FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00FN/LBC/2019/0026**
Property	**:**	**Flat 2, 137 Humberstone Drive Leicester LE5 0RF**
Applicant	**:**	**Cedar Court Management Company**
Representative	**:**	**Thomas Flavell & Sons, solicitors**
Respondent	**:**	**Mr Anthony Allen**
Representative	**:**	**N/A**
Type of Application	**:**	**Commonhold & Leasehold Reform Act 2002 – section 168(4)**
Tribunal Member	**:**	**Regional Surveyor N Walsh** **Judge L Bennett**
Date and venue of Hearing	**:**	**Determined without a hearing**
Date of Decision	**:**	**16 March 2020**

DECISION

DECISION

Breaches of covenants in the Lease of the Property (date 11 July 1989) have occurred by reason of the Respondent failing:

- **"Throughout the said term to keep the demised premises and the lessor's fixtures and fittings there in good and substantial repair and condition….clean all window glass in the demised premises at least once a month and to forthwith replace any broken or displaced window glass."**

- **"In every fifth year…to paint all the inside wood and iron work usually painted in the flat and garage…"**

- **"To permit the Lessor or the management Company or their respective agents…..after reasonable notice….to enter the demised premises and examine the state of repair and condition thereof"**

- **"Upon receipt of any notice order direction or other thing from any competent authority affecting or likely to affect the demised premises or any part thereof…..to comply therewith at his own expense and forthwith deliver to the Lesser a true copy of such notice.**

- **"To repair maintain uphold and to keep Flat so as to afford all necessary support shelter and protection to the parts of Cedar Court other than the Flat and to afford to the lessees of neighbouring and adjoining flats access for the purpose and subject to the conditions set out in sub clause (14) of clause 3 hereof."**

- **"… no owner shall leave or suffer to be left any invalid carriage or chair or any bicycle perambulator box parcel refuse rubbish or any article whatsoever upon or obstructing any part of Cedar Court or the paths ways or entrances leading to Cedar Court."**

- **"during the said term keep all the windows of the flat properly cleaned and in particular shall clean all the windows at least in every month."**

- **"Each Owner shall furnish and keep furnished all windows of his flat."**

- **"To use the Visitors Parking Space for the parking of the Owners authorised visitors private motor vehicles."**

- **"No act or thing shall be done upon the demised premises or any part thereof which shall or may be or become a nuisance damage annoyance or inconvenience to the Lessor the Management Company or their tenants or the occupiers of any adjoining or neighbouring flat or the neighbourhood."**

REASONS

Background

1. On 4 September 2019, an application was made to the First-tier Tribunal (Property Chamber) under section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination that multiple breaches of covenants or conditions have occurred in a lease of a property known as Flat 2, 137 Humberstone Drive, Leicester LE5 0RF ("the Property").

2. The lease in question ("the Lease") is dated 11 July 1989 and was made between (1) Kingsley Engineering Co Limited and (2) Cedar Court Management Co (Leicester) Limited and (3) Michael Williams. The Lease was assigned to the Respondent on 21 March 1996. It was granted for the term of nine hundred and ninety-nine years from 24 June 1986 with a reserved annual rent of £25.00.

3. The Property comprises a ground floor flat situated in a two-story block of eight flats, which from the insurance documentation submitted appears to have been constructed in the 1960s.

4. The Applicant is the management company named in the Lease and the Respondent is the long leaseholder of the Property.

5. On 26 September 2019, the Tribunal gave directions for the conduct of the proceedings. The parties were informed that this matter was considered suitable for a determination without an oral hearing unless either party gave notice that they wished a hearing to be listed. No such notification was received. The Tribunal has determined the matter on the basis of the evidence provided in the application, the written submissions, documentation, and the witness statement provided by the Applicant in response to directions.

6. The Respondent failed to comply with the Tribunal's directions and subsequent Order dated 17 January 2020. The Respondent was therefore barred from taking further part in these proceeding by an Order dated 10 February 2020. To date no response has been received from the Respondent.

