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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/LBC/2017/0065**
Property	:	**160D Finchley Road, London NW5 5HD**
Applicant	:	**R.F.Y.C Limited (Landlord)**
Representatives	:	**Mr Philip Brown of Counsel**
Respondents	:	**Ms D. Abramson, Ms O. Abramson,and Mr R. Abramson**
Representative	:	**Ms Miriam Seitler of Counsel**
Type of application	:	**Declaration of Breach of Covenant - Section 168 CLARA 2002**
Tribunal members	:	**Judge Lancelot Robson** **Mr C Gowman MCIEH**
Date and venue of hearing	:	**11th and 12th December 2017, and 19th January 2018; 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**26 March 2018**

DECISION

Decisions of the Tribunal

(1) On the preliminary point, the Applicant had no locus standi to bring this application, as at all material times a Tribunal Appointed Manager had been appointed, and his powers precluded the Applicant from making this application. The Tribunal struck out the application.

(2) The Tribunal further decided that it was too late to raise breaches of covenant alleged to have occurred prior to 2001, as the then leaseholders and freeholders had moved on, and neither party had adequate records to be able to pursue or defend the application. To that extent the application was an abuse of process.

(3) The Tribunal also made the findings noted below. There are potential breaches of covenant relating to recent works, but it it is for the Tribunal-appointed Manager to pursue these matters, and apply to the Tribunal, if so advised.

(4) The Tribunal gives Directions below for the application made by the Respondent pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

(5) The Tribunal made the detailed decisions noted below.

The application

1. The Applicant seeks a determination pursuant to Section 168 of the Commonhold and Leasehold Reform Act 2002 that the Respondents were in breach of the sublease dated 17th September 1970 (the Lease) by virtue of:

(i) unlawful alterations contrary to the Lease clauses 2(6)a), 2(6)b), 2(c), 2(13), 2(14), 2(18), 2(19), 2(20), and paragraphs (10) and (15) of the First Schedule as noted below;

a) Internal layout of the property substantially altered by moving internal walls

b) subdividing the reception room by the addition of a wall

c) Installing a large skylight in the reception area

d) Installing dormers and windows in the attic

e) Use of attic as a bedroom/habitable space

f) Installing dormer construction and door leading to the flat roof

g) Installation of a shower room in place of and by enlargement of the w.c. on the 1st floor

h) Whether any of these alterations breached the Building Regulations as stated at para 6.3 of the Michelin Flower Report

i) Whether any of these alterations post-dated the Mobax Lease

j) Whether any consent had been granted for any of the alterations

(ii) Unlawful use by subletting to four unrelated individuals contrary to Clauses 2(8) and 2(20) of the Lease, and Para (1) of the First Schedule

(iii) Failure to comply with the law and the terms of the insurance by subletting without a licence under the HMO regulations contrary to Clauses 2(14) and 2(19)

(iv) Failure to give notice of assignment to the Applicant contrary to Clause 2(9)

2. During the first hearing the Tribunal became aware that a Tribunal-appointed Manager was still managing the building pursuant to Section 24 of the Landlord and Tenant Act 1987, but no evidence or submissions had been made relating to the effect of that matter by either party. It directed that at the second hearing, in addition to the above matters, the parties should make submissions on the preliminary point as to whether the Applicant had locus standi to make this application. The Tribunal considered that it would be undesirable to allow or assist parties to attempt to exercise the powers of its appointed Manager, if on the true construction of the Management Order they had no power to do so.

3. Extracts of the relevant legal provisions are set out in the Appendix to this decision.

Background

4. The property is a residential flat located on the first floor within a building constructed on ground and first floors approached from an entrance at street level over an internal private staircase, more particularly described in the parties' expert witness reports, neither of which was disputed on that point.

5. The original lease (the Mobax Lease, or the Lease) was dated 17th September 1970. The original leaseholder was Mr Sedat Kahya (who gave evidence at the first hearing). He sold his interest in 1978. The Applicant became the landlord by a Lease

dated 18th June 2005. Mr Norman Freed (who gave evidence) is the Applicant's manager. The Respondents became the long leaseholders in February 2016. Their immediate predecessor in title was Bretby Limited, which purchased the Lease in 2001. Mr Raz (who also gave evidence) is a consultant to Bretby Limited.

