasse Munk (Danish), Christian Klare (German), Marcel Bartelik (German) and Patrick Strolz (Austrian).

15. Later that day, PA asked the Respondent for references and passport copies. These were sent immediately.

16. On 24 July 2020, PA emailed the Respondent:

All seems to be in order – but first of all we will need you attached[1] *and arrange for payment to be made.*

17. On 7 August 2020, the Respondent emailed ("PA"), enclosing a signed AST with the four students and saying that the registration fee of £96 had been sent by bank transfer. PA could not open the enclosures, so later that day Foxtons (the Respondent's agents) sent the document to PA[2].

18. On 9 August 2020, the Respondent emailed PA attaching the registration form duly completed. There is also in the bundle a resident registration form which has been signed by all four of the students.

[1] Presumably this referred to the registration of under letting form the Respondent was required to fill in.

[2] Curiously, the Respondent subsequently erroneously agreed with the Applicant that the signed AST had not been sent.

19. The above is a full recital of the facts taken from the bundle provided to me. There is no credible evidence of PA and the Applicant at any time discussing matters between themselves or having any doubts about the propriety of what was happening.

20. Equally, there is no evidence of PA or the Applicant raising any doubts with the Respondent or Foxtons about the propriety of what was happening.

The proceedings

21. The breaches of covenant alleged in the Applicant's notice of application are those set out in paragraphs 10(2) – 10(9) above.

Discussion of the issues

The prior correspondence issue

22. The Respondent's case is that the application was wholly without merit and had the Applicant troubled to put these allegations to her before issuing these proceedings it would have been appreciated that the Respondent had done no wrong.

23. The Applicant's response is that there had been previous proceedings between the parties in which the Respondent was found to have broken covenants and her response thereto was very unsatisfactory. So there was no point in writing to her as it would make no difference.

24. In view of my findings below, it is clear to me that had the Applicant put its case to the Respondent prior to issue proceedings it is highly unlikely that proceedings would be issued.

25. In my judgment, the fact that the Respondent may have been a difficult tenant in the past is no excuse for having failed to write prior to instituting these proceedings.

The tenant subletting issue

26. The allegation that the Respondent had allowed her own tenant to sublet is untrue. There is no evidence to support the allegation.

The deed of covenant issue

27. It is unusual for an AST tenant to enter into a direct covenant with a superior landlord. Nevertheless, I accept the Applicant's argument that this is required by clause 2(14)(iii) of the lease. Nevertheless, PA's email on 24 July 2020 made no reference to such a deed. At no time prior to the institution of the proceedings did either PA or the Respondent asked for a deed. But I do not agree with the Respondent's submission that an estoppel or waiver has arisen.

28. In RLS Law's letter dated 18 December 2020 an open offer was made to procure direct deeds of covenant with the subtenants. I think it is unlikely that proceedings would have been instituted in respect of this issue if the Applicant were not also complaining about the other matters.

The giving details issue

29. The allegation that the Respondent failed to give the Applicant details of the subtenancy is untrue.

The producing issue

30. The Respondent initially produced a copy of the unsigned tenancy agreement. She then provided a signed document. The allegation that the Respondent failed to produce a copy of the completed tenancy agreement is untrue.

The registration fee issue

31. The allegation that Respondent failed to pay the registration fee is untrue.

The user issue

32. The allegation that Respondent allowed the flat to be used other than as a self-contained private residential flat is untrue. There is no credible evidence otherwise.

The occupation issue

33. The allegation that the Respondent allowed the flat to be in the occupation of more than one family or household is untrue. There is no credible evidence otherwise.

The flooring issue

34. The Respondent says that the flooring laid in the flat is wood laminate with a noise reducing underlay. It is therefore of a similar material to carpet. Nevertheless, this seems to me to be a breach of covenant, and it is likely to be a continuing breach so the claim is not statute barred.

35. However, the flat is above commercial premises and no complaint has been made about any noise. Again, I think it is unlikely that proceedings would have been instituted in respect of this issue if the Applicant were not also complaining about the other matters.

The alterations issue

35. The allegation that the Respondent altered the flat without consent did not form part of the Applicants' application and, accordingly, has no relevance to the questions I have to decide.

Unreasonable conduct: the law.

36. Rule 13(1)(b)(iii) of the 2013 Rules provides:

The Tribunal may make an order in respect of costs only … if a person has acted unreasonably in bringing, defending or conducting proceedings in … a leasehold case …

37. The jurisdiction to award costs under rule 13 was examined y by the Upper Tribunal in Willow Court Management (1985) Ltd v Alexander [2016] UKUT 290 (LC), [2016] L&TR 34.

38. The head note in L&TR reads as follows:

> *(1) The Court of Appeal guidance on what constitutes "unreasonable" conduct in the context of wasted costs applies in FTT proceedings for the purposes of r.13(1)(b), rather than this term having a wider interpretation, Ridehalgh v Horsefield [1994] Ch 205 applied. The test for unreasonable conduct may be expressed in different ways. Would a reasonable person in*

the position of the party have conducted themselves in the manner complained of? Or, is there a reasonable explanation for the conduct complained of?

