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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00LC/LSC/2014/0121 CHI/00LC/LBC/2014/0029
Property	:	Flat B, 128 Saxton Street, Gillingham, Kent ME7 5EQ
Applicant	:	Mercia Investment Properties Limited
Representative	:	Circle Residential Management Limited
Respondent One	:	Daniel James Oldfield
Representative	:	
Respondent Two	:	National Westminster Bank PLC
Representative	:	Irwin Mitchell
Type of Application	:	Liability to pay service charges (section 27 of Landlord and Tenant Act 1985) Breach of covenant (section 168 of Commonhold and Leasehold Act 2002)
Tribunal Member(s)	:	Judge Tildesley OBE Judge Agnew
Date of Decision	:	16 September 2015

DECISION ON STRIKE OUT AND ORDER FOR COSTS
(Rules 9 and 13 of the Tribunal Procedure Rules 2013)

Summary Decision

1. The Tribunal strikes out the section 27A application for abuse of process in accordance with rule 9(3)(d) of the Tribunal (First-tier Tribunal) (Property Chamber) Procedure Rules 2013 ("Tribunal Procedure Rules 2013"). The Tribunal intends to make an order for costs in the sum of £2,043.50 plus VAT to Respondent Two pursuant to rule 13 of the Tribunal Procedure Rules 2013. The Tribunal is minded to order Mr Martin Paine of Circle Management, the Applicant's representative, to pay those costs in the form of a wasted costs order in accordance with rule 13(1)(a) of the Tribunal Procedure Rules 2013 and section 29(4) of the Tribunals, Courts and Enforcement Act 2007. **The Tribunal gives Mr Paine an opportunity to respond in writing which must be received by the Tribunal by no later than 25 September 2015 with a copy to The Bank.**

The Matter for Determination

2. These proceedings involve two applications, one for breach of covenant and the other for determination of service charges, taken out by the Applicant in November 2014 against Mr Oldfield (Respondent One), who was the registered proprietor of the leasehold interest in Flat B 128 Saxton Street, Gillingham. Mr Oldfield, however, had not occupied the property since 26 September 2013 when an order for possession of Flat B, 128 Saxton Street was made in favour of National Westminster Bank PLC (Respondent Two and also referred to as The Bank). Mr Oldfield was also required to pay The Bank the judgment sum of £80,370.21.

3. On 26 February 2015 Irwin Mitchell acting for The Bank requested the Tribunal to make amongst other matters an order dismissing the section 27A application and an order for costs against the Applicant.

4. On 22 May 2015 the Tribunal served the Applicant with notice of the Tribunal's intention to strike out its application for determination of an interim service charge for the year ending 30 November 2015. Further the Tribunal advised the Applicant that it was minded to make an order for it to pay the costs incurred by Respondent Two in these proceedings. The Applicant had previously withdrawn the breach of covenant proceedings on 6 February 2015.

5. The Tribunal invited the parties' representations on the above matters by the 8 June 2015 with a right of reply by 15 June 2015. The Applicant supplied its responses on 5 and 17 June 2015 respectively. Respondent Two provided its response on 12 June 2015.

6. On 6 July 2015 the Tribunal advised the parties that their representations raised issues of fact and law which required further investigation before it made its decision on the strike out and order for costs. The parties were invited to make their representations by 15 July 2015 which they duly did.

7. The Tribunal convened on 6 August 2015 in the absence of the parties to make its determination on the papers[1].

8. The background and the chronology of the proceedings are set out in Appendix One.

9. The Applicant is Mercia Investment Properties Limited which was represented throughout by Mr Martin Paine of Circle Residential Management Limited (hereinafter referred to as Circle). The Applicant and Circle share the same registered address.

10. Respondent One is Mr James Daniel Oldfield who was the leaseholder under the terms of lease.

11. Respondent Two is National Westminster Bank PLC (The Bank) which had taken over the mortgage to the property from National Westminster Home Loan. Ascent Legal originally represented The Bank. Irwin Mitchell, however, took over the representation of The Bank.

The Facts: Strike Out of Section 27A Application

12. The Tribunal intends to structure its findings under various headings covering the Applicant's state of knowledge; the Applicant's reasons for bringing proceedings and the Applicant's dealings with the Tribunal and with Mr Oldfield respectively.

Applicant's State of Knowledge

13. On 14 November 2014 the Applicant applied for a determination of Respondent One's liability to pay a service charge for the year ended 30 November 2015. The Applicant named Mr Daniel James Oldfield of Flat B, 128 Saxton Street, Gillingham, Kent, ME7 5EQ as the Respondent.

14. The Applicant stated in the application the matter in issue was the interim service charge in the sum of £2,569.05 for the year ending 30 November 2015, of which the tenant of Flat B was liable for 50 per cent of the budget, namely, £1,284.53. The interim service charge was payable in two equal instalments on 1 December and 1 June.

15. The estimated budget for the year ending 30 November 2015 included no proposals for major works or unusual items of expenditure. The estimated expenditure was for routine items with no suggestion of a substantial increase from previous years.

[1] On 9 March 2015 the Tribunal directed the section 27A application be determined on the papers.

16. The Applicant also provided details of the mortgagee in the Application as an interested party. The mortgagee was named as National Westminster Home Loan.