Preliminary Issue

6. Mr Brown for the Applicant submitted;

a) There have been several Management Orders relating to this property. The latest order was made in 2017, but the terms of the 2015 order are the operative ones. A copy of this order was put in evidence.

b) The Manager appeared to have power to deal with the issues raised in this case, but it was silent on the landlord's powers, apart from a provision that the Applicant was not to interfere with the management.

c) The Applicant retained the rights to manage unless they were expressly displaced by the order. The Applicant suggested that the relevant case law did not allow the Manager to step into the shoes of the landlord. He only had the powers expressed in the Octagon case. His rights were additional to those of the landlord. He referred us to the case of Coates v Octagon (Overseas) Limited [2017] EWHC 877. In Mr Brown's view the authorities suggested that the Manager did not step into the Landlord's shoes, he only had the powers expressly set out in the Order, or any additional rights granted by the landlord. Thus there was no prohibition on the landlord from bringing this application. The interpretation of the express terms of the Order was required.

d) Mr Brown also referred briefly to the following cases and legislation

Forest House Estates Ltd v Dakhil Allah Al-Harthi [2013] UKUT 0479 (LC)

Glass v Glass 2007 LRX/153/2007 UT

Maunder Taylor v Blaquiere [2002] EWCA Civ 1633, (particularly Para.38)

The Building Regulations 2010, and also the Approved Document Vol 2 Fire Safety.

7. Ms Seitler for the Respondents submitted;

a) The Respondents had been previously unaware of the existence and effect of the Order, as none of the Orders had been registered at the Land Registry, as they should have been.

b) The Respondents agreed that the Manager did not step into the landlord's shoes, see the Maunder Taylor case (supra) and that no case was clear on the subject, however having considered the Applicant's authorities and the Management Orders brought to the hearing, they had not changed their view that the Applicant was not in a position to to bring this application. Its case should be struck out. The wording of the 2009 Order, (effectively republished in the 2015 Order) included this property. Clause 1.9 gave the Manager the power to bring proceedings, but was not to interfere with any existing proceedings taken by the landlord. Clause 2.13 dealt with consents and licences being given by the Manager. Clause 5 required the landlord to give the Manager reasonable assistance and not to interfere in the management. Clause 6.4 gave the Manager power to deal with Section 146 Notices.

c) The Respondents had asked the Applicant for consent to the alterations they admitted, on two occasions. The Applicant had not referred to the Management Order or to approval by the Tribunal's Manager. Thus the Applicant had failed to comply with (Clause 5) of the Order.

d) It was implicit in the Landlord & Tenant Act 1987 that where a Manager was given the power to take action, the landlord was disabled from taking that action. The purpose of a Section 24 application was to give tenants dissatisfied with the management the right to seek an alternative manager. It would defeat the purpose of Section 24 if the Manager's power was not substituted to that of the landlord, as was clear from any management order, see for example clause 3.1 of the Order in this case. The Manager was empowered to collect the rents, services charges etc. If the landlord had the same rights they would completely nullify the purpose of the Order. It is thus inherent that in giving a power to a Manager that the landlord's power was removed.

e) Looking at this Order, the Manager is given the power to deal with Section 146 proceedings (see Clause 6.4), and the landlord was obliged to assist him (Clause 5). While this application is not a Section 146 notice, it is a necessary statutory step to proceeding under Section 146. The Manager's power to take this step was thus implied.

f) Alternatively, the terms of Clause 1.9 must deal with the situation. There is no restriction on the Manager's power, thus the landlord is precluded from exercising it. The Octagon case dealt with an injunction, and was therefore irrelevant. In the case of Boissevan v Lindhagen 1999 CA (Transcript)(Lexis citation 3001)(first appeal), at p.3 fourth para, Judge Robert Walker LJ stated;

"The notion that a landlord should be able to sue to recover possession of tenanted property even after a receiver has been appointed under Section 24 of the Landlord and Tenant Act 1987, is one I find startling."

In the second appeal in the same case [2000] JHL D3 (CA)(Lexis citation 4909), the Court established that the Management Order did not grant the [Manager] the power to bring an action for possession, or was silent on the matter, and thus accepted that the

power was retained by the landlord. However it is clearly implicit from the decisions that if the power was given to the Manager then the landlord is not allowed to bring proceedings.

g) Further, the last part of clause 2.9 of the Order is significant. It was necessary, it was submitted, because the powers of the landlord were in fact disabled by the first part of the clause, so the Manager's power had to be restricted to allow the landlord to deal with existing matters. In this case the Order gave all the relevant powers to the Manager.

