UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – BREACH OF COVENANT – covenant requiring leaseholder to insure in joint names with landlord – whether covenant breached – costs – whether landlord behaved unreasonably in conducting proceedings – appeal allowed – decision re-made

AN APPEAL AGAINST A DECISION OF
THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

ANNA KYRIACOU

Appellant

-and-

VANESSA LINDEN

Respondent

Re: Ground Floor Flat,
14 Folkestone Road,
London E17

Martin Rodger QC, Deputy Chamber President

10 November 2021

Royal Courts of Justice

Carl Fain, instructed by Southgate & Co, for the appellant
Grant Armstrong, instructed by WVA Solicitors, for the respondent

The following cases are referred to in this decision:

Atherton v MB Freeholds Limited [2017] UKUT 497 (LC)

GHN (Trustees) Limited v Glass LRX/153/2007, [2008] EWLands LRX_153_2007

Bedford v Paragon Asra Housing Association Ltd [2021] UKUT 266 (LC)

Introduction

1. The appellant, Mrs Anna Kyriacou, appeals with the permission of this Tribunal against a decision of the First-tier Tribunal (Property Chamber) published on 1 February 2021. The FTT refused Mrs Kyriacou's application for a determination under section 168(4), Commonhold and Leasehold Reform Act 2002 that the respondent, Ms Vanessa Linden, had breached covenants in the lease of the ground floor flat at 14 Folkestone Road, London E17.

2. After dismissing Mrs Kyriacou's application the FTT made an order for costs against her under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. It took the view that she had behaved unreasonably in connection with the application and required her to pay £35,841 to Ms Linden as a contribution towards her costs.

3. This Tribunal granted Mrs Kyriacou permission to appeal the FTT's determination that no breach of covenant had occurred and its decision to make an order for costs against her. It refused permission to appeal against the quantum of the costs other than to give effect to a concession by Ms Linden that the FTT had made an arithmetical error and that the amount payable in costs should have been £30,036.

4. At the hearing of the appeal Mrs Kyriacou was represented by Mr Carl Fain and Ms Linden by Mr Grant Armstrong. I am grateful to them both for their assistance.

The facts

5. No. 14 Folkestone Road is a mid-terrace Victorian house on three floors divided into a ground floor flat and an upper maisonette. In 1983 the then freeholder granted a lease of the maisonette for a term of 99 years and in the following year it granted a lease of the ground floor flat for the same term.

6. Mrs Kyriacou and her husband, Mr Andres Kyriacou, acquired the lease of the maisonette in 1988. In 1992 Mrs Kyriacou alone acquired the freehold of the building, subject to the residential leases. In 1999 Ms Linden acquired the lease of the ground floor flat.

7. Neither Mr and Mrs Kyriacou nor Ms Linden live in their flats, which are let to tenants.

8. The lease of the ground floor flat includes a number of covenants which are relevant to this appeal. By clause 2(ii) the lessee covenanted with the lessor "in common with the lessor or the lessee of the other maisonette in the property" to carry out certain works listed in the Second Schedule and to be responsible for half the cost. The works included keeping the main structure of the building and the entrance way and entrance hall in good repair. Nothing was said in the lease about how this joint obligation was to be performed in practice.

9. By clause 2(i) and paragraph 17 of the Third Schedule required the lessee "to insure and at all times during the said Term to keep insured the Demised Premises … against loss or damage by fire storm and other insured risks including two years' loss of rent ... in such

insurance office as the Lessor shall approve in the joint names of the Lessor and the Lessee…"

10. Part II of the First Schedule to the lease listed rights which were granted to the lessee with the flat. These included a right of passage over an entrance way from the street to the main door of the building and then over an entrance hall leading to the demised premises. The lessee was also granted "the right (in common with all other persons entitled to the like right) to use the area prescribed by the Lessor for keeping the Lessee's dustbins with all necessary rights of access thereto." The lease does not indicate where that area is to be.

11. The lease included a plan depicting the general arrangement of the two units. At the front of the property there is a small garden which is included in the demise of the maisonette. The entrance way to the front door adjoins the front garden but is not itself demised. The rear garden is demised with the ground floor flat. There is no means of access from the rear garden to the front of the building except through the ground floor flat. The only area not included in the demise of either the flat or the maisonette appears to be the entranceway.

12. The lease also includes a covenant by the lessee not to obstruct the entranceway at paragraph 7 of the Fourth Schedule.

13. The relationship between the parties has not been an easy one. For more than 20 years Mr and Mrs Kyriacou have complained to Ms Linden about her and her tenants' suggested failures to comply strictly with the terms of the lease of the ground floor flat. Those complaints were brought to a head in 2019 when Mrs Kyriacou applied to the FTT for a determination under section 168(4), 2002 Act that Ms Linden had breached two of the covenants in the lease, namely, a covenant against causing nuisance or annoyance to the lessor or to the owners or occupiers of the maisonette, and a covenant requiring the lessee to give notice in writing to the lessor within one month of every underletting of the flat.