17. In its response to the Notice to Strike Out, the Applicant confirmed that it was aware the mortgagee had taken possession of the property but was unable to give a precise date. Respondent Two acknowledged that it was unable to confirm the date the Applicant was notified of when The Bank took possession. Respondent Two, however, maintained that the Applicant would have been aware of The Bank's possession of the property when the Applicant took forfeiture proceedings in the County Court (Claim Number A00ME734) in July 2014 in respect of Flat B, 128 Saxton Street.

18. On 25 September 2014 Ascent Legal on behalf of The Bank reached an agreement with the Applicant to settle the forfeiture proceedings (Claim Number A00ME734) in connection with Flat B, 128 Saxton Street.

19. The terms of the settlement were:

    (a) The Bank to pay the Applicant £7,500 in full and final settlement of the matter.

    (b) The Applicant to file and serve a notice of discontinuance of the proceedings.

    (c) The Applicant to make an application to Land Registry to remove the unilateral notice from the register to title K726231 (Flat B, 128 Saxton Street).

    (d) The Applicant to provide written agreement that any future demands for payment of service charges, ground rent or any incidental fees will be referred to The Bank at least 14 days before issuing any further claims in respect of the same.

20. On 9 October 2014 the Applicant sent the agreement referred to in 12(d) above to Ascent Legal. The letter stated:

> "We confirm that in future we, or our agents Circle Residential Management Limited, will put you on notice to request payment of ground rent or service charges on behalf of the tenant prior to us taking any steps to issue County Court proceedings against Daniel James Oldfield...
>
> If any sum due under the terms of the lease granted on the above property remains unpaid follow the elapse of the 14 day period above we will be at liberty to issue whatever proceedings we feel are appropriate without any further reference to yourselves or your client".

21. On 27 October 2014 Circle gave notice to Ascent Legal of the sums that were due or would fall to be paid in the near future totalling £898.27 under the terms of the lease for Flat B 128 Saxton Street. The sums demanded included an amount of £642.27 which represented the half yearly payment for the interim service charge ending 30 November 2015.

22. On 10 November 2014 Ms Fiona Hayles of Ascent Legal informed Mr Paine of Circle that The Bank was in the process of arranging for the sum of £742.27 to be transferred using the same accounts details as for previous payments. Ms Hayles advised that the payment did not include the sums of £90 for pre-action demand or £66 in respect of Office Copy. Ms Hayles said that the inclusion of these sums in the amount of £898.27 was contrary to the settlement agreement dated 9 October 2014.

23. On 3 December 2014 the Applicant gave receipt for the sum of £642.26 in payment in full of the interim service charge payable on 1 December 2014 to Mr Oldfield at Flat B 128 Saxton Street. The statement of account stated that the payment was received on 13 November 2014.

The Applicant's Stated Reasons for Bringing the Proceedings

24. In a letter dated 3 December 2014 Ms Walpole of Circle wrote to Mr Oldfield stating that

> "We are asking the Tribunal to determine the reasonableness of the 2014-2015 budget and not the payability of the interim service charges as the December 2014 interim service charge has already been discharged in full and we have not yet demanded the June 2015 interim service charge".

25. Mr Paine in his response dated 27 March 2015 to the Tribunal said the Applicant applied to the Tribunal to decide the following questions in relation to the 2015 budget:

    (a) The person by whom the service charge is payable.

    (b) The amount which is payable

    (c) The date at or by which it is payable

    (d) A determination on costs and reimbursement of fees under Rule 13.

26. Mr Paine also stated that as Mr Oldfield remained the registered owner of the property and a party to the lease the Applicant was entitled to treat Mr Oldfield as the Respondent.

27. Mr Paine in his response dated 5 June 2015 said it was reasonable for the Landlord to issue the section 27A application considering the long history of non-payment in relation to Mr Oldfield. Mr Paine maintained that the whole years' service charge had not been discharged by the date of application.

28. The e-mail correspondence between Mr Paine and Ms Hayles of Ascent Legal representing Respondent Two dated 11 and 12 November 2014 gave another perspective of Mr Paine's reason for making the Application on behalf of the Applicant.

11 November 2014 at 11:35 Mr Paine to Ms Hayles:

> "I have been advised by our accounts dept. that no payment has been received in respect of the above, is the payment to be made today or shall I pass this file to our recovery team".

11 November 2014 at 15:26 Ms Hayles to Mr Paine

> "Further to your telephone conversation earlier with our Hannah Tripkovic. I confirm that the payment has already been made to Simon Burn Solicitors who has previously acted on this matter. The payment was sent to them from our client as we have not received any notification that they were no longer acting on your behalf.
>
> As the payment has already been sent by our client, we will not request they send a further payment. Instead we suggest that this matter can be dealt with amicably given that our client has made the required payment to your solicitors. Perhaps you would liaise with Simon Burn Solicitors to ensure that the payment has been received.
>
> In the meantime, please confirm that no further steps will be taken regarding court proceedings which would be an entirely unnecessary course of action. We of course reserve the right to refer this email in relation to the question of costs and/or conduct as necessary, but trust that this will not become necessary.
>
> Should you wish to discuss this matter, please call me using the contact details below".

