FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BH/LBC/2020/0024**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**Ground floor flat, 14 Folkestone Road London E17 9SD**
Applicant	**:**	**Ms A Kyriacou**
Representative	**:**	**Mr C Kyriacou**
Respondent	**:**	**Ms V Linden**
Representative	**:**	**Mr M Davies of counsel**
Type of application	**:**	**Application for the determination of alleged breaches of covenant under section 168(4) Commonhold and Leasehold Reform Act 2002 (the "Act")**
Tribunal member	**:**	**Judge F J Silverman MA LLM** **Mr A Harris LLM FRICS FICArb** **Mr J Francis QPM**
Date of hearing	**:**	**26 and 27 January 2021**
Date of decision	**:**	**01 February 2021**

DECISION

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1 The Tribunal declines to grant a declaration under s 168 **(**4) Commonhold and Leasehold Reform Act 2002. For the reasons set out below it did not find any of the Applicant's allegations of breaches of covenant by the Respondent to have been substantiated.

2 Exercising its jurisdiction under Rule 13 of the Tribunal Rules of Procedure, the Tribunal orders the Applicant forthwith to pay to the Respondent the sum of £35,841 (thirty five thousand eight hundred and forty one pounds) by way of contribution to the Respondent's legal costs of defending this application.

REASONS

1 By an application dated 23 March 2020 (Page A3) the Applicant landlord sought a determination pursuant to s.168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the Respondent was in breach of various covenants contained in her lease dated 10 September 1984 (page A35) of the ground floor flat 14 Folkestone Road, London E17 9SD (the property).

2 Directions were issued by the Tribunal on 11 August 2020 and again on 29 October 2020 following a preliminary hearing at which three of the six breaches alleged by the Applicant were struck out under Rule 9(3) of the Tribunal Rules of Procedure as having no reasonable prospect of success (page A14 et seq). The Decision dated 29 October 2020 reminded the Applicant that the fact that parts of the application were permitted to proceed was not a warranty that they would ultimately be successful, only that the remaining issues were not of themselves without *any* reasonable prospect of success.

3 The three breaches outlined below are those which remained extant following the preliminary hearing on 29 October 2020 and, apart from costs, are the only issues which were before the Tribunal at the hearing on 26 and 27 January 2021.

4 The breaches which were considered by the Tribunal at the hearing which is the subject of this decision are:

a. The alleged breach of paragraph 2(ii) of the Respondent's lease relating to the repair of the common parts;

b. The alleged breach of paragraph 17, Third Schedule which imposes obligations on the tenant in relation to the insurance of the demised premises;

c. The alleged breach of paragraph 7, Fourth Schedule which prohibits the obstruction of the Entrance Way and hall.

5 The hearing took place by way of a remote video hearing which was not objected to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

6 Restrictions in place on account of the Covid pandemic prevented the Tribunal from making a physical inspection of the property. The Tribunal considered that the issues before them did not require a physical inspection and were assisted by photographs of the property supplied by the parties and views of the property on Google maps.

7 At the hearing the Applicant was represented by her son, Mr C Kyriacou, and the Respondent was represented by Mr Davies of counsel.

8 The Tribunal heard evidence from Mr A Kyriacou , the Respondent, Mr S Cowen and Ms N Fowler (both witnesses for the Respondent) and submissions from Mr Davies and Mr C Kyriacou. They also considered the documents in the parties' respective hearing bundles the content and length of which had been prescribed by paragraph 35 of the Decision and Directions dated 29 October 2020. Written schedules of costs were supplied to the Tribunal electronically.

9 The Tribunal noted that the Applicant, Mrs A Kyriacou, although present at the beginning of the video hearing had not filed a witness statement. Mr C Kyriacou said that his mother's signed statement of case (page A61) had been agreed with her and that she had been assisted by family members with correspondence and preparation of the Tribunal case. The Tribunal was therefore unable to question her about the matters contained in her statement of case which was also not subjected to cross-examination by the Respondent.

10 At the commencement of the hearing Mr C Kyriacou made an application to adduce further documents. He said that it had become necessary to produce further documents because of the contents of the Respondent's reply to the allegations and that the Respondent had exceeded the document limit prescribed at the previous hearing at which the Applicant's representative had himself presented a bundle which exceeded 1000 pages.

11 The Respondent objected to the inclusion of further documents at this late stage. Having retired to consider the matter the Tribunal refused the Applicant's application on the grounds that it was made too late and was not central to the allegations under discussion. Further, the documents referred to had been in existence before the previous hearing and could have been included in the present bundle if the Applicant had considered it necessary to do so. The Applicant was factually mistaken in his reference to the number of documents in the Respondent's bundle which numbered 103 (ie within the prescribed limit of 150 pages).

