FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOAE/LBC/2014/0091**
Property	:	**88A Willesden Lane, London, NW6 7TA**
Applicant	:	**Dr J Inklebarger (landlord)**
Representative	:	**Mr A Rosenthal of counsel, instructed by Freshlaw, solicitors**
Respondent	:	**Ms K Jackson (leaseholder)**
Representative	:	**Ms V Seifert of JPC Law, solicitors**
Type of Application	:	**Application under section 168 of the Commonhold and Leasehold Reform Act 2002 (the 'Act') for a determination that the leaseholder is in breach of her lease.**
Tribunal Members	:	**Judge James Driscoll and Mrs A Flynn MA, MRICS**
Date and venue of Hearing	:	**The application was heard at 10 Alfred Place, London on 19 December 2014**
Date of Decision	:	**21 January 2015**

DECISION

Summary of the decision

1. **The applicant is permitted to withdraw the application under section 168 of the Act in accordance with regulation 22 of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013.**

2. The respondent's application that the claim be struck out is dismissed.

3. The application that the applicant should pay costs under rule 13 of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 is dismissed.

Background

4. An application dated 11 November 2014 was made on behalf of the landlord seeking a determination that a breach of covenant or a condition in the lease has occurred. The application was made under section 168 of the Act.

5. The landlord purchased the freehold of 88 Willesden Lane NW6 in October 2013. It is a building comprising a ground floor shop and a two-storey flat above it. The flat is held on a long lease owned by the respondent to the application. The leaseholder lets the flat on a three year assured shorthold tenancy dated 28 October 2013.

6. Directions were given by the tribunal on 25 November 2014. As the applicant told the tribunal that he considered the application needed to be dealt with urgently an early hearing date was fixed for 19 December 2014.

7. Those advising the applicant wrote to the tribunal on 4th and 5th December 2014 seeking to have the hearing postponed and seeking to withdraw their application. This was opposed by those advising the respondent who had made a cross application seeking an order that the claim be struck out and also seeking an order for costs under rule 13 of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013. In a letter to the tribunal dated 11 December 2014 the applicant sought to withdraw his application.

8. Applications cannot be withdrawn without the consent of the tribunal (see rule 22). In a decision dated 15 December 2014 the tribunal refused to consent to the proposed withdrawal. It directed that the hearing scheduled for 19 December 2014 should go ahead to consider the application to strike out, the application for costs made under rule 13 and whether the tribunal should exercise its powers under section 20C of the Landlord and Tenant Act 1985. In this connection we should also record that those advising the leaseholder wrote a detailed letter to the tribunal rejecting the application to withdraw, seeking to have the application under section 168 struck out and an application for orders for costs. A reply was sent to the tribunal by those advising the respondent opposing this though the letter was not received by the tribunal until 7 January 2015.

The hearing

9. At the hearing held on 19 December 2014 the landlord was represented by Mr Rosenthal of counsel and the leaseholder was represented by Ms Seifert a barrister employed by JPC Law, solicitors. Mr Rosenthal was instructed by Freshlaw solicitors who he had instructed instead of Churchills, his previous solicitors. Both parties prepared bundles including written submissions, statements made by the parties and other relevant documents. The landlord was present during the hearing. We were told that the leaseholder, who lives in Australia, could not attend the hearing.

10. After opening submissions it was agreed that the landlord should be allowed to withdraw its application and that in light of this withdrawal the leaseholder's application to strike out was no longer relevant. This was because the landlord accepted that the leaseholder was taking action to deal with the problems caused by her tenant. We were told that her managing agents have instituted possession proceedings against the tenant.

11. Ms Seifert told us that her client no longer wished to pursue her application for an order under section 20C of the 1985 Act.

12. This left the application by the leaseholder for a costs order under rule 13. of the 2013 rules. Both counsel addressed us on the costs application.

13. From these submissions we draw the following to be the main factors concerning this case.

14. It is evident that landlord became aware that there were problems shortly after he purchased the building in October 2013. These problems consisted of leaks from the flat into the commercial part of the building and the landlord suspected that the flat was let to several occupiers and it was in consequence a property in multiple occupation. According to his statement and his counsel's submissions he sought the assistance of Brent Borough Council but he became dissatisfied with their lack of action, as he saw it. The

landlord then sought advice from Churchill's solicitors who served a forfeiture notice under section 146 of the Law of Property Act 1925 alleging various breaches of the lease by the leaseholder.

15. The leaseholder communicated by telephone and email with Churchills and she stated that she would look into the complaints and arrange for her managing agents to investigate. She also consulted her solicitors who pointed out to Churchills that under the restrictions on forfeiture for residential leases in section 168 of the Commonhold and Leasehold Reform Act 2002 a section 146 notice cannot be served alleging breach of covenant unless the landlord obtains a determination that the breach complained of occurred.