12 November at 10:22 Mr Paine to Ms Hayles

> "Noted, however, not a satisfactory response.
>
> Our client cannot be held responsible for your errors and therefore our recovery team are now issuing a s27 application today. Does your client wish to be noted as an interested party".

12 November 2014 at 11:07 Ms Hayles to Mr Paine

> "Your response is entirely unsatisfactory. You have been told that our client has made payment to the solicitors who you have instructed in this matter and who have not been notified are longer acting.

Please confirm whether as Head of Legal, you are a solicitor. If not please confirm, which (if any) professional bodies you belong to. Our client will no doubt wish to take this further and make the requisite complaint to your supervising body.

I expect these details to be provided by return.

Please also note that if you do indeed issue further Court proceedings, those proceedings will be defended and your conduct and the question of costs brought to the Court's attention.

Finally please note that we will now take our client's urgent instructions on whether injunctive relief is appropriate given your conduct in this matter".

12 November 2014 11:23 Ms Walpole of Circle to Mr Paine

"Do you really want me to send a s27 application to the Tribunal? I'm not sure once this email correspondence is disclosed they will look on the application that kindly".

12 November 2014 12:09 Mr Paine to Ms Walpole

"Lets go for it".

29. Circle's comment on Mr Paine's e-mail of 12 November 2014 12:09 was ".... whilst brief and casual in manner was in fact an indication to proceed with the s27 application even if a formal complaint was to be forthcoming".

30. Irwin Mitchell's comment on the e-mail chain was that it "amply demonstrates the vexatious and aggressive stance of the Applicant and of the fact that the Applicant has caused increased costs by taking unnecessary formal action".

The Applicant's dealings with the Tribunal

31. The Applicant did not disclose on the Application form that

(a) The Bank had taken possession of the property.
(b) Mr Oldfield no longer lived at Flat B 128 Saxton Street.
(c) Details of the agreement with the Bank dated 9 October 2014 putting the Bank on notice of demands for service charge.
(d) The interim service charge due on 1 December 2014 had been paid in full.
(e) The Applicant had accepted the payment on 13 November 2014.

32. The Tribunal posted copies of the service charge and breach of covenant applications to Mr Oldfield at Flat B 128 Saxton Street. The envelopes containing the applications were returned to the Tribunal "Marked Gone Away".

33. On 27 November 2014 the Tribunal wrote to Circle asking whether it held an alternative address for Mr Oldfield or if the representative was aware of a reason for the post being returned.

34. On 3 December 2014 Circle responded stating that it did not have an alternative address for Mr Oldfield and that Flat B 128 Saxton Street was the last known address for Mr Oldfield.

35. On 12 December 2014 the Tribunal wrote again to Circle advising of the problems with service of the documents. The Tribunal asked Circle to confirm that the flat was currently unoccupied. Also Judge Tildesley requested Circle to make appropriate enquiries regarding an alternative address for Mr Oldfield.

36. On 17 December 2014 (received 22 December 2014) Circle informed the Tribunal that Mr Oldfield was employed with a local County Council and gave details of the address of his employers.

37. On 14 January 2015 the Tribunal directed the Applicant to serve the applications on Mr Oldfield.

38. The Applicant named National Westminster Home Loan as an interested party but gave no reasons for the Bank's interest in the property except its status as a mortgagee of the property.

39. The Tribunal provided National Westminster Home Loan with a copy of the application on 24 November 2014. The Tribunal also wrote on 12 December 2014 to National Westminster Home Loan enquiring about a correspondence address for Mr Oldfield.

40. On 14 January 2015 Ascent Legal for National Westminster Home Loan contacted the Tribunal requesting an adjournment of the applications for six weeks so that it could discuss them with the Applicant. Ascent Legal informed the Tribunal that The Bank was currently in possession of the property as mortgagee in possession. This was the date when the Tribunal first became aware of the nature of the Bank's interest in the property. Ascent Legal also advised that the Applicant was aware that Mr Oldfield had not lived at Flat B 128 Saxton Street for some time.

41. The Applicant had attached to the Application submitted to the Tribunal a copy of the e-mail chain between Mr Paine and Ms Hayles referred to in paragraph 20 above. There was, however, no explanation of the reason for attaching the e-mail. Judge Tildesley became aware of its significance when he received the parties' responses to the Strike Out notice, which resulted in the issue of further directions inviting representations on the contents of the e-mail chain.

The Applicant's dealings with Mr Oldfield

42. The Applicant made no enquiries of Mr Oldfield about whether he accepted the service charge budget for 2015 prior to making the

Application. The Applicant knew Mr Oldfield's mobile telephone number and work e-mail address when it submitted the Application.

43. The Applicant sent the demand for the interim service charge payable on 1 December 2014 to Mr Oldfield at Flat B 128 Saxton Street on 20 November 2014 which was after the making of the application and receipt of The Bank's payment.

44. Circle first made contact with Mr Oldfield by e-mail on 7 January 2015. Mr Oldfield replied on 8 January 2015 that

> "I was just wondering what we are going back to the Tribunal for I have not been living in the property for over a year and have not received any letters or e-mail in that time".

45. On 9 January 2015 Circle responded informing Mr Oldfield that he was still the registered owner of the property and would be the Respondent in any Tribunal proceedings until such time as the mortgagee sold the property.

