FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/43UD/LBC/2021/0006
Property	**:**	12 Eastcroft Court, Albury Road, Guildford, Surrey, GU1 2BU
Applicants	**:**	Eastcroft (Guildford) Management Ltd
Representative	**:**	Dr Richard Stanhope (Director)
Respondent	**:**	Alastair Richardson and Michaela Richardson
Representatives	**:**	Bolt Burdon, Solicitors
Type of Application	**:**	Breach of covenant (s.168 Commonhold and Leasehold Reform Act 2002)
Tribunal Members	**:**	Judge MA Loveday Ms C Barton MRICS
Date and venue of hearing	**:**	27 October 2021 (video proceedings)
Date of Decision	**:**	30 October 2021

DETERMINATION

Introduction

1. This is an application under s.168 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") for a determination of breaches of covenant in a lease of a flat in Guildford. The application was listed for a one day-remote hearing on 27 October 2021. The hearing involved the preparation and consideration of a 277-page bundle and the attendance of an expert witness, notwithstanding the fact the breaches were (save in minor respects) formally admitted.

Background

2. The matter relates to 12 Eastcroft Court, Albury Road, Guildford Surrey, GU1 2BU. The Tribunal did not inspect the premises, but they are described in a report of the expert Mr Nigel McDonough MRICS dated 16 November 2020. Eastcroft Court comprises a small development of apartments c.1987-89 in a residential area of Guildford which is laid out in two three-storey blocks. Structurally, the property has loadbearing masonry walls and concrete block and beam floors. Flat 12 is a two-bedroom maisonette with a garage, reception and study on the ground floor, and 2 bedrooms, kitchen and bathrooms etc. on the first floor. As originally laid out, the flat featured a dining area at first floor level, with a further gallery area above the head of the staircase reached by three steps up from the dining area.

3. The Respondents acquired the flat in April 2019 and there is no dispute they proceeded to carry out various works. Notwithstanding the considerable effort which has gone into this matter on both sides, it is an unsatisfactory feature of this case that none of the statements of case specifically identify the works which were carried out. However, Mr McDonough's report summarises them as follows:
    a. Structural Works. The main structural works to the property were the removal of the existing staircase between ground and first floor, infilling and extending the existing first floor structure and creation of a new staircase. The structural works involved drilling resin Hilti fixings into the load bearing walls to support timber trimmer beams, joist hangers and a new timber staircase string, creating a new hole in the external wall for a boiler flue and filling in the existing hole. The effect was to improve the layout by combining the gallery and dining area into a new room on a single level and reducing the space taken up by the stairwell.
    b. Non-structural works. The non-structural works included converting an airing cupboard into wardrobe space by removing some of the cupboard walls, providing new kitchen worktops, cupboards and fittings, replacing the tank-fed gas boiler with a Combi boiler and fitting a new bathroom vanity unit. The flat was rewired, including the relocation of the consumer unit (fusebox) from inside the flat to a service cupboard (riser) in the communal hallway. The Respondents also attached a "Ring" motion-activated video doorbell to the front door of the flat.
    c. Decorative works. These included replacing the floor coverings (including engineered wood flooring) and complete redecoration.

The Lease

4. By a lease dated 27 September 1989, the flat was demised for a term of 125 years from 28 September 1988. The Demised Premises were defined by Sch.1 to the Lease – a definition which appears in the Appendix to this decision.

5. By clause 3(5) there was a covenant on the part of the lessee:
   > "(5) Not at any time during the Term to make any alterations or additions to the Demised Premises or any part thereof or to cut maim alter or injure any of the walls or timber beams or joists thereof or to alter the landlords' fixtures therein, without first having made a written application (accompanied by all relevant plans and specifications) in respect thereof to the Lessor and secondly having received the written consent of the Lessor thereto."

6. By clause 3(7), there was a further covenant by the lessee:
   > "(7) To pay to the Lessor all costs charges and expenses including Solicitors' Counsels' and Surveyors' costs and fees at any time during the Term incurred by the Lessor in or in contemplation of any proceedings in respect of this Lease under sections 146 and 147 of the Law of Property Act 1925 or any re-enactment or modification thereof including in particular all such costs charges and expenses of and incidental to the preparation and service of a notice under the said Sections and of and incidental to the inspection of the Demised Premises and the drawing up of Schedules of Dilapidations such costs charges and expenses as aforesaid to be payable notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court."