Decision

8. The Tribunal considered all the evidence and submissions. Both parties seemed to have agreed that the terms of the Order were decisive. On balance it preferred the submissions on behalf of the Respondents. To find in favour of the Applicant's view would make the remedy granted by Section 24 worthless. Allowing two parties, including one which had been found to be an unsatisfactory manager, to collect the service charges and enforce the covenants independently would lead to an absurd and chaotic result, which could not have been the intention of Parliament.

9. The Octagon case, although dealing with the powers of Managers, primarily related to the correct procedure for a Manager when making and enforcing an injunction against the landlord. It did not appear relevant to the issues in this case. The Maunder Taylor case dealt with a defence raised against the Manager that a tenant was entitled to set off sums owed to the landlord against the service charge demands of the Manager. That decision did not consider in terms the question of whether the powers granted to the Manager precluded an action by the landlord in purported exercise of those powers. However Maunder Taylor confirmed that the Manager's powers under Section 24 emanated from the Tribunal, not the Lease or the landlord. Thus it was correct to say that the Manager did not step into the landlord's shoes, but the Tribunal decided that does not go far enough.

10. The Tribunal considered that the correct starting point was to decide whether the Management Order gives the Manager the relevant powers. In this case it does so. The Tribunal then considered whether the Order makes any relevant saving for the powers of the landlord. If that answer is in the negative (as it is in this case), then the landlord's powers fall into abeyance until the Management Order is discharged. While it may be objected that the Order in this case does not mention an application under Section 168 of the Commonhold and Leasehold Reform Act 2002, it is a statutorily required first step towards issuing a Notice pursuant to Section 146 of the Law of Property Act 1925 (as amended). Thus the power to issue Section 146 Notices must, of necessity, include the power to apply for a Section 168 declaration. In this case the power presently lies with the Manager, and not the landlord. The Tribunal therefore decided that the Applicant's case must be struck out.

11. The parties' cases were pleaded in the alternative. For completeness the Tribunal then went on to consider the other points made in the application.

Alleged breaches of covenant

12. The parties framed the application and response by reference to 2001, (apparently being the date that Bretby became the leaseholder). The parties each called an expert witness to make a report and to give evidence. The Respondents also located and called Mr Sedat Kahya, the original lessee under the Lease to give factual evidence as to the state of the property in the period 1970 - 1978. Mr Norman Freed and Mr Raz gave evidence for the Applicant and Respondents respectively

13. The Applicant confirmed at the hearing that it was no longer pursuing the following matters noted in the Scott Schedule used by the parties:

Item A (internal layout substantially altered) - it was a preamble to more detailed allegations

Item P in the Scott Schedule (external wall to rear bedroom altered from that appearing in the Lease plan.

14. The Applicant's submissions on the remaining dispute matters were:

a) The factual matters in the Flower Michelin report, and Mr Freed's evidence established the alterations within the property as pleaded. The expert opinion of Mr Firrell established that the alterations post dated the grant of the Lease. There was no convincing evidence to the contrary.

b) The Building Regulations 2010 were engaged (Approved Documents B (Fire Safety), K (Protection from Falling, Collision and Impact, and L1B, as the work amounted to "building work" within the definition of Regulation 3. Also the removal of the partition separating the reception room from the hallway clearly created a habitable room, putting the entire property in breach. This, it was submitted, was all but accepted by the Respondent's Expert.

c) There had been no consent to any alterations.

d) The subletting to four unrelated individuals was a breach of the user covenant.

e) Subletting without a licence pursuant to the HMO regulations was a breach of Clause 2(19).

14. Generally, The Applicant had made the admissions noted below. The experts were in dispute as to whether and when certain other alterations had taken place. This could only be decided by testing the evidence of Mr Khaya, and the experts. Other matters, i.e. breach of the Building Regulations, unlawful subletting to 4 unrelated individuals, and failure to comply with the law and terms of insurance were matters for submissions.

Respondents' case

15. The Respondents admitted the following matters in their statement of case (which post date 2001):

Items H, I, J, U, W (Clause 2(14) only), and X (cured in 1.6.16) in the Scott Schedule. All these admitted items relate to work done or matters arising in 2013 onwards.