14. On 6 July 2019 the FTT published an exhaustive decision detailing the dealings between the parties over the storage of refuse bins and giving notice of sub-letting. The FTT determined that there had been no breach of the covenant against causing nuisance or annoyance, but that there had been a technical breach of the notice covenant when in February 2019 Ms Linden failed to provide particulars of a new letting until ten days after the date specified. The FTT found that over a number of years Ms Linden had persistently failed to provide the required notices of subletting; although the breach was only a technical one, the FTT expressed the view that it was reasonable in all the circumstances for Mrs Kyriacou to have made the application for a determination under section 168(4).

The proceedings before the FTT

15. On 23 March 2020, a little over eight months after the FTT had published its decision on her first application, Mrs Kyriacou made a second application under section 168(4) seeking a determination that Ms Linden had committed nine separate breaches of covenant. They were:

    (1) that she had failed to carry out repairs to the roof and common parts;

(2) that by failing to repair the roof she had permitted a situation to arise in which any insurance claim relating to the roof would be disallowed;

(3) that since 1 November 2019 she had failed to insure the demised premises in accordance with her obligation in the lease;

(4) that she had obtained building insurance on the basis of false and misleading statements and declarations; and

(5) that refuse bins were deposited in the entrance way obstructing and blocking it;

(6) that she or her contractors had deposited building material and rubbish in the front garden;

(7) that she had caused unspecified nuisance and annoyance;

(8) that she or her contractors had disconnected the water supply to the whole of the building for more than 12 hours without giving notice; and

(9) that she had given notice of her intention to seek the appointment of a manager under the Landlord and Tenant Act 1987, which had caused annoyance, inconvenience and damage to Mrs Kyriacou.

16. On 9 September 2020 Ms Linden applied to strike out the new application. By a decision handed down on 29 October 2020, following a hearing at which Ms Linden was represented by counsel, the FTT struck out six of the nine claims of breach of covenant on the grounds that they were an abuse of process or otherwise had no realistic prospect of succeeding. The three allegations which were permitted to proceed to a hearing were those relating to the alleged failure to repair the common parts of the building; failure to insure the demised premises in accordance with paragraph 17 of the Third Schedule to the lease; and that Ms Linden had permitted her tenants to obstruct the entrance way by placing rubbish bins there contrary to paragraph 7 of the Fourth Schedule.

17. The hearing of the application took place over two days in January 2021 and, as on the previous occasion, Ms Linden was represented by counsel and Mrs Kyriacou was represented by her son, Mr C Kyriacou.

18. The FTT published its decision on 1 February 2021. It refused to make a determination under section 168(4) in respect of any of the allegations and ordered Mrs Kyriacou to pay £35,841 as a contribution towards the respondent's costs.

19. The FTT found that there had been no breach of the repairing covenant in relation to the repair of the common parts because the work was not urgent and Ms Linden had agreed to it being carried out but wished only to be satisfied that it would be done by a reasonably competent contractor (rather than by Mr Kyriacou) and at a reasonable cost. It rejected the allegation that the insurance covenant had been breached, and I will deal with that part of its decision in greater detail below. Finally, in relation to the allegation that the entrance way had been obstructed by rubbish bins belonging to the respondent's sub-tenant, the FTT found that bins had indeed been left in the access way on four occasions but considered that was not amount a breach of covenant because Mrs Kyriacou had failed to designate an area

where bins could be kept and had instead insisted (contrary to the lease) that the ground floor tenants should keep their bins in the rear garden.

20. I will come in detail to the FTT's determination in relation to costs after considering the insurance issues.

The insurance issues

21. Section 168(4), 2002 Act provides that:

> "A landlord under a long lease of a dwelling may make an application to the appropriate tribunal for a determination that a breach of a covenant or condition in the lease has occurred."

In England the appropriate tribunal is the FTT.

22. The covenant in Ms Linden's lease requires her to insure the ground floor flat in the joint names of herself and Mrs Kyriacou, as the owner of the freehold. The lease of the maisonette is not in evidence, but I assume that it includes a comparable covenant obliging Mrs Kyriacou and her husband to insure the remainder of the building in their capacity as joint leaseholders.

23. This arrangement is cumbersome and inconvenient. Between 2012 and 2019 Mr and Mrs Kyriacou and Ms Linden disregarded the strict terms of their leases and informally substituted an arrangement for Mrs Kyriacou to insure the whole building with Ms Linden paying half the cost. That arrangement broke down during the first FTT proceedings and in July 2019 Ms Linden informed Mrs Kyriacou that she would provide her own insurance.

24. In *Atherton v MB Freeholds Limited* [2017] UKUT 497 (LC) the Tribunal referred to some of the difficulties created by covenants requiring insurance to be in joint names. The evidence in that case suggested that it was unusual and difficult, though not impossible, for insurance to be obtained in the joint names of parties with different legal interests and that by far the more common approach is for one party to insure in their own name with the other party's interest being noted on the policy. An important practical difference between the two arrangements is that a person whose interest is noted on a policy is not usually in a position to make a claim in their own right and must depend on the named insured to make a claim on their behalf.

