FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/23UF/LBC/2019/0026**
Properties	**:**	**62 Champions Court, Henlow Drive, Dursley, Gloucestershire, GL11 4BE**
Applicant	**:**	**Coventry Church (Fortieth) Housing Association Ltd**
Applicant's Representative	**:**	**Shakespeare Martineau, Solicitors**
Respondent	**:**	**Mr Frank Morris**
Type of Application	**:**	**Application for an order that a breach of covenant has occurred – Section 168(4) Commonhold and Leasehold Reform Act 2002**
Tribunal Members	**:**	**Judge Professor David Clarke** **Jan Reichel BSc, MRICS**
Dated	**:**	**6 January 2020**

DETERMINATION AND STATEMENT OF REASONS

DETERMINATION

The Tribunal determines that the Tenant (and the Respondent) is in breach of the covenant 4(4) contained in the Lease dated 31 July 1996 and made between the Applicant and Edith Emily Maud Morris in that:

(1) The Demised Premises are not in good and substantial repair; and

(2) The Demised Premises have not been decorated inside at least once in every seven years.

The Tribunal determines that the Tenant (and the Respondent) is in breach of the covenant 4(5) contained in the said Lease dated 31 July 1996 in that the rear garden of the Demised Premises is not in a neat and tidy condition.

The Tribunal determines that no other breaches of covenant, as alleged, have occurred.

STATEMENT OF REASONS

Background

1. This application ("the Application") was made on 9 July 2019 by Coventry Churches (Fortieth) Housing Association Ltd ("the Applicant"). The Respondent is Mr Frank Morris who lives at 62 Champions Court, Henlow Drive, Dursley, Gloucestershire, GL11 4BE ("the Property"). The Property is subject to a lease ("the Lease") granted by the Applicant to Edith Emily Maud Morris ("Mrs Morris"), the Respondent's mother, and dated 31 July 1996 for a term of 99 years (less one day) from 22 January 1988. Mrs Morris is now deceased. The Respondent lived with his mother until her death in 2004 and has remained in occupation of the Property ever since.

2. The Applicant is a Housing Association and the Lease requires that any assignment of the Lease must be to a person over the age of 55. The Respondent has been resident at the Property (he says) for over 30 years since his mother was granted a lease of the Property in 1989 (presumably an earlier, now superceded, lease). Initially, he says he was a companion to his mother, and then became her carer until her death.

3. The Respondent describes himself as the 'Responsible Resident' of the Property. Though he is now over 55 years old, there has never been a formal assignment of the Lease to him. The registered title to the Property remains in his mother's name. Apparently, the executrix of Mrs Morris's estate is the Respondent's sister (Ms Rita Adams) and there is presumably an arrangement between her and the Respondent for him to reside in the Property. There was very little evidence before the Tribunal to indicate the Applicant's attitude towards the residence of the Respondent since 2004 except a letter in 2012 from

a firm of solicitors acting for the Applicant's managing agents, Midland Heart Ltd, advising the Respondent to take legal advice on the transfer of the Lease to him. What can be said is that, for a very considerable period of time, the Applicant has acquiesced in the residence of the Respondent in the Property, presumably accepting from him the service charge payments covenanted to be paid under the terms of the Lease.

4. The consequence of the above means that it is unclear if the Tenant under the Lease remains the executrix of Mrs Morris, or whether the long term acceptance of residence and receipt of service charge payments by the Applicant means the Respondent can claim the status of either a tenant or the Tenant under the Lease. Fortunately, in respect of this Application, the Tribunal does not have to determine that issue. But it may need to be decided in another venue on another occasion. For the record, firstly, the Respondent denies that any action on his behalf has made him the Leaseholder and, secondly, no argument was addressed on the relevance, if any, of the covenant in clause 4(11) of the Lease where the Tenant covenants not to underlet or part with possession of the Property.

5. Section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") provides:

> "A landlord under a long lease of dwelling may make application to [the Tribunal] for a determination that a breach of covenant or condition in the lease has occurred."