12 The Applicant then asked the Tribunal to adjourn the hearing to another day which application was also refused. Both parties had known since the end of October 2020 that the hearing would be scheduled for January 2021 and had ample time to prepare. It would be unfair on the Respondent to delay the proceedings further.

13 The property which is the subject of this application comprises a one bedroom ground floor flat in a mid-terrace two storey house situated in a residential

area of Walthamstow, East London. The property was probably built in the early part of the 20th century and is constructed of brick with a pitched roof . It has an open entrance porch protecting the front door, with a tiled pathway leading over the very small front garden to the public pavement/highway. There is no side access to the property but its rear garden is included as part of the demise in the Respondent's lease. The upper flat and front garden are demised to the Applicant and her husband as co-owners. The Applicant owns the common parts and freehold reversion of the property in her sole name. Both flats are sub-let to tenants ie neither the Applicant nor the Respondent actually live at their respective demised premises.

14 The first alleged breach to be considered by the Tribunal related to the repair of the common parts of the building in respect of which clause 2(ii) of the lease provides:

"*The Lessee HEREBY COVENANTS with the Lessor as follows:*

(ii)In Common with the Lessor or the Lessee of the other maisonette in the property to carry out the work specified in the Second Schedule hereto and to pay one moiety of the cost and expense thereof."

15 The second schedule of the lease refers to the structure and common parts of the building. There was no argument between the parties as to what was covered by the clause nor that the Respondent was liable for one half of the cost of those repairs. The current dispute (as applicable to this application) arose out of Mr A Kyriacou's wish to repair a damaged tile in the entranceway, a broken glass panel above the front door and to replace flooring in the common hallway. He claimed that these items were urgent on health and safety grounds. His initial estimate of £65 for repairing the tile was acceptable to the Respondent and that work was carried out by Mr A Kyriacou but the Respondent suggested that alternative quotes should be obtained for the other works. She obtained a quote herself from an independent builder to which Mr A Kyriacou responded by increasing his own quote to a similar level to that quoted by the independent builder. No explanation for the increase in cost was provided at the time but Mr A Kyriacou said in cross-examination that having seen the builder's estimate he increased his own to the going rate. He confirmed that he is not a builder by trade. He did not seek to obtain a further independent estimate from a contractor of his own choice. The Respondent felt that in the light of the previous disagreements between herself and Mr A Kyriacou that the engagement of a qualified independent contractor was a sensible safeguard for them both. In evidence (page A81 et seq) Mr A Kyriacou said that he was capable of doing the works himself but did not assert that he was qualified to do so. He confirmed that he is not a builder by trade. As at the date of the hearing the disputed works remain largely uncompleted.

16 It seems that the Applicant's only evidence of purported breach of this clause is the Respondent's insistence on obtaining independent estimates before deciding on what work should be done and by whom. She agreed that the works needed to be done but queried their necessity as 'urgent' . The fact that

the works remain outstanding supports the Respondent's assertion that the works were not urgently required as 'health and safety issues' as stated by Mr A Kyriacou. Most lease clauses make provision for independent quotations to be obtained by a landlord prior to works being undertaken and it is a matter of regret that the lease under discussion is unusually and inadequately drafted in this respect. The Tribunal can find no breach of this clause by the Respondent. She was entitled to ask the landlord to obtain independent quotes and to withhold her consent to the works until satisfied that they were going to be carried out by a reasonably competent contractor at a reasonable cost.

17 The second alleged breach to be considered by the Tribunal related to insurance where the lease provided as follows (Third Schedule para 17):

"Forthwith to insure and at all times during the said term to keep insured the Demised Premises and all buildings erections and fixtures of all insurable nature which are now or may at any time during the said Term be erected or placed upon or affixed to the Demised Premises against loss or damage by fire storm and other insured risks including two years loss of rent and also including Architects and Surveyors fees that may be incurred in and about any rebuilding or reinstatement thereof and against damage or breakage arising from any cause whatever in the full replacement value thereof in such insurance office as the Lessor shall approve in the joint names of the Lessor and the Lessee whether in conjunction or not in conjunction with the name or names of any other person or persons legally or beneficially interested in the Demised Premises and when required to produce to the Lessor and his Agent the policy for every such insurance and the receipt for the last premium thereof and in case the Demised Premises or any part thereof shall at any time during the said Term be destroyed or damage by fire then as often as the same shall happen with all convenient speed to lay out all moneys received in respect of such insurance in rebuilding repairing or otherwise re-instating the Demised Premises in a good and substantial manner to the satisfaction of the Surveyor for the time being of the Lessor and in case the moneys received in respect of the said insurance shall be insufficient for the purpose to make good any deficiency out of his own moneys."