16. Relating to the remaining issues in dispute:

a) The Applicant had not shown that the alleged alterations were carried out during the term of the Lease. The burden of proof was on the Applicant. It had to show not just that it was "possible" that the works were carried out prior to the Lease, but it was "more likely than not". An alteration required some material change to be made. A repair was not inevitably an alteration. The evidence (noted below) did not demonstrate alterations. Also, the evidence showed that there was in fact nothing suspect about the purchase price paid by the Respondents, nor about the conveyance (sic) between Bretby and the Respondents.

b) Insofar as it can be shown that the alterations were carried out during the term of the Lease, the Application is an abuse of process. It was abusive to bring an application for no practical or legal purpose having had knowledge of the state of the property for so many years. The Respondents believed that the Applicant had knowledge of the state of the property since 2007. It was not disputed that some repairs had been carried out. The work complained of had taken place prior to 2001 at the very latest. Their position was that the alterations had been carried out prior to 1970. The Respondents were prejudiced by the delay. The application appeared motivated by imposing pressure for a sale to the Applicant which would unlock development potential, rather than enforcing compliance with the covenants. The delay in bringing this application had prejudiced the Respondents. In any event the application was futile and could not proceed to a valid forfeiture.

c) A breach of the Building Regulations has not been made out. The Applicant produced little evidence. It had wrongly assumed that the Building Regulations 2010 applied to all alleged breaches without considering if the alterations were carried out prior 2010. Whether building work had been carried out was a subjective question, a matter of fact and degree, for expert evidence. No evidence was provided showing the building approvals register

d) It had not been proved that the Property was not in one occupation only. The Respondents referred to the cases of Roberts v Howlett (2002) 1 P& C.R. 1, and Berton v Alliance Economic Investment Company [1922] 1 KB 742. The burden of proof was on the Applicant. The Applicant had no evidence to suggest the occupants were not friends or colleagues. The evidence available to the Respondents, e.g. one tenancy agreement, which contained the same user restriction imposed by the Lease, suggested they were linked. Further there was no evidence suggesting the Respondents permitted any alleged breach by the occupants.

e) The Property might be a House in Multiple Occupation (HMO) requiring a licence from the Local Authority, but this was unclear. The Respondents believed that the evidence favoured the property being in single family occupation, but the HMO rules were more restrictive.

f) Counsel also referred to the following cases and materials in argument;

Hagee v Cooperative Insurance Society Ltd (1992) 63 P &CR 362

Parissus v Blair Court (St John's Wood) Management Limited [2014] UKUT 0503

Swanston Grange (Luton) Management Limited v Langley-Essen LRX/12/2007

The Building Regulations 2010 Regs 3 and 4

Building Act 1984 ss35A and 36

Town and Country Planning Act 1990

Evidence

17. Mr Khaya gave the following evidence from his own knowledge, following his statement dated 1st November 2011. He emphasised in oral evidence that he had no other connection with the parties, other than as the original lessee, and that he had nothing to gain by giving his evidence. He had been the original long leaseholder between 17th September 1970 and 1978. He had seen the report of Mr Palos dated 8th August 2017 with photographs of the current state of the property. He had made no major alterations such as changing the position of the door, windows or skylights, or structural changes to the staircase. His following comments were by reference to the state of the property as it was at the beginning of the Lease;

a) The property had recently been refurbished before the lease had been granted to him.

b) The dining room ceiling had both vertical and sloping skylights. He attached a photograph taken during his occupation showing the 4 vertical panels, and part of the 7 larger sloping skylight panels. They were both in the same position and style as shown in the photographs in Mr Palos' report. He had not altered them. He could not remember if the glazing was the same.

c) The attic room was used by him for socialising and relaxing. It was accessed by the staircase from the first floor. The access and wooden stairs were exactly as shown in the photographs in Mr Palos' report.

d) There was a door that opened onto the flat roof. The door itself appeared to have been replaced. He could not recall if access to the door was from the top of the staircase or from the attic room, possibly the latter. There were 2 windows in the attic. He could not remember if they were sloped or not. They appeared to him to be in exactly the same position as he remembered them, but he thought the fittings of the door and windows had changed.

e) The parapet around the skylight existed and was in the same position as shown in Mr Palos' report.

f) The roof was not completely new when he took occupation, but looked much as it does now in Mr Palos' photographs, except that the vents and replacement tiles were not there.

g) There was no partition wall between the reception and dining rooms in his time, but there was an arch between the two rooms, as shown on the relevant photograph in his evidence taken at the time.

h) The floors were hardwood throughout the property. He had had them sanded and varnished. Except for some rugs, no fitted carpet was installed. The landlord had not raised any question of a breach of covenant at the time.