An application under s168(4) is necessary (in the absence of an admission of a breach) if a landlord wishes to serve a notice under section 146(1) of the Law of Property Act 1925 in respect of a breach by a tenant of a covenant in a long lease of a dwelling. As such, it is an additional restriction that must be satisfied before an action for forfeiture. The section does not demand that a tribunal be satisfied that the breach has been caused by the Tenant only that a breach of covenant has occurred.

History of the Application

6. Following the submission of the Application, Directions were issued by Judge Barber on 24 July 2019. These provided, inter alia, for a determination on the papers without a hearing in accordance with Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules"). Neither party objected to that decision. The directions also provided for official copies of the entries on the register of the Respondent's leasehold title; for the Applicant to serve by 31 July 2019 extended reasons for the Application; to provide further details of the breaches alleged; and for any witness statements of fact. The Respondent was required to serve, by 4 September 2019, his response, any legal submissions, any signed witness statements and any other documents on which he intended to rely. The Directions permitted a brief reply by the Applicant. The Applicant was responsible for preparation of the bundle of documents.

7. The Respondent sought, on 30 July 2019, further time for serving his response. This was granted, with the response to be served by 16 October 2019. On 4 September, the Respondent sought a further extension of time. This was also granted, with the response to be served by 30 October 2019. The response of the Respondent was duly filed within this time limit and the Applicant served a reply within their revised time limit of 13 November. The bundle of papers was provided by 27 November 2019.

8. The matter was set down for determination on 23 December 2019, after a visit to, and inspection of, the Property by the Tribunal.

Applications to vary the Directions

9. The Respondent made two applications to vary the Directions prior to 23 December. The first was dated 27 November, following the receipt by him of the bundle of documents. He asked that two photographs, on pages 214 and 217 of the bundle, be struck out. The basis of his application was that they had not formed part of previous correspondence and were therefore contrary to the Directions.

10. The second application was dated 28 November 2019 and complained that his legal submissions had not been given an identified section in the bundle and asked for an order that it be put in a separate section – though in his accompanying letter he indicated that he was content that the Tribunal accommodate his concerns by whatever means the Tribunal deemed appropriate. Both applications were considered by the Tribunal on 23 December.

11. The Tribunal declined to strike out the two photographs from the bundle. Though they may not have been included in any relevant correspondence between the parties, paragraph 12 of the Directions also permits the inclusion of 'any other documents on which the parties wish to rely'. The Applicants having included the photographs for that purpose, there is no basis to exclude them from the bundle.

12. With respect to the second application, the Tribunal can assure the Respondent that his submissions in his Appendix 1 and the supporting documentation were read thoroughly by the Tribunal. The Tribunal did not therefore consider it necessary to amend the bundle to place that material in a separate section.

Outline of the Applicant's case

13. The Applicant indicated in its application that, in its opinion, six of the covenants in the Lease had been breached, all of which are contained in sub-clauses of clause 4 of the Lease. These are sub-clauses numbered 4, 5, 6, 7, 8 and 10.

14. The six sub-clauses can be summarised, as relevant to the Application, as follows:

(1) Number 4: To keep in good and substantial repair the inside of the Demised Premises (including the sanitary apparatus).
(2) Number 4: In the seventh year of the term and thereafter at least once in every seven years to decorate all inside parts of the Demised Premises.
(3) Number 5: To keep the rear garden in a neat and tidy condition and maintain the boundary fences marked with a "T" inwards on the plan.
(4) Number 6: To permit the Landlord and its agents at reasonable times after notice to the tenant or without notice in case of emergencies to enter upon and examine the condition of the Demised Premises.
(5) Number 7: Not without the consent of the Landlord to make any alterations whatsoever nor to damage the Demised Premises.
(6) Number 8: Not to do anything that may be or become a nuisance or an annoyance or inconvenience to the Landlord or neighbouring tenants, owners or occupiers.

(7) Number 10: To perform or observe such rules and conditions relative to the management of the Property as may from time to time be determined by the Landlords. However, the Tribunal was not supplied with any copy of any such rules and regulations and therefore does not need to consider this covenant further.

Inspection of the Property

15. The Tribunal inspected the Property on the morning of 23 December 2019. They were accompanied in the inspection by Ms Sharon Parker of Midland Heart Ltd, the appointed managing agents of the Applicant, and by the Respondent.