18 The Applicant's complaints about the Respondent's failures with her insurance were many and varied. The Tribunal noted however, that at all times during the period under discussion the property had been covered by an insurance policy which covered all the usual insurable risks issued by a mainstream insurance company through an independent broker. (see pages 106-119) The Applicant accepted that the terms of the lease covenant (above) entitle the landlord to raise objections to the insurance provider but not to object to the minutiae of the policy. None of the Applicant's objections related to the policy provider. One of the Applicant's objections relating to the terms of one of the policies taken out by the Respondent was that the policy did not cover two year's loss of rent. Since the total loss of rent over two years would be £120 (ground rent) the Tribunal does not consider this to have been a

significant detriment to the Applicant. The terms of the covenant in this lease are somewhat unusual in that they require insurance of the demised premises to be in the joint names of the landlord and tenant. The Respondent had experienced some difficulty in complying with this provision since the landlord has no insurable interest in the demised premises. Mr Cowen, an insurance broker who gave unchallenged evidence on behalf of the Respondent (page R23), confirmed that position and said that it was very unusual either for a lease to make provision for the insurance to be in the joint names of landlord and tenant or for an insurer to issue a policy in joint names. The usual situation is for the lease to provide and for the insurer to insure the property in the tenant's name with the landlord's interest being noted on the policy.

19 The Applicant also asserted that the various policies taken out by the Respondent were void for misstatements. The Tribunal dismisses these unsupported allegations. It is for the insurer to say whether or not a policy is vitiated by the act or conduct of the insured. No evidence was produced by the Applicant to demonstrate that to be so in this case.

20 Only during closing submissions did the Applicant state that the Respondent 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 the Applicant's application is incapable of succeeding.

21 The final alleged breach which the Tribunal was asked to consider related to paragraph 7 of the Fourth Schedule which states as follows:

"The Entrance Way and hall shall not be in any way obstructed with any objects."

22 The Applicant's complaint related to the alleged obstruction of the front pathway by the Respondent's sub-tenant's rubbish bins. The Applicant's statement of case (page 61 et seq) cited four separate occasions on which two black dustbins used by the tenant of the Respondent's flat had been left for lengthy periods on the front pathway and had obstructed it. The dates listed however only covered short overnight intervals and not the 'lengthy periods' asserted by the Applicant. These dates could logically coincide with a bin collection expected on the following morning. In oral evidence Mr A Kyriacou said that on one occasion (date unspecified) he had difficulty in moving a sofa over the path because of the presence of the bins . The Applicant's photographic evidence of the bins (page A150) showed two small classic dustbins (not wheelie bins) on the side of the path but patently leaving sufficient room for adults to pass along the path without difficulty. A normal interpretation of the word 'obstruction' would suggest that the offending object would need to block the passage of anyone/anything either totally or to a large degree. There is insufficient evidence of that in this case. The Applicant said that she had asked her tenants to keep their bins in the back garden (part of her demise) and to only take them out on the night before a

collection. She accepted that the bins should not be placed on the front garden belonging to the upper flat and said it was not possible to leave them on the public pavement. There was no place other than the front path where the bins could be left for collection and they were removed as soon as possible after being emptied. She had specifically bought small bins which were portable and had engaged a private waste collector to deal with them rather than rely on the sometimes unreliable service provided by the local council. The Tribunal considers that the Respondent had done everything she could to ensure that the bins did not cause a problem to the Applicant. The evidence produced does not show an obstruction of the pathway and the Tribunal does not find this allegation to be substantiated.

23 The Tribunal notes that the lease provides that the landlord (the Applicant) will designate a place where the tenant of the lower flat can store dustbins. The Applicant has failed to do so other than saying that the Respondent must keep the bins in the back garden which in the Tribunal's opinion does not satisfy this requirement since the rear garden is part of the demise to the Respondent's flat and the wording of the covenant implies that the designated place will be on the part of the property which is under the Applicant's control eg common parts, such as the front path. The Respondent 's dustbin difficulties stem from the Applicant's failure to comply with her own obligations in this respect under the lease. The Tribunal does not consider that the four discrete occasions cited by the Applicant coupled with the Respondent's clear endeavours to comply with the Applicant's wishes constitute a breach of this covenant. The Tribunal dismisses the Applicant's oral assertion that the Respondent wanted to steal the front garden of the property as without foundation.