The statements of case

7. The application was issued on 22 February 2021. Directions were given on 23 March, 12 April, 13 May and 14 June 2021. There were Statements of Case from the Applicant (dated 7 April 2021 and 31 August 2021) and from the Respondent (dated 27 August 2021).

8. The Applicant referred to the works in Mr McDonough's report, alleging they were carried out without the consent of the Applicant in breach of clause 3(5) of the Lease.

9. The Respondents' Statement of Case (settled by counsel) admitted all the above works and further admitted that none of them were carried out with the lessor's written consent. The Statement of Case further admitted breaches of clause 3(5) of the Lease, subject to various qualifications:
   a. The structural works. The Respondents admitted there was a breach of clause 3(5) of the Lease. But the extent of the admission was limited to works to the Demised Premises as defined by Sch.1 to the Lease (so, for example, there was no admission the works to the floor joists in the flat were a breach of clause 3(5) of the Lease).
   b. The non-structural works. It was admitted that all the non-structural works were in breach of clause 3(5) of the Lease, save for the relocation of the consumer unit and the video entry system. The removal of the

consumer unit was in breach of clause 3(5) of the Lease, but not the installation of the unit in the hallway. It was denied the video entry system amounted to a breach of covenant.

c. The decorative works. It was admitted the new flooring was a breach of clause 3(5) of the Lease, but not that the general redecoration of the flat was a breach.

10. In the light of these admissions, and the limited nature of the remaining issues, it is perhaps surprising the parties did not simply enter into a consent order making a determination in relation to the breaches of covenant which were admitted. However, the parties did not reach agreement. Instead, the Applicant chose to pursue matters to a Tribunal hearing. On 19 October 2021, the Respondents applied to strike out the Applicant's Statement of Case.

11. At the hearing, Dr Richard Stanhope (a Director) appeared for the Applicant. The First Respondent appeared in person.

The Act

12. The material provisions of the 2002 Act are as follows:

> **"168 No forfeiture notice before determination of breach**
> (1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.
> (2) This subsection is satisfied if—
> (a) it has been finally determined on an application under subsection (4) that the breach has occurred,
> (b) the tenant has admitted the breach, or
> (c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.
> (3) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.
> (4) A landlord under a long lease of a dwelling may make an application to the appropriate tribunal for a determination that a breach of a covenant or condition in the lease has occurred.
> (5) But a landlord may not make an application under subsection (4) in respect of a matter which—
> (a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
> (b) has been the subject of determination by a court, or
> (c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement."

Striking Out

13. The Tribunal first dealt with the Respondents' application to strike out the Applicant's case under Rule 9 of the Tribunal Procedure (First-tier Tribunal)

Procedure Rules 2013 ("the Procedure Rules"). The Tribunal declined to strike out. These are the brief reasons for refusing the application to strike out.

14. The relevant provisions of Rule 9(1) are:

> "9(1) The proceedings or case, or the appropriate part of them, will automatically be struck out if the applicant has failed to comply with a direction that stated that failure by the applicant to comply with the direction by a stated date would lead to the striking out of the proceedings or that part of them.
> (2) The Tribunal must strike out the whole or a part of the proceedings or case if the Tribunal-
> (a) does not have jurisdiction in relation to the proceedings or case or that part of them; and
> (b) does not exercise any power under rule 6(3)(n)(i) (transfer to another court or tribunal) in relation to the proceedings or case or that part of them.
> (3) The Tribunal may strike out the whole or a part of the proceedings or case if-
> (a) the applicant has failed to comply with a direction which stated that failure by the applicant to comply with the direction could lead to the striking out of the proceedings or case or that part of it;
> (b) the applicant has failed to co-operate with the Tribunal such that the Tribunal cannot deal with the proceedings fairly and justly;
> (c) the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal;
> (d) the Tribunal considers the proceedings or case (or a part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal; or
> (e) the Tribunal considers there is no reasonable prospect of the applicant's proceedings or case, or part of it, succeeding."

15. By way of background, it should be said the Respondents previously applied to strike out on other grounds on 28 April, 14 June and 30 June 2021. On 3 May 2021, the Tribunal rejected the first of these applications, stating that it "… wished to make it clear that both parties must cease playing procedural games …". Sadly, that warning was not heeded. The second and third applications to strike out were not granted. There were also several procedural applications by the Applicant (all or most of which appear to have been rejected by the Tribunal) and a lengthy telephone Case Management Hearing which took place on 27 July 2021.