18. Mr Terence Firrell FRICS, MEWI, MAE prepared a report and gave expert witness evidence for the Applicant. Mr George Palos BSc(Eng), ACGI, FRICS, FCIArb, MAE, MIET prepared a report and gave expert witness evidence for the Respondents. Both experts had subsequently seen and commented on the witness statement of Mr Kahya. They had produced a statement of agreed facts and matters dated 9th November 2017. That statement dealt with the following items of dispute (following the lettering in the Scott Schedule);

1) *c) The reception room has been reduced in size*

d) The original reception has been subdivided by the addition of the partition

They agreed that the opening was probably not original, but was certainly prior to the grant of the Lease. They further agreed that it had been closed by a lightweight timber and plasterboard partition.

2 *e) The attic space has been converted into a long room*

They agreed that the attic space had not been converted into a long room but had been refurbished by decoration and possibly other work.They also agreed that the attic existed prior to the Lease, and was noted on the Lease plan.

3. *g) A small skylight has been installed in the roof*

They agreed that they had no definite information as to the installation, but it could have been original to the construction, but in the alternative, no later than the renewal of the roof covering.

i) *A shower room has been installed in place of the wc area*

They agreed that there is a shower/wc in situ at present.

q) *The roof surface (outside the demise under the Lease) has been accessed by the occupiers and used as a terrace. The surface is not suitable for use as a roof terrace and this use is cause[ing) damage to the roof surface*

They agreed that there was no direct evidence of the roof being used as a terrace, also that the roof is not designed for leisure use.

19. The expert witnesses remained in dispute relating to the following matters:

1 f) A large skylight with four fixed panels have been installed in the new reception area

Mr Firrell is of the opinion that the skylights are a later installation and did not exist prior to the grant of the Lease 47 years ago. Mr Palos is of the opinion that the skylight is very old, probably prior to the grant of the Lease, and possibly original.

2 *l) The attic conversion is accessed via a steep narrow staircase which does not have a full hand rail to the whole stair in breach of Building Regulations*

m) The external staircase, which is outside the demised premises, has been unlawfully incorporated into the attic bedroom

n) a door, which cannot be accessed safely, has been installed to the roof within a large dormer construction

They are agreed that a staircase and a door to the roof existed at the time of the grant of the Lease, also that the UPVC door was installed after the grant of the Lease, and that the new treads were changed prior to the grant of the Lease. Mr Firrell is of the opinion that the staircase, which does not extend to the level of the base of the door, will constitute a breach of the Building Regulations. Mr Palos is of the opinion that a breach of the Building Regulations has not necessarily occurred. This depends upon the use the attic is out to, and thereafter there would only be a breach if building work that is a material alteration has occurred (which he considers doubtful), or if the staircase did not comply with the regulations at the time it was installed which would have been prior to the grant of the Lease.

k) Two dormers have been constructed and roof windows have been installed

Mr Firrell's view is that while it is possible the dormer windows were constructed at the time the roof covering was installed, it is not possible to state categorically when that occurred. He considers that the roof was installed after the grant of the Lease. The Dormer windows are now located in positions different from those indicated in the Lease plan and therefore have been moved. Mr Palos considers that the dormer windows were in all probability installed prior to the grant of the Lease. The Lease plan shows two dormer windows as apparently the Lease plan shows them on the exterior. He could see no logical reason why the windows would be moved at considerable expense.

r) *There are a number of breaches of Building Regulations set out in Section 6.3 of the Flower Michelin report*

They are agreed that the layout has altered by removing the partition and doors separating the reception room to (sic) the landing. They are agreed that this might potentially breach Building Regulations. Mr Firrell is of the view that there are apparent breaches. Mr Palos considers that the works have resulted in the rear right room being no longer an inner room and can now be used as a habitable room hence it is an improvement. It is unclear if the non compliance is now more unsatisfactory than before, hence it is not clear if there is now a breach.

20. Mr Freed's evidence was that he had managed the property on behalf of the Applicant since 2005, when the Applicant became the landlord of the Respondent. The office copies of the Respondents' title showed that the Lease of the property had been purchased for £550,000, which he considered unusual. He referred to the relevant lease clauses and the reasons he considered the Respondent was in breach (also noted in the Scott Schedule below). He referred also to the experts' evidence and the report of Flower Michelin which he considered was a factual report of that firm's inspection of the

property in December 2016, which he had also attended. He had not previously been in the property prior to that date. He had been advised that the Applicant's motives, waiver and the parties' knowledge of the breaches was irrelevant.