7. The Tribunal did not inspect the Property.

Law

8. A prerequisite for the forfeiture of a lease (otherwise than for a breach of a covenant to pay rent) is the service of a notice under section 146(1) of the Law of Property Act 1925. However, section 168(1) of the Commonhold and Leasehold Reform Act 2002 provides that a landlord under a long lease of a dwelling may not serve such a notice unless section 168(2) of the 2002 Act is satisfied.

9. One of the ways in which section 168(2) may be satisfied is for it to be finally determined by the Tribunal (upon an application by the landlord under section 168(4)) that a breach of a covenant or condition in the lease has occurred.

The relevant covenants in the Lease

10. In exhibit DS1 to the witness statement of Debra Simms the Applicant sets out the Lease clauses that it contends have been breached. These are:

10.1 Clause 3(3) – "Throughout the said term to keep the demised premises and the Lessor's fixtures and fittings there in good and substantial repair and condition….clean all window glass in the demised premises at least once a month and to forthwith replace any broken or displaced window glass."

10.2 Clause 3(4) – "In every fifth year…to paint all the inside wood and iron work usually painted in the flat and garage…"

10.3 Clause 3(5) - "To notify the Lessor or its agents of any defect in the demised premises which might give rise to a duty on the part of the Lessor to third parties."

10.4 Clause 3(14)(a) - "To permit the Lessor or the management Company or their respective agents…..after reasonable notice….to enter the demised premises and examine the state of repair and condition thereof….and the Flat Owner will repair and make good all defects or want of repair and decoration of which notice in writing shall be given by the Lessor or Management Company to the Flat Owner within two calendar months."

10.5 Clause 3(14)(b) – "To permit the lessor or the Management Company or their respective tenants or occupiers of Cedar Court or respective agents…..at reasonable hours in the daytime after reasonable notice ….to enter upon the demised premises for the purpose of executing repairs improvements or alterations to or upon any part of the Site (whether hereby demised or not) or for the purposes of constructing laying down altering cleansing emptying removing renewing or maintaining any existing or new conduits…."

10.6 Clause 3(15) – "Upon receipt of any notice order direction or other thing from any competent authority affecting or likely to affect the demised premises or any part thereof…..to comply therewith at his own expense and forthwith deliver to the Lesser a true copy of such notice.

10.7 Clause 3(17) - "Not to do or permit to be done any act or thing whereby any policy or policies of insurance effected by the Lessor on the site may be rendered void or voidable."

10.8 Clause 4(c) - "To repair maintain uphold and to keep the Flat so as to afford all necessary support shelter and protection to the parts of Cedar Court other than the Flat and to afford to the lessees of neighbouring and adjoining flats access for the purpose and subject to the conditions set out in sub clause (14) of clause 3 hereof."

10.9 Clause 8(A) - "... the Management Company will at all times during the said term.....insure and keep insured Cedar Court including the Lessor's fixtures and fittings but not the contents of any flat...."

10.10 First Schedule, clause 2 – "... no owner shall leave or suffer to be left any invalid carriage or chair or any bicycle perambulator box parcel refuse rubbish or any article whatsoever upon or obstructing any part of Cedar Court or the paths ways or entrances leading to Cedar Court."

10.11 First Schedule, sub clause 4 - "Owners shall keep all sinks and waste pipes in the flats clear and open."

10.12 First Schedule, sub clause 5 - "Each owner shall at all times during the said term keep all the windows of the flat properly cleaned and in particular shall clean all the windows at least in every month."

10.13 First Schedule, sub clause 16 - "Each Owner shall furnish and keep furnished all windows of his flat."

10.14 First Schedule, sub clause 17 - "No owner shall cause or permit any motor car or other vehicle belonging to him or to his servants licensees underlessees or visitors or under his or their control to:

(i) ....
(ii) Except with the written consent of all other flat owners to be parked or remain stationary except on the visitors parking space."

10.15 First Schedule, sub clause 23 – To use the Visitors Parking Space for the parking of the Owners authorised visitors private motor vehicles.