16. The Respondents relied on two distinct arguments to support their latest application to strike out. First, it was suggested the case should be struck out under Rule 9(2)(a), because the Tribunal did not have jurisdiction. The argument was that s.168(2) of the 2002 Act provided for various alternative means of establishing a breach of covenant. If the lessee admitted the breach under s.168(2)(b), there was no jurisdiction for a tribunal to make a final determination under s.168(2)(a) and (4). Secondly, it was suggested the Tribunal should exercise its discretion to strike out under Rule 9(3). The Respondents relied on the following:

d. The Application was very narrowly focussed on clause 3(5) of the Lease. However, the Response dated 31 August 2021 sought to widen the issues to include consideration of clauses 3(3) and 3(6) as well.
e. The breaches had been admitted in the Respondents' Statement of Case.
f. The bundle did not comply with the *Guidance on PDF Bundles* document circulated to the parties. It was not machine readable, some documents appeared in landscape mode and there was no bookmarking. This was a waste of the Tribunal's time.

17. The Applicant left it to the Tribunal to deal with the interpretation of s.168(2). However, in relation to abuse of process, Dr Stanhope did not accept the original Statement of Case was narrowly confined to consideration of clause 3(5) of the Lease. But that was in any event the only breach he asserted. Not all the issues were dealt with in the admissions made by the Respondent – for example, the relocation of the consumer unit was still disputed, and the expert Mr McDonough had attended the hearing in order to give evidence. Dr Stanhope asserted the bundle substantially complied with the *Guidance on PDF Bundles*. The Tribunal should also take into account the history of failed attempts to strike out.

18. The Tribunal did not consider it was required to strike out the Applicant's Statement of Case under Rule 9(2)(a) because it rejects the Respondents' interpretation of s.168 of the 2002 Act. Although the word "or" appears in s.168(2)(b), this does not mean the three conditions in s.168(2) are exclusive. The condition may be met by any one or more of these conditions. Indeed, the position is put beyond doubt by s.168(5), which expressly sets out three circumstances where the tribunal does not have jurisdiction to determine a breach. Notably, these include circumstances where a "court" or "arbitral tribunal" becomes seized of the question of breach, using words which echo the provisions of s.168(2)(c). Had the Act intended to remove jurisdiction from the Tribunal automatically whenever there was an admission under s.168(2)(a) of the 2002 Act, Parliament would have expressly stated this in s.168(5). The Tribunal also contrasts s.168 with the wording of s.27A(4)(a) of the Landlord and Tenant Act 1985, which has exactly the effect contended for by the Respondents in the context of applications to determine liability to pay service charges. In any event, the Tribunal accepts that in this case the admissions in the Respondents' Statement of Case (although extensive) do not cover all the matters which are in dispute. It follows the Tribunal is not required by s.168 of the 2002 Act to strike out the Applicant's Statement of Case under Rule 9(2)(a).

19. The Tribunal does not exercise its power to strike out under Rule 9(3):
    a. It does not accept there has been any material change in the Applicant's case, which focussed throughout on an alleged breach of clause 3(5) alone. The references to other provisions in the latest Statement of Case do not suggest otherwise, and Dr Stanhope confirmed he was only relying on a breach of clause 3(5). The Applicant has not therefore conducted the proceedings in a frivolous or vexatious manner under Rule 9(3)(d).

b. It cannot be considered an abuse of process under Rule 9(3)(d) to continue to seek a formal Tribunal determination about something which is not only substantial, but which is also largely admitted.
c. The Tribunal accepts the *Guidance on PDF bundles* was a "direction" of the Tribunal for the purposes of Rule 9(3)(a): see Directions 27 July 2021 para 24. It also finds that the hearing bundle does not entirely comply with the Guidance. But the bundle is not seriously deficient, and the Tribunal has had no difficulty using it to reach a decision. It would not be proportionate to strike out on this basis. It also bears in mind there are other (more proportionate) remedies to meet any default on the part of the Applicant, such as an order for Rule 13(2) costs.
d. The Tribunal bears in mind the sorry procedural history of matters, and in particular the previous unsuccessful applications to strike out.

The substantive issues

20. The Applicant sought a Tribunal determination about the matters which were admitted. The Tribunal therefore finds there was a breach of clause 3(5) of the Lease in relation to those matters which are admitted.