46. On 14 January 2015 Circle invited Mr Oldfield to agree to the reasonableness of the cost of the 2015 budget, and to admit to the breach of the tenant's covenant. Circle confirmed that the e-mail of 14 January 2015 was the first time it invited Mr Oldfield to agree to the reasonableness of the cost of the 2015 budget.

Consideration

47. The first decision for the Tribunal is whether to strike out the section 27A Application dated 14 November 2014 for abuse of process.

48. Before considering the parties' arguments the Tribunal finds the following facts:

(a) The Applicant knew or should have known no later than 14 July 2014 that the Bank was a mortgagee in possession of Flat B 128 Saxton Road, and that Mr Oldfield had ceased to reside at the property.

(b) As of 7 October 2014 the Applicant had a binding agreement to give The Bank notice of demands for service charges and ground rents in connection with Flat B, 128 Saxton Street and allow The Bank 14 days in which to settle the outstanding amount.

(c) On 27 October 2014 the Applicant gave notice to The Bank that the interim service charge of £642.27 for the year ending 30 November 2015 was due on 1 December 2015.

(d) On 10 November 2014 Ms Hayles informed Mr Paine of Circle that The Bank had arranged for payment of the service charge due.

(e) The Applicant accepted the payment and allocated it to the statement of account for the property on 13 November 2014.

(f) The Applicant did not disclose to the Tribunal at the making of the application the full nature of The Bank's interest in the property, the fact that Mr Oldfield no longer lived at the property, the details of the payment, and the acceptance of the payment and its allocation to the statement of account. The Applicant's non-disclosure continued despite two requests from the Tribunal enquiring about whether Mr Oldfield lived at the address. The Tribunal was made aware of The Bank's interest in the Property by Ascent Legal in its letter of 14 January 2015. The Tribunal has issued three sets of directions on 9 March 2015, 22 May 2015 and 6 July 2015 in order to establish the facts appertaining to the Application.

(g) The Applicant made no enquiries of Mr Oldfield about whether he admitted the interim service charge for the year ended 30 November 2015 prior to making the Application.

(h) On 14 January 2015 the Applicant invited Mr Oldfield to agree the service charge budget and the breach of covenant which was one day after Ascent Legal contacted the Applicant to withdraw the breach of covenant application.

(i) The Applicant has put forward contradictory reasons for bringing the section 27A application. The Tribunal contrasts Ms Walpole's emphasis on reasonableness of the budget with Mr Payne's reliance on payability and Mr Oldfield's "history of non-payment".

(j) The Tribunal questions the relevance of Mr Oldfield's history of non-payment to the facts of this case. The Applicant was required under the agreement of 9 October 2014 to notify The Bank of monies due under the lease. The Applicant also knew that The Bank would meet those demands because it would not jeopardise its interest in the property.

(k) The Tribunal is satisfied that the e-mail exchange between Mr Paine of Circle and Ms Hayles of Ascent Legal was an accurate reflection of Mr Paine's state of mind at the time of making the Application. The Tribunal finds the most likely explanation for the Application was that Mr Paine took umbrage with Ms Hayle's decision not to alter the payment instructions to the Applicant's solicitors, and decided to make a point by issuing the Application.

49. Respondent Two contended that the section 27A application was misconceived, vexatious and premature. Respondent Two argued since taking possession of the property on 24 October 2013 Mr Oldfield had

no remaining liability in respect of the service charge. According to Respondent Two The Bank had been bound by the tenant's covenants in the lease including the requirement to pay the service charge in accordance with section 141 of the Law of Property Act 1925.

50. Respondent Two referred to the provisions of section 27A(4) of the 1985 Act which state that an application cannot be made to the Tribunal in respect of a matter that has been agreed or admitted by the tenant. Respondent Two pointed out that The Bank would have agreed to the 2015 budget if it had been asked prior to the application being made. Without prejudice to its primary submission about Mr Oldfield's liability, Respondent Two said that Mr Oldfield had not received any information about the 2015 service charge budget until the Applicant's e-mail dated 14 January 2015 inviting him to agree to the budget.

51. Respondent Two relied on the chain of e-mails between Mr Paine and Ms Hayles saying that it amply demonstrated the vexatious and aggressive stance of the Applicant and the fact that the Applicant had caused increased costs by taking unnecessary formal action.

52. The Applicant argued The Bank was not liable to the landlord for any sums under the lease because it was not a party to the lease. Further the Applicant submitted that section 141 of the Law of Property Act 1925 placed no obligation upon The Bank to meet the tenant's obligations under the lease.

53. The Applicant stated it made the section 27A Application to determine the budget for the whole service charge year not just a half year interim payment. The Applicant suggested that its actions were those of a prudent landlord by obtaining a determination of a whole year in a single operation. According to the Applicant, Mr Oldfield was the correct Respondent to the Application because he was still a party to the lease and bound by its terms. The Applicant argued that it was reasonable to pursue such an application given the history of Mr Oldfield's non-payment.