25. Ms Linden did indeed find it difficult to obtain insurance in joint names. In correspondence before the application to the FTT she suggested that the lease should be varied to introduce a more convenient structure. Mrs Kyriacou did not respond to that suggestion preferring instead to criticise the insurance which Ms Linden had obtained. She objected to the first policy taken out by Ms Linden with the NFU on 1 November 2019 because although it was in joint names it insured the whole building and not just the ground floor flat (the policy also did not include cover against loss of rent). Ms Linden obtained a second policy on 2 December 2019 from NIG, which was limited to the demised premises alone, but Mrs Kyriacou's interest as freeholder was only noted on that policy with Ms Linden being

specified as the sole insured. Mrs Kyriacou objected to that policy, as she was entitled to, because it was not in joint names.

26. On 19 February 2020 Ms Linden secured an amendment to the NIG policy by which she and Mr Kyriacou were identified as the joint insured. Mrs Kyriacou objected to this policy on a number of different grounds. She first suggested that the cover for loss of rent was inadequate because it insured Ms Linden in respect of the rent payable by her (a £60 annual ground rent) but not in respect of rent receivable (£27,000 a year). Mrs Kyriacou later suggested that the policy had been obtained on the basis of a false representation that she and Ms Linden were jointly letting the property and that it was conditional on the maisonette being occupied. Mrs Kyriacou also objected to a prohibition in the policy on further subletting by tenants of the flat. Each of these later objections seems to have been based on a supposed uncertainty whether the policy covered the whole building or just the ground floor, but it was clear enough that the insured premises were the ground floor alone.

27. Possibly because of inquiries about the policy made by Mrs Kyriacou NIG appears to have had a change of heart and terminated the policy on 3 April 2020 on the grounds that Mrs Kyriacou had no insurable interest. By that time the application under section 168(4) had already been made to the FTT. I was told that Ms Linden was unable to obtain another policy in joint names until December 2020.

28. The FTT referred to Mrs Kyriacou's numerous complaints about Ms Linden's attempts to comply with the insurance covenant. It was satisfied that at all times during what it called "the period under discussion" (which I take to mean the period from 1 November 2019 until the commencement of the application) the property had been covered by an insurance policy against all usual risks. It dismissed the suggestion that cover against loss of rent was inadequate on the grounds that two years' loss of ground rent would be only £120 and "the Tribunal does not consider this to have been a significant detriment". It said that the requirement to insure in joint names was unusual and noted the difficulty which Ms Linden had experienced in complying since the landlord had no insurable interest in the demised premises. Mr Cowan, an insurance broker who had given evidence on Ms Linden's behalf, had confirmed that it was very unusual for an insurer to issue a policy in joint names, and that the insurer would usually insure the property in the tenant's name with the landlord's interest being noted on the policy. The FTT also found no evidence that the insurance policies were void for misstatements.

29. The FTT completed its consideration of the insurance issue as follows:

> "Only during closing submissions did [Mrs Kyriacou] state that Ms Linden had in December 2020 put in place an insurance policy which was fully compliant with the provisions of the lease. Therefore, as at the date of the hearing the breach has been remedied. There is no actionable breach of this covenant. This part of Mrs Kyriacou's application is incapable of succeeding."

30. Mrs Kyriacou's first ground of the appeal was that the FTT had been wrong in law in failing to determine that Ms Linden had breached the insurance covenant. It was suggested that its reasoning was flawed in two respects. First, the FTT had been wrong to refuse to determine that a breach of covenant had existed at least between 2 December 2019 and 19 February

2020 when the flat was not insured in joint names. The fact that insurance in joint names had been obtained in December 2020 was irrelevant. Secondly, in relation to loss of rent, whether a loss of £120 over two years was a significant detriment or not, the respondent's covenant required her to procure insurance covering two years loss of rent and the policy documents clearly demonstrated that the covenant had been breached from 2 November to 2 December 2019.

31. In responding to the appeal Mr Armstrong emphasised the efforts which Ms Linden had made to obtain insurance in joint names and the difficulties which she had encountered. Nevertheless, he accepted that for a period before 19 February 2020 (possibly beginning on 2 December 2019 or possibly on 6 January 2020 depending on the date on which the original joint names policy was terminated) the flat had not been insured in joint names and a technical breach of covenant had been committed. Mr Armstrong's case, which he advanced with realistic moderation, was that the FTT had been correct to refuse to make a determination because by time the application was made to the FTT on 23 March 2020 the breach of covenant had been remedied. Mr Armstrong described that date as "the relevant date".

32. I do not accept Mr Armstrong's submission. This is another case in which a leaseholder who has undoubtedly been in breach of covenant has been unwilling to make a timely admission. It is also another example of the FTT erroneously refusing to make a determination that a breach has occurred on grounds that the breach has been waived or remedied.