21. As to the matters which were not admitted, Dr Stanhope indicated he only sought a determination about two of the outstanding items of work. These were (a) the installation of the consumer unit in the common parts, and (b) the Ring video doorbell.

22. The Tribunal explored with Dr Stanhope whether there was much point in pursuing a determination in relation to the consumer unit. The Respondent admitted that removal of the fuse box from inside the flat was a breach of covenant. But Dr Stanhope wished to pursue the argument that installing it in the hallway cupboard was a separate breach of clause 3(5). He indicated that a finding by the Tribunal might support an application to the County Court to have the consumer unit removed from the common parts.

23. Dr Stanhope called Mr McDonough as an expert. Mr McDonough explained that he inspected on 27 and 31 October 2020. He referred to photographs of the cupboard in the hallway outside Flat 12, showing the repositioned consumer unit – contrasting it with the cupboard outside another flat showing the original wiring layout. Mr McDonough considered there was a fire risk inherent in the new arrangement, since the occupiers could not operate the fuses from inside the flat. He also referred to photographs of the video doorbell, which was attached to the front door of the flat itself. Mr McDonough questioned the need for this extra level of security, since anyone reaching the door to the flat would already have had to gain access through the (locked) street door in the hallway and a further (locked) doorway to the lobby outside the flat. He also pointed out there were privacy issues with video doorbells which automatically recorded images of visitors to Flat 12 and indeed anyone entering the doors other flats through the lobby. The First Respondent did not challenge any of Mr McDonough's evidence of fact. Dr Stanhope accepted that neither the cupboard nor the front door to the flat were demised to the lessee under the Lease. But his case was that the installation of the consumer unit in the cupboard was an "alteration[…] or addition[…] to the Demised Premises".

24. The First Applicant submitted that the two alleged breaches raised the same question of interpretation of clause 2(5) of the Lease. The cupboard outside the flat was not part of the "Demised Premises", as defined by Sch.1. Neither was the front door to the flat. Even if the lessees altered the common parts or cut, maimed altered or injured them, that was not a breach of clause 3(5) of the Lease. And the Applicant solely relied on alleged breaches of clause 3(5)

25. This is a very narrow point of law, and the Tribunal considers the two additional alleged breaches add very little to the breaches which are already admitted. But the Tribunal finds the cupboard in the hallway is not part of the Demised Premises. Neither is the "external surface" of the front door to the Flat: see para 1(a) of Sch.1 to the Lease. It therefore agrees with the Respondents that alterations to the door to the flat and the cupboard in the common parts are not alterations of the "Demised Premises" or breaches of clause 3(5) of the Lease. It may well be that such alterations could be said to be breaches of other covenants in the Lease, but that is not the way the Applicant has put its case.

Rule 13 costs

26. Under Rule 13(1)(b) of the Procedure Rules, the Tribunal may make an order in respect of costs "if a person has acted unreasonably in bringing, defending or conducting proceedings". In Willow Court Management Company (1985) Ltd v Alexander [2016] UKUT 0290 (LC) at para 28, the Upper Tribunal suggested three convenient stages for the award of costs under Rule 13(1)(b):
    (a) Stage 1: Whether the party has acted unreasonably. If there is no reasonable explanation for the conduct complained of, the behaviour will properly be adjudged to be unreasonable, and the threshold for the making of an order will have been crossed.
    (b) Stage 2: Whether the First-tier Tribunal ought (in its discretion) to make an order for costs or not. Relevant considerations include the nature, seriousness, and effect of the unreasonable conduct.
    (c) Stage 3: Discretion as to quantum. Again, relevant considerations include the nature, seriousness, and effect of the conduct.

27. The Applicant sought costs under Rule 13(1) and Dr Stanhope addressed the Tribunal on this at the end of the hearing. The First Respondents also indicated the Respondents might wish to pursue a similar application, but the First Respondent had not prepared for it. He therefore reserved his position about making a proper Rule 13(1) costs application at a later date.

28. Dr Stanhope sought payment of the following costs:
    a. Expert report fees of £2,340: see invoice from Vail Williams dated 17 November 2020.
    b. Legal costs. The Applicant quantified these as £12,306 - but the fee notes from solicitors DHM Stallard dated 28 May 2020 to 29 January 2021 provided to the Tribunal amounted to £7,858.80.
    c. Extra Managing Agents' fees of £2,442: see invoice dated 7 April 2021.
    d. Mr McDonough's fees of attending the hearing (to be advised).