21. He considered some points in the Respondents' witness evidence were untrue. He and another had personally bought 43 Frognal Court from Bretby Limited in April 2007. He had later discussed with Mr Raz the possibility of buying the subject property. The intention at the time was to demolish the property and/or its roof and redevelop it. He and Mr Simon Freed, his son, had met Mr Raz for coffee. He denied Mr Raz's account of that meeting, and the allegation that he (Mr Norman Freed) had visited the property in 2007. Mr Raz had offered the property to the Freeds in 2007 for £475,000 subject to planning permission. The negotiations eventually came to nothing. In February 2014 Mr Raz had put the property on the market for £820,000 apparently to reflect the potential for extending upwards. Prospective purchasers had approached Mr Freed asking about this possibility. He had informed them that asking price for the airspace would be £600,000. They informed him that they were no longer interested in purchasing it. In March 2015 he called Mr Raz to ask if the property was still for sale. He offered £800,000 ,(revised later to £550,000) which was refused. He was then very surprised to learn that the property had been sold for £550,000 in 2016. He invited the Tribunal to infer that this was because they knew about the breaches of the Lease when they bought it. He only saw Dexters' sale particulars of the property in January 2017, when he received it with the Flower Michelin report. Mr Freed recounted the chronology of correspondence between the parties (which does not seem relevant to the issues before this Tribunal), starting with an enquiry he had directed to Bretby's agent on 5th November 2015, enquiring about what was being done at the property, as he had learned that work was being carried out.

22. He considered from his inspection in December 2016 that the house was being used as a house in multiple occupation, despite assurances from the Respondents' solicitors in September 2016 that it was not being so used. There was no record of any Planning applications or Building Regulations approvals relating to this property on the (London Borough of) Camden website. The Applicant had not given consent to the works at the property, nor had the Applicant been informed of any licences given when it bought the property. Mr Raz had also failed to say in his statement what enquiries Bretby had made in 2001 to query the differences between the plan attached to the Lease and the actual layout of the property.

23. Mr Raz's evidence was that the offer finally made for the property by Mr Freed in 2015 was £550,000 without the benefit of planning permission for redevelopment. This was the price for which Bretby had sold the property to the Abramsons. Their parents were Mr Raz's best friends for over 40 years. It was incorrect to infer that the price reflected knowledge of breaches of the Lease. In any event he had been advised that the question of whether he or the Respondents had knowledge of the alleged breaches was irrelevant to the Tribunal's jurisdiction relating to Section 168, or the Respondents' request for striking out the application. He felt morally obliged to sort out the problems raised in this application for the Respondents.

24. Mr Raz expressed concern about the status and accuracy of the Flower Michelin report. The Applicant relied heavily upon it, as, it was asserted, did Mr Firrell. It was indisputable that plan in the Flower Michelin report was inaccurate. It seemed they had been given a very indistinct copy, which had led them into error in their report. This error had been pointed out by the Respondents' solicitors, but no response had been received. This error had made it necessary for him to pursue this litigation. The foundation of this application was based on a flawed opinion. The Applicant's evidence relating to the difficulty of ascertaining the Respondents' agent's address was refuted. Mr Raz referred to evidence that the Applicant had corresponded with the Respondents' agent in 2005, and again in 2013 at certain addresses, but had not written to those addresses in its letters written before the application commenced. In fact Mr Freed had his telephone number and email address, and could have contacted him directly.

25. When the letters complaining of the alleged breaches were finally received by the Respondents' agent on 31st August 2016, prompt admissions of the breaches relating to the shower room and the reception to landing partition, together with requests for consent were made on 5th May 2017. Offers to reinstate were made on 22nd August 2017. The Applicant ignored these offers. Mr Raz believed that the Applicant was putting pressure on the Respondents to force them to a deal on the airspace above the property, rather than securing compliance with the Lease.

26. Mr Raz's evidence also strayed into irrelevant issues relating to other dealings between his company and the Applicant. His evidence on whether Mr Freed had inspected in 2007 was completely to the opposite of Mr Freed's evidence. The Tribunal noted that there was evidence that a written offer had been discussed between Mr Freed's son, Simon, (who appeared to be a business partner of his father) and Mr Raz. Mr Freed disclaimed any knowledge of that event.