33. The allocation of functions between the FTT and the County Court in residential breach of covenant cases may sometimes be inconvenient but it is the policy of section 168(4) of the 2002 Act which the FTT is required to apply and which it should not seek to circumvent. It is clear on the face of the statute that the FTT's only task is to determine whether a breach of covenant has occurred. Whether any breach has been remedied, or the right to forfeit for that breach has been waived, are not questions which arises under this jurisdiction.

34. That was made clear by the Lands Tribunal (George Bartlett QC, President) in *GHN (Trustees) Limited v Glass*, LRX/153/2007, an appeal from a leasehold valuation tribunal, the predecessor of the FTT. A landlord sought a determination that leaseholders had breached a covenant requiring notice to be given of any assignment of the lease. No notice had been given but the LVT found that the landlord had become aware of the identity of the assignee and it concluded that no "material or actionable breach" remained by the date of the hearing and that "any breach at the time has been remedied and no longer subsists". The Tribunal explained at [10] why that conclusion was not open to the FTT:

> "In my judgment the LVT was in error in refusing to make a determination that a breach had occurred on the ground that the breach had been remedied by the acquisition by the landlords of knowledge of the tenants' identity. The jurisdiction to determine whether a breach of covenant has occurred is that of the LVT. The question whether the breach has been remedied, so that the landlord has been occasioned no loss, is a question for the court in an action for forfeiture or damages for breach of covenant."

35. Since the FTT made its decision in this case the Tribunal has looked again at the FTT's role under section 168(4) in *Bedford v Paragon Asra Housing Association Ltd* [2021] UKUT 266 (LC). The FTT had been invited to strike out an application for a determination that a breach of covenant had occurred on the ground that the breach had been waived. At [28] I said this:

> "The FTT's jurisdiction under section 168, 2002 Act is to determine whether a breach of covenant has occurred. Before the right to forfeit a breach of covenant can be waived, it is necessary that a breach of covenant must first have been committed. It is the determination of that prior question which has been allocated by statute to the FTT."

36. The FTT was wrong to refuse to make a determination because it considered the breach had been remedied by the date of the hearing. Nor is there anything in section 168 which supports Mr Armstrong's submission that the FTT is restricted to considering whether a breach of covenant existed at the date of the application to it. The question for the FTT is simply whether a breach has occurred. In my judgment it is unnecessary to treat the date of commencement of the application as of any particular significance. Provided an applicant has clearly explained what breaches are alleged to have been committed, and the respondent has had the opportunity to respond to those allegations, there would be no good reason for a tribunal not to make a determination on the basis of all of the evidence which it had heard even if that covered a period after the commencement of the application. Indeed, it is highly desirable that the FTT should provide as complete and up to date an account of any breaches it finds to have been committed and which then may become the subject of a notice under section 146, Law of Property Act 1925 in order to avoid any need for further application. There is certainly no justification for refusing to make a determination that a breach has occurred simply because the breach may have been remedied, or the right to forfeit had been waived. The FTT has no jurisdiction over either of those matters.

37. The FTT was also wrong to refuse a determination that Ms Linden's omission to obtain cover against loss of rent was a separate breach of covenant. It was said in answer to this ground of appeal that the allegation had not been pleaded, but that was not a point made by the FTT. Mrs Kyriacou had explained in her statement of case what breaches she maintained had been committed, and a failure to obtain insurance against loss of rent was not mentioned (although it had been raised in correspondence). The FTT could properly have refused to make a determination on the basis that the point was not before it. But, having allowed the allegation to be made, the FTT ought to have determined that the absence of cover for loss of rent in NFU the policy was a breach. The reason given by the FTT, that the absence of cover was not a "significant detriment" to Mrs Kyriacou, was no answer to the point.

38. The appeal is therefore allowed on the first issue and I substitute a determination under paragraph 168(4) on both breaches. A breach of paragraph 17 of the Third Schedule occurred for the whole of the period when the insurance was not in joint names. On the evidence before the FTT that period was from 2 December 2019 until 19 February 2020. Ms Linden was also in breach of the same provision from 1 November until 2 December 2019 because the policy she had obtained did not cover loss of rent.

Costs

39. The second ground of appeal for which permission was given is against the FTT's order for costs.

40. Both parties included applications for costs in their statements of case. The FTT dealt with Ms Linden's application in a lengthy paragraph which I will not quote in full but which concluded with the following summary:

> "The tribunal therefore makes an award of costs to the respondent on the grounds both that the applicant's conduct has been unreasonable in pursuing an unsubstantiated claim and that Mrs Kyriacou's actions in so doing have caused the respondent to expend costs which have been wasted in that the insurance claim, in particular, should have been withdrawn before or at the commencement of the present hearing."