16. The Property is a mid-terraced house of traditional brick and tile construction and faces onto what is effectively a large courtyard where there are car parking spaces for residents. In front of the terraced houses, of which 62 forms part, are communal landscaped areas of bushes and shrubs. The outside of the Property looked very little different from others in this terrace except for the storage in the porch of two redundant mechanical items.

17. The front door opens onto a small hallway, so small in fact the Respondent termed it a lobby. To the left, there was an open door into a downstairs toilet and washbasin. There was an unpleasant smell and staining of the toilet, and the facilities would be difficult to use because of accumulated rubbish and items abandoned in the small space. Some fresh food was on the floor of the lobby, the Respondent explaining that it was the coolest part of the house. There were other items in this lobby area which was dirty. Even the light bulb was stained. The door to the main lounge was damaged, apparently by fire officers entering.

18. The kitchen occupied the rest of the front of the house downstairs. It can only be described as clearly unfit for use. Everything was black, there was evidence of smoke damage to all surfaces, and the floor covering was missing and the floor very dirty indeed. It was not possible to ascertain if any of the appliances worked but it was very unlikely that that was the case as some appeared to be broken as well as black. Perhaps the microwave may have worked. Once again, items were haphazardly resting around the kitchen, the surfaces badly cluttered with some items of food, such as a packet of biscuits. The kitchen door had a lock, which the respondent explained had been fitted when his mother was living in the Property, to protect her, when she was confused, from entering the kitchen. It could only be locked from the outside.

19. The main living area is accessed via a door from the lobby. The door is damaged and also has a lock. The area is open plan, with the staircase rising to the left; and to the right the main area is divided by a floor-to-ceiling divider with open shelves. In the interior of the division so formed, in what may have been designed as a dining area, there was a desk, chair and lamp and cupboard. Most of the main area, designed to be a lounge no doubt, was occupied by what may have been a small double bed mattress, but it was covered by so many items of clothing, bags of material and other items including rubbish, that it could not be seen as a bed. There was a huge amount of clutter in the rest of the room, so much so that there was but a very narrow winding passage through the area to the rear patio door to the garden. There was one usable chair. Perhaps because the electric points

could not be easily accessed, the Respondent had an extension lead into the tiny passageway space from which other leads and wiring for electrical appliances ran. Lying as it did close to potentially inflammable material, there was concern that it was a fire risk, especially as it seemed to spark while the Tribunal was present.

20. The first floor of the Property consists of two bedrooms and a bathroom opening off the landing at the top of the stairs. The stairs themselves were partially blocked by items left on the stairs, as was the landing itself. The door to the hot water tank cupboard over the stairs was missing.

21. Both bedrooms, of small double bed size, were not used for sleeping – the Respondent said he slept downstairs. Both rooms were just store rooms, with various items of furniture, mattresses against the wall, boxes and clutter lying about in the room. Neither bedroom was completely full of such items nor were they as obviously as untidy as the living room downstairs – they were simply not being used.

22. The bathroom was however in a very poor state indeed. The bath lacked its side panel, and all the fittings were badly stained. Since items were again strewn around the bathroom, it looked as if the toilet, which had items stored on it, and bath (which was designed with a shower over) were not used. The washbasin was also grubby and stained.

23. The Property had clearly not been decorated for a very long time and the whole of the downstairs of the Property needs to be decorated – after the Property has been cleaned and the kitchen and bathrooms restored to proper use. The Tribunal noted that 'mechanical damage' – i.e., that beyond normal wear and tear- was evident throughout the house to surfaces and fittings. This will have to be remedied during any redecoration and refurbishment. The upstairs bedrooms are not as bad as the rest of the Property in terms of decoration, though it seems quite possible that they have not been decorated for some considerable time – the Respondent volunteered during the inspection that it was over ten years ago since they were done.

24. The overall impression was of a property that was dirty and had not been cleaned for a long time; and so cluttered with abandoned household and other items that normal living was impossible. The state of the kitchen, bathroom and downstairs toilet was such as to cause the Tribunal to conclude that the state of the Property as it stood at the date of our inspection was to make it unfit for human habitation.

