FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/19UJ/LBC/2022/0004
Property	:	Flat 69 Cavendish Court, Woolcombe Road, Portland, Dorset DT5 2HY
Applicant	:	Tapestart Limited
Representative	:	Compton Group
Respondent	:	Derek William Rossall (also known as Dale Rossall)
Representative	:	
Type of Application	:	Breach of Covenant S168(4) Commonhold and Leasehold Reform Act 2002 and an Application by the Respondent for an Order under Para 5A of Sch. 11 CLARA 2002
Tribunal member	:	D Banfield FRICS Regional Surveyor
Date of Decision	:	16 June 2022

DECISION

Background

1. The Applicant seeks an Order under S168 (4) of the Commonhold and Leasehold Reform Act 2002 on the basis that the Respondent has breached covenants in his lease. It states that he has carried out works to his flat without the required consent. The application was made on 11 February 2022.

2. The Tribunal made Directions on 23 March 2022 setting out a timetable for the exchange of cases between the parties leading to a determination on the papers alone without an oral hearing in accordance with rule 31 of the Tribunal Procedure Rules 2013 unless a party objected in writing. No objection has been received and this determination is made on the papers received.

3. On 20 April 2022 the Respondent made an application for an Order under Paragraph 5A to Schedule 11 of the Commonhold and Leasehold Reform Act 2002 in respect of which the Tribunal made Directions on 4 May 2022 ordering that the application would be determined as part of the substantive application.

4. The Directions of 23 March required the Respondent to send his statement of case in reply to the Applicant by 4 May 2022. This does not appear to have taken place although a substantial number of emails have been sent to the Tribunal some of which are relevant to the dispute and have been copied to the Applicant.

5. The Applicant has, as directed, prepared a paginated hearing bundle consisting of 124 pages and it is upon the contents thereof that this determination is made.

6. The Tribunal examined the bundle to enable it to be satisfied that an oral hearing would not add to the available evidence and decided that it would not. Reference to page numbers in the bundle are referred to as [*].

The Law

7. See attached Appendix.

The Lease

8. The section of the lease relevant to this application is at Clause 3(5) which reads;

> Not at any time during the said term to make any alterations in or additions to the Demised premises or any part thereof or to cut maim alter or injure any of the walls or timbers thereof or to alter the Landlord's fixtures thereon without first having made a written application (accompanied by all relevant plans

specifications) in respect thereof to the Lessors and secondly having received the written consent of the Lessors thereto such consent not to be unreasonably withheld in respect of internal non-structural alterations

The Evidence

The Applicant

9. In a Statement of Case dated 6 April 2022 the Applicant says that [11] "between March 2017 and September 2020 the Respondent removed a window , cut a new opening in an external wall and installed a new "patio" door at the subject property" and "from a search of the Applicant's records, I cannot find a notification of an intended approval from Cavendish RTM Company Limited, the right to manage company for the building at the relevant time, pursuant to section 98(4)(a) of the Commonhold and Leasehold Reform Act 2002"

10. The Applicant further states that the "consent" [67] relied upon by the Respondent is not evidence of consent given that;

- The document is signed by Cyril Freedman, not Cyril Freedman Limited
- The proper person with responsibility for giving consents under the terms of the Lease is Cavendish RTM Limited

11. The evidence in support referred to in the Statement of Case that alterations have been carried out comprises two aerial photographs one with the date March 2017 added [61] the other marked September 2020 [62]

The Respondent

12. In the absence of the required Statement of Case from the Respondent the Tribunal has taken the information contained in the application referred to in paragraph 3 above as a response to the application.

13. Under the Grounds of Application the Respondent says that;

- he has shown the consent and drawings to Ben Hammond, the solicitor for the Applicant
- "Window World did the patio door install of a utility room Enoch used to be a balcony with rear access"

14. He further asks that the landlord's costs are not claimed against him and that he is seeking damages due to being unfairly treated by Mr Ben Hammond.

15. Further evidence is included in the Applicant's bundle at [64-66] being photographs of a partially open patio door.

Applicant's response

16. The Applicant points out that the Application by the Respondent for an Order under Para 5A of Sch. 11 CLARA 2002 has named Ben Hammond as the Respondent to the application rather than Tapestart Limited. He refers to a previous unsubstantiated claim brought against him in the County Court by the Respondent and as such he acts vexatiously which is an abuse of process.

17. The Applicant refers to the Respondent's application as incoherent and gives an undertaking that the cost of proceedings will not be applied to the service charge accounts. The Applicant does however reserve the right to claim costs against the Respondent under Rule 13 of the Tribunal's Procedural Rules.