41. The order was made under rule 13(1) of the FTT's Rules which enables it, in a residential property case, to make an order for costs either under section 29(4) of the Tribunals, Courts and Enforcements Act 2007 in respect of wasted costs, or if it is satisfied that a person has acted unreasonably in bringing, defending or conducting proceedings. The FTT may have conflated these alternative jurisdictions by referring on the one hand to the applicant's conduct having been unreasonable (clearly a reference to rule 13(1)(b)) and to the applicant's actions having caused Ms Linden to incur "costs which have been wasted" (suggesting the power to award wasted costs under section 29(4), 2007 Act). The conditions which must be satisfied for an award under section 29(4) are not the same as those which apply to an award under rule 13(1)(b). In particular, wasted costs may only be recovered to the extent that they were incurred "as a result of" an improper, unreasonable or negligent act or omission on the part of a legal or other representative. Costs under rule 13(1)(b) are not restricted by that requirement of the causation. Be that as it may, Mr Fain did not base his appeal against the FTT's award of costs on that distinction. He made two points.

42. First, as Ms Linden had accepted when the application for permission to appeal was made to this Tribunal, the FTT's arithmetic was flawed. It had indicated that Ms Linden should recover 75% of the costs she had incurred which, as she acknowledges, should have resulted in a recovery of £30,036. It is not necessary to say any more about that aspect of the appeal.

43. Secondly, Mr Fain maintains that the FTT's explanation for its award of costs took into account irrelevant considerations and failed to have regard to relevant matters; it was therefore flawed and should be set aside by the Tribunal.

44. The matter which the FTT is said to have overlooked was correspondence between Mrs Kyriacou and the respondent's solicitors before the issuing of the application including in particular a letter written on 30 December 2019 in which Mrs Kyriacou offered to compromise all allegations of breaches of covenant on condition that Ms Linden procured an insurance policy in accordance with the lease and paid sums totally £7,239. That total included the cost of the repairs to the roof which had by then been carried out. It also included a sum of £935 described as compensation for the breach of covenant found by the first FTT plus £85 for the cost of preparing and serving notice under section 146 in respect

of the same breach. The total also included a £500 administration charge which was said to cover a variety of previous disputes.

45. Ms Linden's solicitors replied to the letter of 30 December 2019 on 13 January enclosing a cheque for the £935 claimed in respect of the section 146 notice. They sent a further response on 19 February expressing their clients willingness to reach a final agreement under which she would pay her half of the costs of the works to the roof on condition that all allegations of historical breaches were treated now as having been resolved and on condition that Mrs Kyriacou allocate an area for the respondent's dustbin, as provided by the lease.

46. Mrs Kyriacou responded to that proposal on 22 February in a lengthy letter going over historic grievances. She indicated a willingness to accept payment for the roof repairs plus £200 as an administration charge (a reduction on the previous figure of £500). Mrs Kyriacou also suggested that a "protocol" be agreed covering works to the common parts and required that a compliant insurance policy should be obtained. On that basis she offered to waive all historical breaches of covenant but refused to deal with the allocation of an area for the respondent's dustbins. She maintained that each flat should continue to store their bins in their own gardens "as they have done for the last 39 years". Alternatively, she suggested that "the other leaseholder" (i.e. Mrs Kyriacou and her husband) might be willing to provide space in the front garden in return for a rent, but she insisted that any such negotiation should be conducted separately. Mrs Kyriacou did not respond to a suggestion made by Ms Linden's solicitors that the terms of the lease should be varied.

47. I do not accept that the FTT overlooked this correspondence. It did not mention the exchanges specifically but at the conclusion of paragraph [26], in which it explained its reasons for making the order for costs, it noted "that the respondent's prior offer to vary the terms of the lease were rejected by Mrs Kyriacou", which indicates that the FTT was aware of the correspondence. It is not necessary for a tribunal to refer to every part of the material before it and it cannot be assumed that it was unaware of the pre-application letters.

48. In any event, the correspondence does not reflect well on Mrs Kyriacou. Rather than simply accepting the respondent's counter offer, which gave her all but £200 of what she had asked for in financial terms, she continued to insist on her own formulation and refused to budge on the one matter of substance on which the parties were at variance, namely, Ms Linden's request that she be allocated a space for the ground floor flat's dustbins. The parties had been in dispute over the storage of dustbins since October 2000 (as the account of their exchanges given in the decision of the first FTT records). The suggestion faintly made by Mr Fain that the right to an allocated area for bins may have been waived by Ms Linden is therefore insupportable.

49. In my judgment the FTT was correct when it said that the lease did not envisage that the space to be allocated by the lessor for the leaseholder's dustbins would be part of the demise of the ground floor flat; the right to a place to store dustbins was granted separately from the demise and it could not effectively be taken away by requiring Ms Linden to use part of the demise for that purpose. Rather, it was clearly intended by the lease that the space to be allocated would either be on land retained by the lessor or it would be in the area at the front of the building demised by the leaseholders of the maisonette. If the lessor was unable to provide sufficient space from within her retained land (which comprises only the access

way) it would be for her to negotiate with the owners of the maisonette to secure their agreement (unless there is something in their lease which requires them to cooperate).