24 This application was commenced by the Applicant less than three months after the final determination of the Applicant's previous application against the Respondent (also for breach of covenant page A24)). In reply to a question from the Tribunal Mr A Kyriacou said that the Applicant's intention, in the event of securing a declaration from the Tribunal, was to proceed with proceedings for forfeiture. He said that the Respondent could either 'pay up or choose to forfeit her lease'. This answer conflicts with the view he expressed at the recent preliminary hearing that forfeiture was not being contemplated. It is unclear what the Respondent could be expected to 'pay up' since no evidence of loss or damage was asserted by the Applicant.

25 Both parties made applications for costs supported by costs schedules. It was unclear on what basis the Applicant was claiming costs. No detail was supplied of what work had been done to justify the days spent on preparation of the case charged for both Mr C and Mr A Kyriacou at a daily rate of £800 each and totalling £30,000. Neither Mr C nor Mr A Kyriacou are legally qualified and no solicitor's costs were claimed. Mr C Kyriacou confirmed to the Tribunal that neither he nor his father Mr A Kyriacou had suffered any loss of income as a result of the time spent preparing the case. As a lay representative Mr C Kyriacou may not have appreciated that an award of costs is not automatically made as a result of Tribunal proceedings. In any event, since the Applicant's case has not succeeded on any grounds, such an award would be wholly inappropriate in this case. Similarly, the return of the

Applicant's application and hearing fees will not be made in this case. Since the lease does not contain a general administration charge clause, these costs cannot be recovered as a part of any future purported service charge.

26 The Respondent's application for costs was based on the Tribunal's jurisdiction under Rule 13 of the Tribunal Rules of Procedure which applies where it is shown that the conduct of the proceedings by a party or a party's representative has been unreasonable or costs have been wasted. On behalf of the Respondent it was alleged that the conduct of the Applicant throughout these proceedings has been unreasonable. Not only were these proceedings initiated a mere five months after the end of the Applicant's previous litigation against the Respondent, which in itself is suggestive of an aggressive and pugnacious attitude, lacking the will to reach a conciliatory settlement, the application was founded on six specious allegations three of which were struck out at preliminary hearing. Mr A Kyriacou's attitude was witnessed by Ms Fowler who gave evidence (page R25) that he had on one occasion aggressively attempted to push his way into the ground floor flat after she had lawfully refused him entry. None of the remaining allegations have been substantiated at the present hearing and the Applicant wasted the time of both the Respondent and 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. The only allegation which had any possible foundation related to the placement of the Respondent's dustbins and even this argument could have been avoided if the Applicant had complied with her own lease obligations and designated an area for their storage. In the main, the allegations made by the Applicant have been grossly exaggerated, lacking in supporting evidence (despite the 1000+ pages of documents in the Applicant's previous bundle) and disturbingly not evidenced by a witness statement from the Applicant in person. The Tribunal has no hesitation in agreeing with the Respondent's assertion that the conduct of the Applicant and her representative(s) has throughout these proceedings been both unreasonable and vexatious within the meaning of those words as defined in Ridehalgh v Horsefield [1994] Ch 205 and more recently in Willow Court Management Co (1885) v Alexander [2016] UKUT 290. 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 the Applicant'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. The Tribunal also notes that the Respondent's prior offer to vary the terms of the lease was rejected by the Applicant.

27 The Respondent's schedules of costs for both hearings (14 October 2020 and current hearing) give details of the person(s) involved in the preparation of the case, what they have done, the time spent and their hourly rates. She had little option but to defend the proceedings brought against her and sensibly sought professional advice and assistance in order to do so. The Tribunal accepts that the hourly rates claimed (namely £325/350 Grade A and £130/250 Grades C&D) are within the band of rates currently applicable to a firm of solicitors practising in Greater London and that the amount of work

done on what should have been a straightforward case, was exacerbated by the Applicant's conduct and the requirement prior to the previous hearing to examine and respond to a document bundle in excess of 1,000 pages. Even given these circumstances, the Tribunal finds the Respondent's schedule totalling £47,788 somewhat high and chooses on a summary assessment to make an overall reduction of 25% giving a total claimable sum of £35,841 (out of which Counsel's fees should be paid in full) which the Tribunal orders to be paid to the Respondent by the Applicant forthwith.

The Law

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 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

(7)Nothing in section 168 affects the service of a notice under section 146(1) of the Law of Property Act 1925 in 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).

Rule 13 Tribunal Rules of Procedure

1 3(1) The Tribunal may make an order in respect of costs only —

(a) under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in—

(i) an agricultural land and drainage case,

(ii) a residential property case, or

(iii) a leasehold case; or

(c) in a land registration case.

Name: Judge F J Silverman **Date:** 01 February 2021

Note:
Appeals

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 rplondon@justice.gov.uk.
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.