25. The Tribunal were invited to see the small rear garden area, accessed through the patio door. Photographs in the bundle of papers suggested that recently it had been totally overgrown. Since the photographs were taken, the Respondent has obviously made a real effort to clear the garden of that growth – the Tribunal could see the stumps of what must have been a sizeable bush. But the area was still strewn with a considerable amount of cut branches (but not the smaller green cuttings) and a number of items best described as abandoned household items. Given the time of year, the garden surface area was generally muddy.

26. The boundary at the back was a brick wall, in fair condition. The side boundaries with the adjacent properties were fences, both of which seemed to be sound and in an acceptable condition.

The Applicant's submissions

27. The Applicant's case is that the Respondent is in breach of five, if not six, of the covenants in the Lease. In particular:

(1). The Property is not in good and substantial repair internally contrary to clause 4(4). Photos from 2016 were supplied. There is particular concern about the fire risk with three occasions that year when the smoke alarm activated, leading to attendance by Gloucestershire Fire and Rescue services.

(2) The Property has not been decorated at least once in every seven years, again contrary to clause 4(4).

(3) The Respondent has failed to keep the rear garden in a neat and tidy condition and maintain the boundary fences. The Tribunal was supplied with photographs taken in the summer of 2019 showing the garden to be overgrown and unkempt.

(4) The Respondent has not allowed the Landlord or its agent access to the Property as required by clause 4(6). Reference was particularly made to the Fire Service's attempts to access in September and October 2015 when smoke alarms were activated; and in the same year when water was escaping from the overflow pipe. Finally, it was said access had not been granted in 2016 when a contractor called to take pull cord maintenance checks.

(5) The Respondent has made alterations to the Property contrary to clause 4(7) by putting on locks to the kitchen and living room area doors. These doors were found to be locked when emergency access was made on 30 September 2015 because of the water leak occurring while the Respondent was absent from the Property.

28. Though not included in the witness statement of Sharon Palmer, there is also a suggestion in the papers that the Respondent has breached clause 4(8) of the Lease in that his actions, or inactivity, has caused nuisance or annoyance to his neighbours.

The Respondents Submissions

29. The Respondent submitted a statement of some 60 pages, which was well set out and clear. His legal submissions were in Appendix 1 to his Statement of Case, which followed his detailed justification of the matters in contention.

30. The response of the Respondent to the Applicant's case can be summarised as follows:

(1) With regard to the claim for disrepair, the Respondent claimed that the repairing obligation was subject to 'fair wear and tear'; and that there was a lack of transparency as to what internal repair might involve. He claimed that he had never been notified as to what repairs might be needed. He also considered that it was not necessary to continuously to maintain the interior in the condition it was on the grant of the Lease.

(2) The Respondent considers that it would be a waste of effort and finance to concentrate on redecoration and, in his view, complete redecoration is normally only required prior to a sale. He claimed there was no evidence of seeking to enforce redecoration requirements elsewhere in Champions Court. He said that one third of interior decoration of the Property is complete. He claimed he should have had notice of

the requirements to redecorate and that a rolling programme would then be appropriate. He also said that redecoration is a matter of aesthetic and subjective judgement.

(3) In his paperwork, the Respondent defends the garden as it was, with his preference being for a natural habitat with the shrubs being maintained below the level of the wall. He also referred to finding flowers an anathema because of his pollen allergy. He defended the presence of redundant items and garden waste in the garden as he had no ability to take them for disposal so he described it as interim storage of items which in the meantime he uses to assist in garden maintenance. He strongly claimed that the boundary fences were in good condition.

(4) The Respondent strongly denies denying access to the Applicant, its agents, or authorised callers. He says he only asks for assurances that contractors have been 'Criminal Records Checked'. He provided in his statement a detailed riposte to the Applicant's claims of refusal of entry in 2015.

(5) The Respondent admits to minor alterations by fitting of locks to two internal doors but denies these constitute a breach of covenant, one in 2005 to restrict risk to his elderly mother and one on 2013 to enhance security of the Property. Since the locks are only lockable from the lobby, and he is the only resident, he denies that any person could be locked inside.