50. I am satisfied that the FTT took account of the pre-application correspondence and the offers and counter offers which it contained. Even if it did not, the correspondence demonstrated that attempts at compromise failed because Mrs Kyriacou refused to move on the most important issue, in which she was in the wrong; even if greater weight had been given to the correspondence I am satisfied that it would not have caused the balance to tip more in Mrs Kyriacou's favour on the issue of unreasonable conduct.

51. Mr Fain next submitted that the FTT had taken account of irrelevant considerations. It had criticised Mrs Kyriacou's conduct of the proceedings in eight specific respects before concluding that she had behaved unreasonably throughout the proceedings. Mr Fain took issue with almost all of these criticisms.

52. The FTT first pointed out that the proceedings had been initiated a mere five months after the end of the previous litigation "which in itself is suggestive of an aggressive and pugnacious attitude, lacking the will to reach a conciliatory settlement." Mr Fain noted, correctly, that eight months rather than five had elapsed between the first FTT's decision and the commencement of the current application. More importantly, he suggested that the mere fact of commencing a further set of proceedings ought not to have been characterised as aggressive, pugnacious, or as demonstrating an unwillingness to reach a settlement. The pre-application correspondence showed that that was not Mrs Kyriacou's approach at all.

53. I agree with the FTT that the commencement of a further application so soon after the determination in July 2019 was indeed indicative of a pugnacious attitude. In particular, Mrs Kyriacou's choice to raise once again the issue of the placing of rubbish bags or bins on the entrance way, when the same issue had been comprehensible investigated by the FTT on the previous occasion, was manifestly unreasonable. Her insistence that she would not allocate space for dustbins and her suggestion that Ms Linden should either make use of her own garden or pay for a space in the front garden, were consistent only with a determination to achieve a victory on every point, whatever the rights of the parties.

54. Secondly, the FTT said that three out of six "specious allegations" originally included in the application had been struck out at the preliminary hearing. Mr Fain submitted, and I agree, that it was not apt to regard the alleged breach of the insurance covenant as specious, since the allegation ought to have succeeded, as it now has. That is a powerful point to which the FTT had no regard, having come to the wrong conclusion about the breaches.

55. The FTT also referred to the fact that none of the allegations which had proceeded to the final hearing had been substantiated. Once again I agree with Mr Fain that that was a misdirection. The insurance allegation ought to have been found to have been made out. A party is not to be treated as having behaved unreasonably simply because an allegation has been made which the tribunal does not accept. On the other hand, in this case the FTT could quite properly treat the allegation in relation to the storage of dustbins as specious for the reasons I have already explained. The allegation concerning the cost of repairs to the common parts was based on a misconception about the effect of the covenant. It had never been suggested that Ms Linden herself should carry out the works, and the disagreement

was over whether they should be done by Mr Kyriacou or by an independent contractor. The dispute was petty and it was more indicative of Mr and Mrs Kyriacou's unwillingness to compromise than of their unreasonable conduct of the proceedings.

56. As for the three allegations which had been struck out, one of those, relating to payment for repairs to the roof, was struck out only because section 169(7) of the 2002 Act exempts covenants to pay service charges from the requirement to obtain a determination under section 168 before steps towards forfeiture may be commenced. I agree with Mr Fain that a litigant in person ought not to be treated as behaving unreasonably simply because they have brought a claim relying on the wrong statutory provision. There were, however, a number of other objections to the alleged breach of covenant. In particular, Ms Linden appears already to have tendered her share of the cost of repairing the roof; indeed, Mrs Kyriacou's explanation for not having included the alleged failure to pay for the roof repairs in the original FTT application was that she had understood the parties had reached an agreement on that issue. From the pre-application correspondence it is apparent that there was no real dispute about payment for the roof, and that the only significant dispute was about the allocation of space for dustbins. Had Mrs Kyriacou complied with the requirements of the lease by nominating a space it is likely that the sum in respect of the roof repairs would have been paid much sooner than it was. Thus, while the FTT may have been over critical of Mrs Kyriacou's command of tribunal procedure, the fact that she had brought a claim raising issues which were summarily dismissed because they overlapped with the previous proceedings, was a matter which the FTT was entitled to take into account in considering whether she had behaved unreasonably.

57. Mr Fain next objected to the FTT's reliance on an incident involving Mrs Kyriacou's husband, Mr A Kyriacou. In paragraph [26] of its decision the FTT said that "Mr A Kyriacou's attitude was witnessed by Ms Fowler who gave evidence that he had on one occasion aggressively attempted to push his way into the ground floor flat after she had lawfully refused him entry." Mr Fain suggested that the behaviour of Mrs Kyriacou's husband was completely irrelevant to the issue of her own conduct of the application. This was in contrast to the position under section 29(4), 2007 Act which enables an order for payment of wasted costs to be made where a legal or other representative has acted unreasonably. Mr Fain acknowledged that Mr Kyriacou was Mrs Kyriacou's representative but submitted that his behaviour was irrelevant when the FTT was considering the exercise of its power under rule 13(1)(b).