18. The Tribunal has no jurisdiction to award damages against him personally and there is no basis for the claim which is made vexatiously and intended to intimidate him. As such a sanction from the Tribunal is sought.

19. Nothing is contained in the application to refute the Applicant's Statement of Case; the purported consent being dealt with at paragraphs 9 to 11.

Applicant's Cost Submissions

20. The Applicant applies for an Order pursuant to Rules 13(1)(b)(iii) and 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.[94]

21. The claim is for the application fee of £100 plus costs to be summarily assessed and as set out in a costs schedule [123] totalling £1,808.50.

22. The Applicant's grounds are that the Respondent has acted unreasonably in defending and conducting these proceedings.

23. The particulars of the Applicant's grievances are;

- In pre action correspondence it was clear from photos that patio doors had been installed and that the Respondent maintained that he had consent from the previous freeholder who was no longer in a position to give it. The Applicant had the opportunity to admit the breach and was put on notice of the proceedings as early as 10 February 2022.
- The Respondent produced no evidence to refute the Applicant's assertion that there had been a breach and it is unreasonable that the Applicant should be put to the cost of the application.

- The Respondent's behaviour has been unreasonable in his defence and conduct of these proceedings.
- The Applicant's solicitor has been sent several malicious communications [117-122] which have been reported to the Dorset police. Court officers should not be subjected to such messages while they represent their clients in proceedings.

Discussion and Decision

24. The purpose of bringing proceedings under section 168(4) is to enable a landlord under a long lease of a dwelling to serve a section 146 notice to forfeit the lease for breaches of covenant by the tenant other than non-payment of rent. If proceedings are brought the Tribunal is required to determine whether the tenant has committed an actionable breach of covenant. A finding against a tenant potentially could result in the tenant losing a valuable asset and in this case his home.

25. The term actionable breach was considered by Judge Huskinson in *Swanston Grange (Luton) Management Limited v Eileen Langley Essen* LRX 12/2007. Essentially the Tribunal's jurisdiction under section 168(4) is limited to a finding of fact on whether a breach has occurred. Judge Huskinson added that the Tribunal can decide whether the landlord was estopped from asserting the facts on which the breach of covenant is based. Judge Huskinson, however, went on to say the Tribunal's jurisdiction did not extend to determining whether the breach has been remedied. This was a question for the court in an action for forfeiture.

26. In the Tribunal's view the structure of section 168 is such that an action under section 168 (4) should only be brought if the tenant does not admit the breach. It follows from the structure of section 168 and the potential severe consequences for the tenant that the landlord is responsible for proving the breach on the balance of probabilities. It also follows the landlord should give the tenant an opportunity to admit the breach and put matters right before bringing proceedings under section 168(4) of the 2002 Act.

27. It is regrettable that the Respondent has chosen not to set out his case as referred to in the Tribunal's directions. It would appear however that his case is a simple one in that he asserts that consent was given.

28. There is no dispute that works were carried out by the insertion of patio doors although when these works were carried out remains undetermined. I am not satisfied that the two, what appear to be Google Earth aerial photos with dates added by the Applicant, can be taken as firm evidence of when the change occurred. That issue is however largely irrelevant given that the Respondent asserts that consent was given on 28 March 2012[67] and as such, if valid, would cover any time following that date.

29. There is also some issue as to the extent of the alterations and whether the structure was "cut". This again is irrelevant as Clause 3(5) refers to alterations and additions which the removal of a window and insertion of a patio door clearly was.

30. This leaves the question of whether the document at page 67 is a valid consent for the works. The document is drawn in legal form and refers to the Property as 69 Cavendish Court DT5 2HY, is dated 28th March 2012, refers to Cyril Freedman as "the Landlord" and Derek Rossall as "Tenant". The consent refers to being subject to planning statutes, permission from owners or occupiers of adjoining land and any other relevant authority and in the box headed "Specification" refers to "to fit a sliding door" At the bottom is a "squiggle" which it is assumed to be the signature.

31. Reference is made to drawings referred to in part 1 and a description of the works contained in Part 3 of the Schedule neither of which has been produced.

32. Whilst, given the paucity of information provided there may be uncertainty as to whether the sliding door referred to is the same as the patio door now fitted I take the reference to consents from planning statutes, adjoining owners etc. as meaning that the door was to be fitted to the exterior rather than some internal alteration. I am satisfied therefore that the consent refers to the works the subject of this application.

33. This leaves the one remaining question as to who or what was the body that was capable of giving a valid consent.

34. The Tribunal has little evidence on that issue. The Lessor under the lease drawn in 1987 refers to Graphicwild Limited, at some stage it seems to be accepted that Cyril Freedman Limited became the Lessor following which Tapestart acquired the Freehold possibly in 2013. The Applicant asserts that it was Cavendish RTM Company Limited were the right to manage company for the building at the relevant time pursuant to s.98(4)(a) of the Commonhold and Leasehold Reform Act 2002.