Decision

27. The Tribunal considered the evidence and submissions. Following the parties' division of the issues, it decided that the Applicant had not discharged the evidential burden necessary to prove that breaches had occurred prior to 2001. A major flaw was that neither the plan it relied on, nor any other plan, was referred to in the Lease. The plan (which was apparently attached to the Lease) was not to scale and contentious parts of it had been drawn in by a rather unsteady hand. The demised premises were identified by a short description only, in the Schedule. The Applicant's Expert's (opinion) evidence in the case tended to be contradicted in many instances by the first hand evidence of Mr Kahya, whom the Tribunal found to be a credible and careful witness. Much evidence and discussion related to whether there were sloping skylights in 1970, but Mr Kahya was quite firm in his evidence that they were there. Further, there was no evidence of complaints of breaches by any previous landlord, or indeed any evidence at all from those sources, which suggested that either the Applicant had made no preliminary enquiries on its purchase, or that the replies received did not assist the Applicant's case.

28. While it might be objected that alterations may constitute a continuing breach, the Applicant did not raise any complaints from 2005 until 2015, nearly a further 10 years, and until 2015 had not, on Mr Freed's own evidence, carried out a proper inspection. The Respondents had submitted that Mr Norman Freed had inspected the property in 2007 when he was first considering a purchase, which he strenuously denied. On balance, the Tribunal preferred the evidence of Mr Raz on this point. However, even if it had found in favour of Mr Freed's recollection of events, the Tribunal decided that the Applicant could not rely upon its own inactivity to excuse the long delay in making its application. Also the Flower Michelin report had serious shortcomings, and was of little evidential value for the period prior to 2001. Even allowing for the period when Bretby was the lessee, the claim relating to the period prior to 2001 appears stale, thus the Tribunal decided that the Respondents were seriously prejudiced in defending this application. The current Respondents were also entitled to rely upon the receipted notice of assignment dated 1st June 2016 issued by KMP, the Manager, which implied that the Lease was treated by the Manager as still subsisting.

29. Notwithstanding the acknowledgement of the notice of assignment, relating to the period after 2001, the Respondents had admitted several breaches relating to alterations occurring in the period from 2013 to date, (in ignorance of the appointment of the Manager). It was unclear if any other breaches were alleged for the period concerned. In the absence of any reliable evidence, the Tribunal decided that no breaches had occurred during the period 2001 to Autumn 2013. However the Tribunal considers that enforcement of the Lease in respect of those admitted breaches is a matter for the Manager, not for the Applicant. At the very least, the Manager should have been joined to this application. Relying on Mr Freed's own evidence to the effect that he had as little to do with the Manager as possible, it seems that the Applicant had taken no steps to make the Manager aware of this application.

30. Dealing with other issues shortly, the Tribunal decided that the Applicant's evidence relating to breaches of Planning or Building Regulations was insufficient to prove its case relating to the breaches alleged to have occurred prior to 2001, or prior to 2010. The applicant put forward no evidence other than the 2010 Act. There was, for example, no suggestion that the 2010 Act was retrospective in effect, or that it was merely a renewal of existing legislation. Although the experts differed, the Respondent's expert also argued that a breach may also not have occurred in relation to the period 2013 - 2017. In any event the case made by the Applicant on that point was unfocused.

31. The Respondents had brought reasonable evidence to suggest that no breach of the user clause (and hence the insurance provisions) had occurred, while the Applicant had only an assertion that the tenants were not related in any way. In the absence of a prima facie case, the Tribunal decided that the Applicant had not proved its case sufficiently to succeed.

32. The Respondent made an application (of which notice was given at the first hearing of case and renewed at the second hearing) to strike out those parts of the application which were not admitted, on three grounds; delay in bringing the

application thus causing prejudice to the Respondent; vexatiousness, as there was no possibility of successfully pursuing an action to forfeit the Lease on the facts of this case; and that the application was being pursued for a collateral purpose, i.e. pressurising the Respondents to sell to it. However, the Tribunal decided that the application had evolved somewhat during the course of the hearing, as the Applicant's right to make the application had been added and argued. Also the Respondents had made an application under Rule 13 of Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and it seemed more appropriate to argue the point in the context of that application, for which the Tribunal makes the Directions below ;

Rule 13 - Directions

Paper determination/ Full hearing (time/date):	***The tribunal will determine the matter on the papers in the week commencing 21st May 2018 unless within 28 days of these directions either party requests a hearing, in which case the tribunal will determine the matter at a hearing on 23rd May 2018 commencing at 10.30am***

Preliminary

(1) The Respondent seeks an order under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("The Rules"). Rule 13(1)(b) provides that the tribunal may make an order in respect of costs if a person has acted unreasonably in bringing, defending or conducting proceedings in a residential property case or a leasehold case ("the rule").