58. On this point I agree with Mr Fain that the FTT may have conflated the conditions for making an order in respect of wasted costs and those relevant to an order under rule 13(1)(b). Nevertheless, as Mr Armstrong pointed out, Mrs Kyriacou had left the conduct of the proceedings entirely to her husband and, to that extent, any unreasonable conduct by him in relation to the proceedings is relevant. I do not read the FTT's criticism of Mr Kyriacou as being directed against his aggressive attempt to push his way into Ms Fowler's flat (which was nothing to do with the conduct of these proceedings) but rather as treating that incident as indicative of Mr Kyriacou's general attitude - the same aggressive and pugnacious attitude which the FTT had already referred to. Ms Linden was apparently not the only woman Mr Kyriacou expected to do as he told them to and in my judgment his attitude towards another resident in the building was a legitimate subject of comment.

59. The FTT criticised Mrs Kyriacou for wasting the time of Ms Linden and of the tribunal "by failing to disclose until closing submissions the fact that any alleged breach of the insurance covenant in the lease had been remedied in December 2020." This was a reference to the joint names policy which Ms Linden had managed to obtain only after the proceedings commenced. I agree with Mr Fain that the FTT ought not to have regarded the late emergence of that piece of information as evidence of unreasonable conduct on the part of Mrs Kyriacou. Ms Linden was represented by counsel who, presumably, had not drawn the latest insurance position to the FTT's attention before it was revealed in closing submissions by Mrs Kyriacou's son, (who represented her at the hearing). The FTT returned to the same point towards the end of paragraph [26] of its decision when it said that costs had been wasted "in that the insurance claim, in particular, should have been withdrawn before or at the commencement of the present hearing." The FTT was not entitled to take account of Mrs Kyriacou's failure to withdraw her case that there had been a breach of the insurance covenant or to treat it as a demonstration of her unreasonableness. In my judgment there had been a breach and she was entitled to the determination which she sought.

60. The FTT then described the allegations made by Mrs Kyriacou as "lacking in supporting evidence (despite the 1,000 pages of documents in the applicant's previous bundle) and disturbingly not evidenced by a witness statement from the applicant in person." It is true that Mrs Kyriacou had not filed a witness statement, but she had signed a very detailed statement of case. Despite that the FTT stated that it had been "unable to question her about the matters contained in her statement of case". I do not understand why the FTT should have felt itself unable to ask questions of Mrs Kyriacou or why it should have regarded the absence of a witness statement by her as in any way disturbing. Mrs Kyriacou's statement of case ran to 19 pages and 121 paragraphs going into the detail of her allegations in considerable depth. It was supported by a statement of truth. It is difficult to see what more she could have said to the FTT about her case. Mr Kyriacou provided a witness statement and gave oral evidence. In the previous FTT decision in 2019 it was recorded that Mrs Kyriacou's understanding of English was limited and that her husband would give evidence on her behalf. No objection appears to have been taken to that course at the first hearing and it was quite proper for Mr and Mrs Kyriacou to adopt the same approach at the second hearing. The FTT therefore ought not to have regarded the absence of a witness statement from Mrs Kyriacou as a demonstration of unreasonable conduct.

61. The FTTT concluded that it would make an award of costs because Mrs Kyriacou's conduct had been unreasonable "in pursuing an unsubstantiated claim". Part of the claim was substantiated and other aspects of the FTT's criticisms were unjustified; in particular it ought not to have given the weight which it did to the late emergence of details of the current insurance arrangements, or to Mrs Kyriacou's failure to provide a witness statement.

62. I therefore agree with Mr Fain that the FTT's decision to make an order under Rule 13(1) was based on a flawed assessment of the relevant considerations and took account of irrelevant considerations. I cannot be satisfied that the FTT would have made the same order for the payment of more than £35,000 in costs if it had come to the correct conclusion about the breach of the insurance covenant. I would go further and say that I do not consider that the FTT could properly have made an order requiring Mrs Kyriacou to pay all of the Ms Linden's costs (subject only to summary assessment) where it ought to have found that she had been in breach of the insurance covenant and it ought to have made the determination which Mrs Kyriacou sought in the proceedings. For those reasons I allow the

appeal against the costs decision and I set aside the order that Mrs Kyriacou pay Ms Linden £35,841.

Redetermination of costs application

63. I asked both parties what they would like me to do if I were to allow the costs appeal and set aside the FTT's order. Neither wanted the matter to go back to the FTT for a further hearing. They had covered all of the points which they wished to have taken into account in their submissions on the appeal and they asked that the Tribunal substitute a decision of its own on Ms Linden's original application for the costs of the proceedings in the FTT.