35. With regard to the Applicant's challenge as to the validity of the 28 March 2012 document as it refers to Cyril Freedman rather than Cyril Freedman Limited the Tribunal finds that the issue is irrelevant given the following paragraph.

36. As stated in paragraph 26 above, it is for the Applicant to prove their case on the balance of probabilities. The Applicant has provided no evidence to the Tribunal as to the period when the RTM company exercised its functions and the extent of those functions and without such evidence the Tribunal is unable to determine that the failure to find an approval within Cavendish RTM Company Limited's records is proof that consent was not obtained.

37. **The Tribunal finds therefore that the Applicant has not proved on the balance of probabilities that the Respondent has breached the terms of Clause 3(5) of his lease.**

Costs

38. The Applicant in this case has invited the tribunal to make orders under Rule 13(1)(b) and 13(2) on the basis referred to at paragraph 23 above and briefly summarised as the Respondent not accepting that the permission he said that he had received was invalid and as such that his conduct was unreasonable.

39. Rule 13(1)(b) of the Tribunal Rules ("Rule 13(1)(b)") states as follows: "The Tribunal may make an order in respect of costs … if a person has acted unreasonably in bringing, defending or conducting proceedings in … a residential property case, or … a leasehold case".

40. The leading case on this point is the decision of the Upper Tribunal in Willow Court Management Ltd v Alexander [2016] UKUT 290 (LC). In Willow Court, the Upper Tribunal prescribed a sequential three-stage approach which in essence is as follows:

> (a) applying an objective standard, has the person acted unreasonably?
> (b) if so, should an order for costs be made? and
> (c) if so, what should the terms of the order be?

41. The first part of the test, namely whether the person acted unreasonably, is a gateway to the second part. As to what is meant by acting "unreasonably", the Upper Tribunal in Willow Court followed the approach set out in Ridehalgh v Horsfield [1994] EWCA Civ 40, [1994] Ch 205 and stated that "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".

42. In Ridehalgh, Sir Thomas Bingham MR described the acid test of unreasonable conduct in the context of a cost application as being whether the conduct permits of a reasonable explanation. One principle which emerges from both Ridehalgh and Willow Court is that costs are not to be routinely awarded pursuant to a provision such as Rule 13(1)(b) merely because there is some evidence of imperfect conduct at some stage of the proceedings. Sir Thomas Bingham also said that conduct could not be described as unreasonable simply because it led to an unsuccessful result. The Upper Tribunal in Willow Court added that tribunals should also

not be over-zealous in detecting unreasonable conduct after the event.

43. In the present case, the Applicant submits that by the Respondent refusing to accept that the written consent from "the Landlord" was invalid he was 'acting unreasonably' for the purposes of Rule 13(1)(b). We do not accept this. Whilst Willow Court did not concern this particular situation and therefore did not address this question directly, there is in our view nothing in that decision or in the reasoning contained therein to indicate that what appears on the evidence provided to be an honest belief that he had provided clear evidence of consent which for whatever reason the Applicant refused to accept.

44. The use of unacceptable language in the emails sent to Mr Hammond which started on 12 March 2022 cannot be condoned. Mr Hammond takes these to be directed at him personally, however he is an employee of the Applicant company apparently attempting to remove the Respondent from his home and as such is the company's "face" to which the Respondent's frustrations could be directed however crudely they were made. As such we do not accept that it was "designed to harass" the Applicant as referred to in the Ridehalgh case above.

45. We therefore do not accept that the Applicants have demonstrated that the Respondent has acted unreasonably for the purposes of Rule 13(1)(b). As the application has failed to pass the first stage of the test set out in Willow Court, it follows that it is unnecessary to go on to consider stages two and three. **Accordingly, the Applicants' cost application under Rule 13(1)(b) is refused.**

46. **The Applicant has not succeeded in their application and it would therefore be unreasonable to make an Order under Rule 13(2)**

47. Whilst we are unaware as to whether the Applicant intends to seek an administration charge against the Respondent the Tribunal indicates that if so levied it would make an Order under Paragraph 5A to Schedule 11 of the Commonhold and Leasehold Reform Act 2002 extinguishing any liability on the grounds that the Applicant has been unsuccessful.

48. Finally, the Tribunal confirms that it has no power to award "damages" against either the Applicant or any of its employees.

D Banfield FRICS
16/06/2022

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 by email to rpsouthern@justice.gov.uk 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.

Appendix of relevant legislation

Commonhold and Leasehold Reform Act 2002

S.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 a leasehold valuation tribunal 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.