16. Churchills then made this application on behalf of the landlord.

17. Following the leaseholder's instructions her managing agents, Ludlow Thompson, gave notice to the tenant that possession proceedings were being started because of breaches of the tenancy agreement. According to the landlord he then decided that as the leaseholder was taking steps to deal with his concerns that it was no longer necessary to seek a determination.

Our decision

18. The question appears to us to be was it unreasonable of the landlord to bring this application?

19. Before setting out our answer we first set out our understanding of the scope of costs orders made under rule 13.

20. Our power to make a costs order is contained in rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 where the relevant part states: 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—residential property case, or (iii) a leasehold case'.

21. We can make an order for costs under rule 13 either under section 29(4) of the Tribunals, Courts and Enforcement Act 2007 (commonly known as a 'wasted costs' orders), or in one or other of the cases set out in rule 13. Wasted costs orders can be made under section 29(4) of the 2007 Act against a legal or other representative and it clearly has no relevance to this application. Instead we are considering an application based on a submission that the landlord has behaved unreasonably by bringing, these proceedings.

22. We now consider the background to this new costs power. Before this new costs power came into effect the tribunal had power to make costs under

paragraph 10, Schedule 12 of the Commonhold and Leasehold Reform Act 2002 limited to a maximum order of £500 (or other amount to be specified in procedure regulations). Under rule 13 of the new rules there is no upper limit on the amount of the costs that can be ordered.

23. The tribunal system is sometimes referred to as a 'cost-free' jurisdiction for, unlike court proceedings, the losing party cannot be ordered to pay the successful party's legal costs. Common sense and experience has shown that parties may have been deterred from using litigation to assert their rights by the prospect of losing the case and having to pay the other party's costs. This may have been one of the reasons for the transfer of jurisdiction over residential leasehold disputes, such as disputed service charges, from the county court to the tribunal. Another relevant factor is that, an order can be made under section 20C of the 1985 Act to prevents a landlord from seeking to recover any professional costs it incurred in proceedings before the tribunal as a future service charge even where the leaseholder has been successful in full or in part in the tribunal. To complete the picture, the tribunal can order one party to reimburse the other for the fee payable in making an application. These points apart the tribunal has no powers to order one party to pay the legal costs of the other.

24. These brief comments lead us to the conclusion that costs orders under rule 13 should only be made in exceptional cases where a party has clearly behaved unreasonably. This is because the tribunal remains essentially a costs-free jurisdiction where an applicant should not be deterred from using the jurisdiction for fear of having to pay the other party's costs should she or he fail in their application. Rule 13 costs should, in our view, 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.

25. Applying this approach to the facts of this case we consider that the leaseholder has made a strong case that the landlord has acted unreasonably in making the application under section 168. It seems to us that the leaseholder did her best to deal with the situation. As soon as she became aware of what her tenant was apparently doing she instructed her managing agents to investigate. She also spoke to the landlord's previous solicitors in an attempt to deal with the concerns of the landlord. In addition, she sought legal advice from her solicitors. It cannot be an easy matter for her to deal with issues relating to a London property when she lives in Australia.

26. As against that we also consider that the landlord who having discovered evidence that the flat's tenant was in breach took steps to protect his interest which he plainly was entitled to do. He tried to persuade the local authority to exercise it powers (presumably their powers in the Housing Act 2004) and when this did not lead to any action he sought legal advice. He was advised to seek forfeiture of the lease and we cannot criticise him for the

fact that his first advisors were unaware that a forfeiture notice could not be served without a prior determination that a breach had occurred. When this mistake was discovered the application was made to this tribunal.

27. It appears that the matters that concerned the landlord about the condition of the flat and its occupancy were the responsibility of the person the leaseholder had let the property to . To the extent that the behaviour of her tenant has put her in breach of the lease has in our view been considerably mitigated by the prompt action she took once she became aware of the problems. Nevertheless, the landlord, if he had continued with the application, might well have succeeded in showing that the leaseholder through the behaviour of her tenant was in breach of the covenants in her lease.

28. The landlord has acted on the advice of his professional advisors and strong as the leaseholders case may be we do not consider that a landlord who decides to apply to this tribunal for a determination in circumstances such as these can be said to have acted so unreasonably as to justify a costs order under rule 13 of the 2013 rules.

29. To summarise with the agreement of the parties we are satisfied that the landlord should be allowed to withdraw the application. In light of this there was no need to consider the leaseholder's application to strike out the application.

30. The application for a costs order under rule 13 is refused.

31. We were not asked to make an order under section 20C of the Landlord and Tenant Act 1985.

Signed: James Driscoll, Alison Flynn

Dated: 21 January, 2015