    Dr Stanhope contended the application was unarguable. The alterations had not been authorised, no application had been made for consent and no plans had

been submitted to the Applicant. The Applicant also relied on clause 3(7) of the Lease.

29. The First Respondent argued the costs were not incurred "in bringing, defending or conducting proceedings". In any event, the Applicant had not acted unreasonably. Clause 3(7) of the Lease may well give a right to recover costs from the Respondents, but that had nothing to do with Rule 13(1).

30. The Tribunal declines to make an order for costs. Although pre-application conduct may be relevant to a Rule 13(1) application, the first stage of the enquiry in Willow Court inevitably focusses on the party's conduct of the proceedings themselves. The conduct relied upon in this case pre-dated the application, and not to "bringing, defending or conducting proceedings". Although criticism might have been made about the Respondents' conduct of the proceedings, that was not what the Applicant relied on in this instance to support the Rule 13(1) application. In any event, even if the Tribunal may properly focus on the circumstances of the breach, it does not accept the criticism made by the Applicant are sufficient to amount to unreasonable conduct under the first stage in Willow Court. In effect, every s.168 application involves some default on the part of a lessee, and there are no particularly aggravating features of the breaches in this case that would mark this case out from the norm.

31. As to clause 3(7) of the Lease, the Tribunal does not find this is relevant to Rule 13(1) at all. There may well be a contractual route by which the Applicant can recover costs - even indemnity costs - but that route is not through Rule 13(1) at all.

32. In any event, under the second stage in Willow Court, the Tribunal would have taken into account the Applicant's own conduct. The Tribunal considers that in relation to the proceedings themselves (a) the Applicant has pursued matters to hearing notwithstanding the significant concessions made, and then failed in the two substantive issues at the hearing and (b) it was wholly unnecessary to incur the costs of the expert attending the hearing in this case. Further, there are the numerous applications to the Tribunal made by the Applicant despite the above warning made by the Tribunal set out above. *Both* parties have therefore contributed to the costs and delays in this matter, and it is relevant to a Rule 13(1) application that the Applicant has itself played its own part.

Disposal

33. The Tribunal determines under s.168(4) of the 2002 Act that there were the following breaches of clause 3(5) of the Lease dated 27 September 1989:
    a. Structural Works. Removal of the existing staircase between ground and first floor, infilling and extending of the existing first floor structure and creation of a new staircase. These included the drilling of resin Hilti fixings into the load bearing walls, creating a new hole in the external wall for a boiler flue and filling in the existing hole.
    b. Non-structural works. Removing the walls to the airing cupboard, new kitchen worktops, cupboards and fittings, replacement of the tank-fed gas boiler with a Combi boiler and fitting a new bathroom vanity unit. Rewiring, including the removal of the consumer unit (fusebox).

c. Decorative works. Installation of engineered wood flooring.

Judge Mark Loveday
30 October 2021

Appeals

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.

APPENDIX: SCHEDULE 1 TO THE LEASE

THE FIRST SCHEDULE
THE DEMISED PREMISES

1. The premises specified in the Particulars as shown for identification purposes edged red on the Plan A annexed hereto and forming part of the Building including:
(a) The internal plastered or plaster board coverings and plasterwork of the walls bounding the premises and the doors and door frames and window frames fitted in such walls (other than the external surfaces of such doors door frames and window frames) and any glass fitted in such doors and window frames and
(b) The plastered or plaster board coverings and plaster work of the walls and partitions lying within the premises and the entirety of any non- supporting walls and partitions and the doors and door frames fitted in such walls and partitions and
(c) The plastered or plaster board coverings and plaster work of the ceilings and the surfaces of the floors including the whole of the floorboards (if any) and
(d) All conducting media which are laid in any part of the Building and serve exclusively the premises (excluding any such deemed to be property of the relevant statutory undertaker)
(c) All fixtures and fittings in or about the Demised Premises and not hereafter expressly excluded from this demise

But not including:
(i) any part or parts of the Building (other than any conducting media expressly included in this demise) lying above the said ceilings or below the said floor surfaces
(ii) any of the main walls roofs foundations timbers beams and joists of the Building or any of the supporting walls or partitions therein (whether internal or external) except such of the plastered and plaster board surfaces thereof and the doors and door frames fitted therein as are expressly included in this demise
(iii) any conducting media in the Building which do not serve the Demised Premises exclusively