54. The Applicant maintained that the provisions of section 27(A)(4) did not assist The Bank. The Applicant repeated its submission that The Bank as a mortgagee in possession was unable to step into the tenant's shoes and agree the service charge. The Applicant referred to the FTT decision in *Flats A & D 21 Valkyrie Road* [2] where the Tribunal held that an agreement or admission by a tenant on liability to pay service charges has to be actively communicated. Mr Oldfield had made no admission of liability. Finally the Applicant asserted that the legislation did not prohibit a pre-emptive application from being taken out, particularly when there has been a long history of non-payment by the tenant.

[2] CAM/ooKF/LSC/2015/0010

55. The Applicant submitted as there was no definition of abuse of process in the Tribunal Rules 2013 the Applicant was in some difficulty in challenging the basis for the Notice of Strike Out. The Applicant, helpfully referred to the LVT decision in *Hugh Bridge v Holding and Management (Solitaire) Limited* [3] which said:

> "But there has to be a finding of abuse in support of the overriding objective, namely to deal with cases justly. It is submitted that the threshold to make such a finding is a high one. It does not follow that even if a finding of abuse is made, the correct response is to strike out the claim".

56. The LVT also recited the definition of abuse of process as applied in Attorney General v Barker [2000] 1FLR 759 which said

> "..... using that process for a purpose or in a way significantly different from its ordinary and proper use".

57. The Tribunal agrees with the Applicant's submission that section 141 of the Law of Property Act 1925 placed no obligation upon The Bank to meet the tenant's obligations under the lease. Section 141 states that the benefit of the lessee's covenants including the payment of rent is annexed and incidental to the reversionary estate. In other words, section 141 enables the assignee of the reversion to enforce the tenant's continuing liability under the lease without the need for an express assignment from the original landlord. Section 141 does not confer liabilities or rights under the lease on a mortgagee in possession of the tenant's interest.

58. The relevant statutory provision dealing with the rights and liabilities of a mortgagee in possession of a leasehold interest is Section 15 of the Landlord and Tenant (Covenants) Act 1995. Section 15, however, only applies to a lease granted on or after 1 January 1996. The lease in this case was entered into on 14 April 1993.

59. The case for abuse of process against the Applicant was predominantly one of fact rather than one of law. The Notice of Strike Out dated 22 May 2015 cited nine grounds, of which eight were grounded on the facts of the Application. In this respect the submissions on the statutory position of The Bank as mortgagee in possession had minimal impact on the question whether the section 27A application constituted an abuse of process.

60. The Tribunal also considers the appropriate legal analysis applicable to the facts of this case related to the legal consequences of the agreement under which the Applicant agreed to notify The Bank of monies due; and of the Applicant's acceptance of the payment made by The Bank on 10 November 2014 rather than the statutory position of The Bank as mortgagee in possession.

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[3] CHI/29UM/LSC/2004/0075

61. The Tribunal considers the Applicant's reliance on the FTT decision in *Flats A & D 21 Valkyrie Road* misplaced. The FTT's principal determination was that there was a duty on the Applicant to establish whether the tenant agreed or admitted the service charge before making an application. The Applicant conceded in this case that it had made no enquiries of Mr Oldfield until after the Application had been submitted.

62. The Tribunal concludes from the facts found in paragraph 48 above that the Applicant had no justifiable grounds for bringing the section 27A Application and that the conduct of the Application by its representative was questionable.

63. The facts showed that the Applicant's representative went ahead with the section 27A Application even though The Bank had paid in full and in advance the interim service charge demanded and due on 1 December 2015. In the Tribunal's view, the representative's action in making the Application contravened the agreement reached with The Bank that the Applicant would not take proceedings against Mr Oldfield if payment was made within 14 days. The Applicant accepted The Bank's payment which it allocated to the service charge account for the year ended 30 November 2015 in respect of the property. The Applicant accepted that the account was not in arrears when the section 27A application was submitted.

64. When the Applicant made the application its representative was not transparent with the Tribunal about the extent of The Bank's interest in the property. Further the representative did not disclose the fact that Mr Oldfield no longer lived at the address. The representative continued with its non-disclosure despite two requests from the Tribunal for clarification about Mr Oldfield's status. The representative's conduct of the case carried the real risk of the Application being heard in the absence of Mr Oldfield.

65. The representative's explanation for bringing the Application was not supported by the facts. The representative's insistence that the Applicant was entitled for a determination on the reasonableness of the proposed service charge was undermined by its admission that no enquiries had been made of Mr Oldfield about whether he agreed with the 2015 budget. Also the suggested budget for 2015 contained no unusual items of expenditure. The representative's reliance on Mr Oldfield's history of non-payment was without merit because the representative knew The Bank would make the necessary payments in order to protect its interest in the property. The Bank had previously settled the forfeiture proceedings instigated by the Applicant and had paid the interim service charge due for 1 December 2015.

66. The Tribunal considers the various explanations put forward by the Applicant's representative were vain attempts to justify its actions after the event. The Tribunal is satisfied that Mr Paine of Circle brought this

application on the Applicant's behalf because he was affronted by Ms Hayle's refusal to make another payment of the amounts due to Circle direct. Mr Paine's colleague, Ms Walpole, warned him of the risks of going ahead but he chose to ignore his colleague's sensible advice. The Tribunal agrees with The Bank's description of Mr Paine's conduct as being vexatious and aggressive.