64. Where the Tribunal sets aside a decision of the FTT it must either remit the case to the FTT for its reconsideration or remake the decision (section 12(2)(b), Tribunals, Courts and Enforcement Act 2007). The better course is usually for decisions on costs to be made by the tribunal before whom the relevant part of the proceedings was conducted but, exceptionally, I will accede in this case to the parties' request and re-make the decision.

65. I have no doubt that Mrs Kyriacou's conduct in bringing the application before the FTT was unreasonable in certain specific respects. In particular, it was unreasonable to raise for a second time allegations about the storage of dustbins when the same allegations (although relating to different occasions and different sub-tenants) had so recently been fully considered and rejected by the FTT in July 2019. It was also unreasonable to include in an application issued in March 2020 allegations about builders depositing rubbish in the front garden in 2017 (one of the allegations which was struck out) when Mrs Kyriacou had had the opportunity to raise those allegations when she applied to the FTT in 2019.

66. In the context of the allegation that rubbish and refuse bins were being deposited unlawfully in the entrance way, I bear in mind that the root cause of that problem, which has persisted for more than 20 years, is Mrs Kyriacou's refusal to give effect to the right granted to Ms Linden by the lease to use an area prescribed by Mrs Kyriacou for that purpose. Where a contract grants one party a right to do something but qualifies that right in a way which requires a nomination or decision by the other party, the right cannot be defeated by a refusal of the other party to make the necessary nomination. The opportunity to nominate will be treated as having been waived if it is not exercised and the other party will be free to exercise its right in any way which would be considered reasonable. In this case the lease gives Ms Linden the right to place dustbins in an area nominated by Mrs Kyriacou. The right to nominate is for the landlord's benefit and if Mrs Kyriacou does not make use of it, she cannot complain of a breach of covenant if Ms Linden's tenants place their dustbins on any land belonging to Mrs Kyriacou. Nor, I would have thought, could Mrs Kyriacou complain if the ground floor's dustbins were placed in the front garden, which, I presume, is where the maisonette's dustbins are stored. The fact that Mrs Kyriacou is not the exclusive owner of the front garden but holds a lease of it together with her husband, does not mean she could not nominate part of it to give effect to the respondent's right. Her refusal to do so, or to nominate any other area, is a seriously aggravating factor which pervades the correspondence which preceded the application.

67. I am therefore satisfied that Mrs Kyriacou behaved unreasonably by seeking a determination that there had been a breach of the covenants against causing a nuisance and against obstructing the access way, in each case by depositing dustbins on it.

68. I am also satisfied that it is appropriate in this case to make an order that Mrs Kyriacou pay part of the respondent's costs. The alleged breaches of covenant have been minor at best, no real damage has been suffered, and there has never been any realistic prospect of a forfeiture, yet Mrs Kyriacou's refusal to deal reasonably with Ms Linden and her unneighbourly insistence on precise compliance with the terms of a poorly thought out lease have had substantial financial repercussions for the respondent. The information provided to the Tribunal suggests that Ms Linden has incurred legal expenses in excess of £60,000 in these proceedings alone (including the costs of this appeal). It is quite appropriate for the Tribunal to make an order for costs not only to reimburse expenditure by Ms Linden but also to discourage Mrs Kyriacou from a repetition of the same conduct. I will therefore make an order under Rule 13(1)(b).

69. It would not be appropriate to make an order that Mrs Kyriacou pay the whole of the respondent's costs subject only to summary assessment. That was the route which led the FTT to make an order for the payment of more than £35,000, but it would not be justified in a case which Mrs Kyriacou was entitled to bring because of the breaches of the insurance covenant. In any event, costs on that scale are quite disproportionate for a dispute of such triviality. I appreciate that any application under section 168(4) raises the spectre of forfeiture and must be taken seriously, but the FTT is well able to accommodate parties who represent themselves (as Mr and Mrs Kyriacou did). While it is understandable that Ms Linden, faced with a landlord apparently determined to embark on forfeiture proceedings, should seek legal advice and representation, that does not mean that Mrs Kyriacou should be responsible for the full financial consequences of that choice even where she has behaved unreasonably.

70. The jurisdiction under rule 13(1)(b) is flexible and the amount which may be awarded need not be limited to the costs caused by the unreasonable conduct. Nevertheless, a causal relationship between the unreasonable behaviour which is found to have occurred and costs which have been incurred should be taken into account. Mrs Kyriacou was entitled to bring her application to obtain a determination that the insurance covenant had been breached. If she had limited her complaint to insurance, and in particular if she had omitted the further allegations about storage of dustbins, it is likely that the hearing before the FTT would have been completed within 1 day (it certainly should have been). The costs incurred by Ms Linden would have been significantly reduced. I bear that in mind.

71. The appropriate order in this case is that Mrs Kyriacou should make a contribution of £10,000 towards the respondent's costs. Payment should be made within 28 days.

Martin Rodger QC,

Deputy Chamber President

18 November 2021

Right of appeal

Any party to this case has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.