(2) The application was made in written submissions for the second hearing of the substantive application, a copy of which was given to the Applicant.

(3) The application is made within the time limits prescribed by rule 13(5).

(4) Rule 13(6) provides that the Tribunal may not make an order for costs against a person ("the paying person") without first giving that person an opportunity to make representations.

(5) Accordingly, this application will be determined by the Tribunal subject to the directions set out below.

(6) The Tribunal notes the Respondents' statement of case dated 5th December 2017, however the Tribunal directs that the Respondents serve a more detailed statement of case in accordance with the Directions set out below, with particular reference to the case law referred to in the Directions

Directions

1. The Tribunal considers that this application may be determined by summary assessment, pursuant to rule 13(7)(a).

2. The application is to be determined **without a hearing, unless either party makes a written request (copied to the other party) to be heard before the paper determination.**

The Respondents' case

3. By **3rd April 2018** the applicants shall send to the respondent a statement of case setting out:

(a) The reasons why it is said that the respondent has acted unreasonably in bringing, defending or conducting proceedings and why this behaviour is sufficient to invoke the rule, dealing with the issues identified in the Upper Tribunal decision in *Willow Court Management Company (1985) Ltd v Mrs Ratna Alexander* [2016] UKUT (LC), with particular reference to the three stages that the tribunal will need to go through, before making an order under rule 13;

(b) Any further legal submissions;

(c) Full details of the costs being sought, including:

- A schedule of the work undertaken;
- The time spent on each item (in hours/minutes);
- The grade of fee earner and his/her hourly rate;
- If the work was done by the applicants' personally, any legal arguments in support of any hourly rate in excess of £19 per hour (or other the current hourly rate for litigants in person allowed by the County Court)
- Supporting invoices for any disbursements or a detailed breakdown of any printing and/or copying done by the applicants personally.

The Applicant's case

4. By **20th April 2018** the Applicant shall send to the Respondents a statement in reply setting out:
   (a) The reasons for opposing the application, with any legal submissions;
   (b) Any challenge to the amount of the costs being claimed, with full reasons for such challenge and any alternative costs;
   (c) Details of any relevant documentation relied on with copies attached.

The Respondents' reply

5. By **27th April 2018** the Respondent shall send to the Applicant a short statement in response limited to those matters raised in either the statement or reply.

Documents for the hearing/determination

6. The Respondents shall be responsible for preparing the bundle of documents (in a file, with index and page numbers) and shall by **8th May 2018** send one copy to the other party and send **four** [two if paper track] copies to the Tribunal.

7. The bundle shall contain copies of:
   - The Tribunal's determinations in the substantive case to which this application relates;
   - These directions and any subsequent directions;
   - The Respondents' statements and response with all supporting documents;
   - The Applicant's statement with all supporting documents.

Determination/hearing arrangements

8. The tribunal will determine the matter on the basis of the written representations received in accordance with these directions in the **week commencing 21st May 2018**

9. If an oral hearing is requested, the hearing shall take place on **23rd May 2018** at 10 Alfred Place London WC1E 7LR starting at **10:30am** with a time estimate of 1-2 hours.

10. Any letters or emails sent to the tribunal must be copied to the other party and the letter or email must be endorsed accordingly. Failure to comply with this

direction may cause a delay in the determination of this case, as the letter may be returned without any action being taken.

Tribunal Judge: Lancelot Robson 12th March 2018

NOTES

(a)If the Respondent fails to comply with these directions the tribunal may strike out all or part of their case pursuant to rule 9(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules").

(b) If the Applicant fails to comply with these directions the Tribunal may bar them from taking any further part in all or part of these proceedings and may determine all issues against it pursuant to rules 9(7) and (8) of the 2013 Rules.

Tribunal Judge: Lancelot Robson 12th March 2018

Appendix of relevant legislation

Section 168 Commonhold and Leasehold Reform Act 2002

(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 (c20) (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) 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 a period of 14 days beginning with the day after that on which the final determination is made.

(4) A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred.

(5) But a landlord may not make an application under subsection (4) in respect of a matter which-
(a) has been, or is to be, referred to arbitration pursuant to a post-dispute resolution agreement to which the tenant is party,
(b) has been the subject of determination by a court, or
(c) has been the subject of a determination by an arbitral tribunal pursuant to a post-dispute resolution arbitration agreement.

169 Section 168: supplementary
(1) – (6) ....

(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).

Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Rules 13(1) - (3)

13.-(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.

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on application or on its own initiative.