Decision

67. The Tribunal finds there was no dispute or live issue which justified the bringing of an application under section 27A(3) of 1985 Act. The Tribunal is satisfied the Applicant's representative made the Application for a purpose significantly different from the ordinary and proper use of the Tribunal for resolving a substantive dispute. The Tribunal, therefore, concludes that the section 27A Application dated 14 November 2014 was an abuse of process. The Tribunal strikes out the Application pursuant to rule 9(3)(d) of the Tribunal Procedure Rules 2013.

Costs Order

68. Respondent Two made an Application for wasted costs against the Applicant's representative, and or unreasonable costs against the Applicant under rules 13(1)(a) and (b) of the Tribunal Procedure Rules 2013 respectively.

69. Rule 13(1)(a) implements the wasted costs provisions in section 29(4) and (5) of Tribunals, Courts and Enforcement Act 2007, which state insofar as they relevant:

> "(4) In any proceedings in the FTT the relevant Tribunal may –
>
> (b) order the legal or other representative concerned to meet the whole of any wasted costs .....
>
> (5) In subsection (4) wasted costs means any costs incurred by a party –
>
> (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative".

70. Rule 13(1) and (1)(b) provide that the Tribunal may make an order in respect of costs only if a person has acted unreasonably in bringing defending or conducting proceedings in a leasehold case.

71. Respondent Two's application for costs was £3,413.50 plus VAT as at 26 February 2015. The detailed costs schedule attached to Respondent Two's response dated 15 July 2015 supplied a costs total of £3,446.50 plus VAT. The Tribunal has adopted the figure of £3,446.50 plus VAT in the costs schedule.

72. The detailed costs schedule comprised two sets of narrative breakdown of costs, one for case reference CHI/00LC/LBC/2014/0029 (Breach of Covenant), and one for case reference CHI/00LC/LSC/2014/0121 (Service charge). On closer examination the schedule for case 0029 represented the costs incurred by Irwin Mitchell and includes a cost for considering the section 27A application (see entry for 23 February 2015). The total amount of costs claimed under this schedule was £1,089 plus VAT. The schedule for case 0121 represented the costs incurred by Ascent Legal and totalled £2,357.50 plus VAT.

73. In this case the Tribunal considers it is the conduct of the Applicant's representative, namely Mr Paine, which has to be examined in order to determine whether the threshold for either a wasted costs order or an unreasonable costs order has been met.

74. The threshold for the two types of costs order is effectively the same one of unreasonableness, although the wasted costs order adds two other criteria in the alternative, namely improper or negligent.

75. The meaning of "improper", "unreasonable" or "negligent" was discussed by the Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205 at 237:

> "Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.
>
> "Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable
>
> The term "negligent" was the most controversial of the three. It was argued that the Act of 1990, in this context as in others, used "negligent" as a term of art involving the well known ingredients of duty, breach, causation and damage. Therefore, it was said, conduct cannot be regarded as negligent unless it involves an actionable breach of the legal representative's duty to his own client, to whom alone a duty is owed. We reject this approach. (1) As already noted, the

> predecessor of the present Ord. 62, r. 11 made reference to "reasonable competence." That expression does not invoke technical concepts of the law of negligence. It seems to us inconceivable that by changing the language Parliament intended to make it harder, rather than easier, for courts to make orders. (2) Since the applicant's right to a wasted costs order against a legal representative depends on showing that the latter is in breach of his duty to the court it makes no sense to superimpose a requirement under this head (but not in the case of impropriety or unreasonableness) that he is also in breach of his duty to his client".

76. The Applicant argued that the threshold for an order of costs is a high one and should be reserved for cases where on any objective assessment a party has behaved so unreasonably that it is only fair and reasonable that the other party is compensated by having their legal costs paid. The Applicant maintained that it had acted reasonably in respect of both applications.

77. The Tribunal agrees with the Applicant's submissions on the law. The Tribunal would add that a wasted costs order is exceptional and the Tribunal should proceed with caution before making an order.

78. The Tribunal disagrees with the Applicant's assertion that it acted reasonably in respect of the service charge application. The Tribunal relies on its findings in paragraphs 48 and 58-66 above which demonstrated that Mr Paine's conduct of the case breached the threshold of unreasonableness and impropriety. Essentially Mr Paine instigated proceedings for purposes which had nothing to do with the Tribunal's role in resolving disputes, and as result The Bank incurred unnecessary legal costs.

79. The circumstances surrounding the Application for breach of covenant are set out in Appendix One.

80. The Tribunal in its Notice of Strike Out dated 22 May 2015 identified the following provisional grounds for substantiating a finding of acting unreasonably:

(a) No enquiries made of Mr Oldfield and the mortgagee before making the application.

(b) No consideration of whether the facts constituted a breach of covenant.

(c) Progressing with the application knowing that Mr Oldfield was not in occupation of the property.

(d) If the Tribunal had not raised concerns about the non-service of documents on the Respondent, the application may have gone ahead and produced an outcome not in accordance with the overriding objective of dealing with cases fairly and justly.

81. The Applicant in response said the section 168 application was made in good faith, and that there was a legal basis on which to make the application. Further the Applicant maintained that it had made a genuine mistake in implying that Mr Oldfield was responsible for making the alleged alterations by moving the location of the kitchen. According to the Applicant, the application was withdrawn in a timely fashion and on the ground of Irwin Mitchell's assertion that no costs had been incurred.