(2) A systematic or sequential approach to applications under r.13(1)(b) should be adopted. At the first stage the question is whether the person has acted unreasonably. At the second stage it is essential for the tribunal to consider whether, in light of the unreasonable conduct it has found, it ought to make an order for costs or not. If so, the third stage is what the terms of the order should be. At both the second and third stages the tribunal is exercising a judicial discretion in which it is required to have regard to all relevant circumstances. Whether the party whose conduct is criticised has had access to legal advice is relevant at the first stage of the enquiry, as the behaviour of an unrepresented party with no legal knowledge should be judged by the standards of a reasonable person who does not have legal advice; it may also be relevant, though to a lesser degree, at the second and third stages, without allowing it to become an excuse for unreasonable conduct. At the third stage, a causal connection with the costs sought is to be taken into account, but the power is not constrained by the need to establish causation.

(3) Applications under r.13(1)(b) should not be regarded as routine, should not be abused to discourage access to the tribunal and should not be allowed to become major disputes in their own right. They should be dealt with summarily, preferably without the need for a further hearing, and after the parties have had the opportunity to make submissions. Those submissions are likely to be better framed in light of the tribunal's substantive decision rather than in anticipation of it, and applications at interim stages or before the substantive decision should not be encouraged.

39. Turning to the actual words used by the Upper Tribunal, the following paragraphs are germane:

24. … "Unreasonable" conduct includes conduct which is vexatious, and designed to harass the other side rather than advance the resolution of the case. It is not enough that the conduct leads in the event to an unsuccessful outcome. The test may be expressed in different ways. Would a reasonable person in the position of the party have conducted themselves in the manner complained of? Or Sir Thomas Bingham's "acid test [in Ridehalgh v Horsefield [1994] Ch 205]: is there a reasonable explanation for the conduct complained of?

28. At the first stage the question is whether a person has acted unreasonably. A decision that the conduct of a party has been unreasonable does not involve an exercise of discretion but rather the application of an objective standard of conduct to the facts of the case. If there is no reasonable explanation for the conduct complained of, the behaviour will properly 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 second 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 that order should be.

29. Once the power to make an order for costs is engaged there is no equivalent of CPR 44.2(2)(a) laying down a general rule that the unsuccessful party will be ordered to pay the costs of the successful party. The only general rules are found in section 29(2)-(3) of the 2007 Act, namely that "the relevant tribunal shall have full power to determine by whom and to what extent the costs are to be paid", subject to the tribunal's procedural rules. Pre-eminent amongst those rules, of course, is the overriding objective in rule 3, which is to enable the tribunal to deal with cases fairly and justly. This includes dealing with the case 'in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal.' It therefore does not follow that an order for the payment of the whole of the other party's costs assessed on the standard basis will be appropriate in every case of unreasonable conduct.

30. At both the second and the third of those stages the tribunal is exercising a judicial discretion in which it is required to have regard to all relevant circumstances. The nature, seriousness and effect of the unreasonable conduct will be an important part of the material to be taken into account, but other circumstances will clearly also be relevant; we will mention below some which are of direct importance in these appeals, without intending to limit the circumstances which may be taken into account in other cases.

40. It will be apparent from what I have said above that I am of the view that no reasonable person in the position of the Applicant would have acted as it has done in these proceedings. The Applicant controls a prestigious block of flats and has the benefit of managing agents and solicitors, and in my judgment it is right, in view of the unreasonable conduct I have found, that the Respondent should recover her costs.

41. The final question, before I go on to make my assessment, is what the terms of the order should be. I have said that I do not believe that, in the absence of the breaches wrongly alleged, the Applicant would have pursued the deed of covenant or flooring issues. Nevertheless, being fair to both parties, I will reduce the amount of costs by 20% to reflect these probable breaches by the Respondent.

Assessment of costs

42. The Respondent claims costs of £3,540 inclusive of VAT. These proceedings were an extremely serious matter to the Respondent, as they were a prelude to the forfeiture of what must be a valuable flat. It was appropriate to instruct someone of Mr Webber's seniority throughout, and I do not regard the hourly fee of £350 as being excessive.

43. Mr Webber spent 13.1 hours on the case. This would amount to £5,502 inclusive of VAT. But he very properly says that he charged the Respondent a fixed fee for each stage resulting in the lower figure of £3,540 inclusive of VAT.

44. I regard the time spent as somewhat too high and would be minded to make an award on the basis of 10 hours. As this is higher than the amount claimed, the

lower figure of £3,540 inclusive of VAT is the starting point from which I must deduct 20%. This results in a figure of £2,832 inclusive of VAT.

45. I also make an order that none of the costs of these proceeding should be recoverable through the service charge.

Name:	Simon Brilliant	Date:	28 April 2021	

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).