31. The Respondent dismissed any claim that he had caused a nuisance to others saying he had never received any notification of that, or been informed of any incident giving rise to such a complaint. He particularly felt that the former state of his garden could not have been a nuisance since the fences would have hidden it from view from his neighbour's properties. He also claimed that there was no fire risk, that internal clutter was not a matter dealt with in the Lease covenants and that the internal situation of the Property was a matter for him and was to suit his lifestyle. He described himself as a 'respectable non-conformist' who does not meet the Applicant's fixation of a resident who conforms to its expected model.

Determination – breaches of covenant that have occurred

32. The Tribunal determines that the Tenant (and the Respondent) is in breach of the covenant 4(4) contained in the Lease dated 31 July 1996 and made between the Applicant and Edith Emily Maud Morris in that the Demised Premises are not in good and substantial repair. The inspection by the Tribunal revealed the appalling state of the kitchen, bathroom and downstairs cloakroom; and 'mechanical disrepair' throughout the property. The kitchen in particular is needing repair and renewal throughout. The covenant in clause 4(4) makes particular reference to the sanitary fittings and these require urgent attention. The Respondent may consider that he prefers an alternative lifestyle but he cannot ignore the clear obligations set out in the covenants in the Lease. He must conform to them as a resident whether he is the Leaseholder or not.

33. The Tribunal determines that the Tenant (and the Respondent) is in breach of the covenant in clause 4(4) contained in the Lease dated 31 July 1996 and made between the Applicant and Edith Emily Maud Morris in that the Demised Premises have not been decorated inside at least once in every seven years. In effect, the Respondent admits he has not decorated in the last seven years and his justification that redecoration can wait until a sale is contemplated is no defence in law. There is no evidence, from the inspection,

that the Respondent has begun a rolling programme to decorate over a period of time. The Applicant does not have to give notice to the Respondent for him to be required to redecorate.

34. The Tribunal determines that the Tenant (and the Respondent) is in breach of the covenant in clause 4(5) contained in the said Lease dated 31 July 1996 in that the rear garden of the Demised Premises is not in a neat and tidy condition. It is clear that the Respondent has cleared the shrubs and 'natural' growth in recent months, but has not cleared away all he has cut down nor removed the unsightly items deposited in the garden. It cannot be said to be neat and tidy. However, this breach could be remedied quite quickly by work to remove what remains and to tidy up.

Determination – alleged breaches that have not been substantiated

35. The Tribunal determines that no other breaches of covenant, as alleged, have occurred; or, at least, insufficient evidence of those alleged breaches have been provided.

36. The Tribunal found that the boundary fences were not in disrepair so there is no breach of that aspect of the covenant in clause 4(5).

37. The Tribunal accepts that there were in 2015 and 2016 a number of occasions where the parties were in dispute about access. Some of these involved emergency access (which is permitted by the Lease) with a pass key so there was no breach by the Respondent (though he said that these were not emergency situations). There was an incident with a contractor leaving after an altercation with the Respondent. The fire service were undoubtedly called to the Property. There may have been a breach of covenant on such occasions and the Respondent must realise that an unreasonable insistence on 'Criminal Record Checks' or any other unilaterally imposed condition cannot be a basis for refusing entry in accordance with the terms of the Lease. But the Tribunal considered that there was insufficient evidence supplied by the Applicant to show that due notice was given to the Respondent on these occasions four years or so ago to justify the finding of a breach of the covenant in clause 4(6).

38. The Tribunal accepts that the installation of two internal locks to internal doors might be construed as an 'alteration' to the Property though the Applicant provided the Tribunal with no authority to confirm that it could be an alteration. But even if it is a technical alteration, the Tribunal considers it should be classed as de minimis and the internal locks do not give rise to a breach of the covenant in clause 4(7).

39. No evidence was forthcoming to suggest that neighbours or other residents considered that the Respondents action or inaction constituted a nuisance. The Tribunal therefore determines that there is no breach of the covenant in clause 4(8).

Right of Appeal

40. 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.

41. 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.

42. 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.

43. 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 that the party who is making the application for permission to appeal is seeking.

Judge Professor David Clarke
6 January 2020