82. Respondent Two disagreed with the Applicant's submissions, arguing there was no legal basis for making the section 168 Application. Respondent Two stated the Applicant withdrew its application due to its misunderstanding as to the effect of the 1995 Act which was pointed out by the Tribunal when the Applicant attempted to amend its statement of case.

83. Respondent Two challenged the Applicant's assertion that the Application was withdrawn on the basis that Irwin Mitchell had incurred no costs. According to Respondent Two, the Applicant's assessment of the correspondence was incorrect and misleading. The correspondence from Irwin Mitchell actually said:

> "We should be grateful if you would confirm as soon as possible if you intend on pursuing your application in relation to a breach of covenant to avoid any potentially unnecessary legal costs in preparing a response to this claim".

84. Respondent Two submitted that it could not see how the above correspondence could be construed as Irwin Mitchell having not incurred any costs.

85. The Tribunal is not convinced by the Applicant's assertion of the application being made in good faith. The Applicant made no enquires of Mr Oldfield and of The Bank in relation to the alleged breach of covenant. The Applicant based its Application on the results of its search of the Zoopla website where the property was being advertised for sale. The Applicant named Mr Oldfield as the person responsible for the alleged breach without any evidence whatsoever. It would appear the Applicant relied on the provisions of Landlord and Tenant (Covenants) Act 1995 to substantiate the liability of Mr Oldfield. The 1995 Act did not apply because the lease was entered into before 1 January 1996.

86. In common with the section 27A application the Applicant was not transparent with the Tribunal about the extent of The Bank's interest in the property and of the fact that Mr Oldfield did not live at the address.

87. The Tribunal is not impressed with the Applicant's claim that it withdrew the Application in timely fashion. The Applicant's first response on being contacted by Ascent Legal on 13 January 2015 was to invite Mr Oldfield and The Bank to admit the breach of the covenant. In

its letter Ascent Legal gave an unambiguous account of The Bank's position stating that

> "It is the Bank's position than in its current form the application should be withdrawn and that no charge relating to the application should be made to The Bank or to Mr Oldfield. The principal reason for this is that you have not disclosed any evidence to show that Mr Oldfield has carried out any alterations to the Property, at the best you have shown that the current layout of the Property may be different to how it is represented in the 1993 plan; yet Mr Oldfield did not become the proprietor of the Property until 22 December 2009".

88. The Applicant also sought to persuade the Tribunal to give permission to what the Applicant described as a *slight* amendment to the Application by substituting the *"The Tenant has breached Clause 3(c) of the lease"* with *"Clause 3(c) of the lease has been breached"*. The Tribunal disagreed with the Applicant's depiction of the amendment as slight and refused the Application to amend.

89. The Tribunal reiterates its view in the Notice of Strike Out that the Applicant withdrew the application because it had nowhere to go following the Tribunal's intervention. The Tribunal does not accept the Applicant's assertion that the Application was withdrawn on the basis that Irwin Mitchell had not incurred costs.

90. The Tribunal finds the Applicant had no proper basis for bringing the section 168 application against Mr Oldfield, and that the Applicant continued with the Application despite being put on notice that it had no case against Mr Oldfield. The Tribunal is satisfied that the Applicant's conduct of the case was not capable of a reasonable explanation and, therefore, unreasonable.

91. In view of its findings that the Applicant and more particularly its representative acted unreasonably in bringing and conducting the proceedings against Mr Oldfield and Respondent Two the Tribunal is minded to make an order for costs.

92. Before making the order the Tribunal intends to deal with subsidiary arguments put forward by the Applicant against an order for costs.

93. The Applicant contended that as Respondent Two was not a party to the lease, the Applicant had no liability to pay the costs incurred by Respondent Two. The Tribunal disagrees. The Applicant's liability to pay the costs is derived from Statute, and arises from the status of Applicant and Respondent Two as parties to the Application.

94. The Applicant submitted that The Bank had not provided sufficient detail to substantiate its claim for costs. The Tribunal is satisfied the narrative breakdown of the statement of costs attached to the response of 15 July 2015 supplied the necessary detail, and that the grade of fee

earner specified (£110 -£115 per hour) was commensurate with the level of tasks undertaken.

95. The Applicant stated that The Bank was only entitled to claim costs from the point at which it became a party to the Applications which was on the 19 January 2015. The Tribunal accepts the validity of the Applicant's submission. The Tribunal only has power to order costs that have been incurred in connection with the proceedings, which in the case of Respondent Two commenced with the date it became a party. This results in a reduction in the eligible costs under case 0121 to £954.50 plus VAT. The eligible costs in connection with case 0029 remain the same at £1,089 plus VAT.

Decision

96. The Tribunal finds that Respondent Two has incurred costs in the sum of £2,043.50 plus VAT as a direct result of the unreasonable conduct of the Applicant's representative, Mr Paine.

97. The Tribunal intends to make an order for costs in the sum of £2,043.50 plus VAT to Respondent Two pursuant to rule 13 of the Tribunal Procedure Rules 2013.

98. The Tribunal considers on the evidence that Mr Paine should bear the responsibility for the costs incurred by Respondent Two. The Tribunal is, therefore, minded to order Mr Martin Paine of Circle Management, the Applicant's representative, to pay the costs of £2,043.50 plus VAT in the form of a wasted costs order in accordance with rule 13(1)(a) of the Tribunal Procedure Rules 2013 and section 29(4) of the Tribunals, Courts and Enforcement Act 2007. **The Tribunal gives Mr Paine an opportunity to respond in writing which must be received by the Tribunal by no later than 25 September 2015 with a copy to The Bank**

Appendix One: Background

1. The property is a self contained first floor flat with its own entrance to a small hall and stairs to the first floor. There is one other flat in the building which is on the ground floor.

2. The property is subject to a lease dated 14 April 1993 and made between Michael John Francis Cavanagh and Marilyn Cavanagh of the one part and Leslie John Bishop of the other part for a term of 99 years from 25 March 1993.

3. Clause 4(2) of the lease requires the tenant to make a maintenance contribution of 50 per cent towards the costs and expenses incurred by the landlord in respect of those matters identified in the Fourth Schedule to the Lease. Under clause 4(2)(c) of the lease the landlord can demand a sum in advance from the tenant on account of the maintenance contribution. Historically the landlord has charged the interim service charges half yearly on 1 December and 1 June each year.

4. On 12 November 2014 the Applicant applied for an order that a breach of covenant had occurred. The Applicant stated that Mr Oldfield (Respondent 1) had breached clause 3(c) of the lease by carrying out alterations without the permission of the lessor.

5. On 14 November 2014 the Tribunal directed the section 168 Application to be heard on the papers and required the parties to exchange their evidence.

6. On the 14 November 2014 the Applicant sought a determination under Section 27A of the Landlord and Tenant Act 1985 on whether an interim service for the year ending 30 November 2015 was reasonable and payable by Mr Oldfield.

7. On 21 November 2014 the Tribunal directed the section 27A Application to be dealt with on the papers and required the parties to exchange their evidence.

8. On 3 December 2014 the Applicant disclosed to Mr Oldfield in accordance with the directions the relevant service charge accounts and estimates for the year in question.

9. On 3 December 2014 the Applicant advised Mr Oldfield that it was asking the Tribunal to determine the reasonableness of the 2014 to 2015 budget and not the payability of the interim service charge because the interim payment for December 2014 had been discharged in full.

10. On various dates from 8 to 18 December 2014 copies of the applications and directions sent to Mr Oldfield were returned to the Tribunal marked "gone away".

11. As one of the Applications concerned a breach of covenant which if found true would have serious consequences for Mr Oldfield, the Tribunal required the Applicant to take every reasonable step to ensure that Mr Oldfield was aware of the applications.

12. On 14 January 2015 the Tribunal issued fresh directions consolidating the two sets of proceedings and requiring the Applicant to serve the relevant papers on Mr Oldfield. The Tribunal also served the directions on the mortgagee for the property.

13. On 14 January 2015 Ascent Legal on behalf of the mortgagee, National Westminster Home Loans Ltd (the Bank), wrote to the Tribunal requesting the mortgagee to be added as a Respondent which was duly granted from 19 January 2015. Ascent Legal also asked for period of a six weeks to discuss the applications with the Applicant. Ascent Legal expressed concern that the application for breach of covenant was a preliminary step to lease forfeiture proceedings which if successful would result in the Bank losing its security. Ascent Legal also pointed out that the Bank was currently in possession of the property and that Mr Oldfield had not lived at the property for some time, which according to the Bank was known by the Applicant.

14. On 19 January 2015 the Bank was named Respondent Two. The Tribunal issued directions to bring the applications to hearing.

15. On 23 January 2015 the Applicant requested an amendment to the Application for the breach of covenant, namely, that it should read "Clause 3(c) of the lease has been breached" instead of the "Tenant has breached clause 3(c) of the lease". The Tribunal was not minded to grant the amendment.

16. On 6 February 2015 the Applicant withdrew the section 168 application regarding a breach of covenant.

17. On 26 February 2015 Irwin Mitchell acting for National Westminster Bank PLC requested the Tribunal to make an order on the following terms:

- Permission to amend the Second Respondent to National Westminster Bank PLC.
- The application made pursuant to section 27A of the 1985 Act be dismissed.
- Costs be ordered against the Applicant in favour of the Bank under Rule 13 of the 2013 Procedure Rules in the sum of £4096.20.
- An Order pursuant to section 20C of the 1985 Act.

18. On 9 March 2015 the Tribunal directed the section 27A application be determined on the papers and for the Applicant to provide a full response to the matters raised by the Bank in its letter of 26 February 2015.

19. The Tribunal informed the parties that they would be notified of the decision within six weeks from the 7 May 2015.

20. On 22 May 2015 the Tribunal gave permission to amend the Respondent Two to National Westminster Bank PLC with effect from 19 January 2015 and made an order under section 20C of the 1985 Act preventing the Applicant from recovering its costs in connection with these proceedings through the service charge.

21. The Tribunal also gave notice on 22 May 2015 that it was minded to strike out the Section 27A Application and order the Applicant to pay the costs incurred by Respondent Two in connection with these proceedings. The Tribunal invited the parties' representations by 15 June 2015.

22. On 6 July 2015 the Tribunal issued further directions seeking clarification of the parties' representations to the notice of strike out.

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 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