10.16 First Schedule, sub clauses 21 & 22, respectively:

- No act or thing shall be done upon the demised premises or any part thereof which shall or may be or become a nuisance damage annoyance or inconvenience to the Lessor the Management Company or their tenants or the occupiers of any adjoining or neighbouring flat or the neighbourhood.

- The demised premises shall not be used for any purpose from which a nuisance can arise to the owners lessees or occupiers of the other flats in Cedar Court or in the neighbourhood or for any illegal or immoral purpose.

Evidence and submissions

11. Given the Applicant asserts 19 separate breaches of the Lease terms, for ease of reference and coherence the Tribunal proposes to briefly set out the Applicant's evidence and submissions, and our conclusion, in respect of each alleged breach individually. The Applicant's Statement of Case is set out in the witness statement of Debra Simms, who has been a director of the Applicant "on and off since 2010". Ms Simms outlines in her witness statement that she

has been resident at Cedar Court since 1998, provides an overview of the Applicant's issues and interactions with the Respondent before addressing in detail the alleged breaches. These are set out in Exhibit DS1. Case authorities, documentary and photographic evidence have also been included and are appended to the Ms Simms's witness statement.

12. Clause 3(3) – The Applicant contends that the Respondent has failed to keep the flat in "good and substantial repair" and "clean the windows" in accordance with the Lease. The Applicant refers the Tribunal to the photographs of the external windows set out at Tab H.

13. Conclusion – The photographic evidence clearly shows the windows to be in very poor decorative order, with little paint covering the wooden frames and one window cill so rotten as to require complete replacement. The windows clearly have not been painted in a very long time nor do they appear to have been cleaned anytime recently. We therefore, with the benefit of this clear photographic evidence, find that the Respondent has breached the covenant in respect of clause 3(3).

14. Clause 3(4) – The Applicant asserts that the Respondent has failed to comply with his obligation to paint the inside wood and iron work every five years. The Applicant assert that given the Lessee, despite repeated requests, has failed to provide the Landlord access and given the poor external condition of the property, "it is highly likely the internal wood and iron have not been kept in good repair."

15. Conclusion – While the Tribunal does not have conclusive evidence as to the interior condition of the Property, we are nevertheless required to make a determination on the basis of balance of probabilities weighing up all the evidence before us. This includes evidence in relation to the Respondent's compliance with Lease terms generally and also the fact that the Respondent has chosen not to engage with these proceedings nor provide any evidence to the contrary. On the basis of the wider evidence before the Tribunal and on the balance of probabilities the Tribunal concludes that the Respondent has breached clause 3(4) of the Lease.

16. Clause 3(5) – The Applicant asserts that the Respondent has failed to notify his Landlord of any defect that might give rise to a liability to a third party and to indemnify the Landlord by virtue of the fact that he is allegedly a recluse and refuses to engage with the Landlord.

17. Conclusion – The Applicant has not specified or particularised what these defects are or even may be. While we do not doubt that on the basis of the evidence before us that the Respondent refuses to engage with his Landlord or indeed that he has breached a certain number of covenants within his Lease, the Applicant has failed to state what the defects are that the Respondent should allegedly have notified his Landlord of. Accordingly, and without knowing what the alleged defects are, there is insufficient evidence to make a finding of a breach in respect of clause 3(5).

18. Clause 14(a) - The Applicant asserts that the Respondent has repeatedly refused the Landlord reasonable inspection facilities, as evidenced by the management agents' letter of 23 May 2019 and the Applicant's engagement with Leicester City Council, which culminated in an Abatement Notice being served.

19. Conclusion – On the basis of the documentary evidence submitted the Tribunal has no hesitation in making a finding of a breach in respect of clause 14(a).

20. Clause 14(b) - The Applicant asserts that the Respondent failed to allow the Landlord access to effect repairs. In support of this contention the Applicant cites its evidence and submissions in respect of clause 14(a) above.

21. Conclusion – While it is clear that the Respondent has refused the Applicant and its agents access, as per the Tribunal's finding above, there is no evidence to suggest that access was ever requested by the Applicant for the purposes set out under 14(b). Namely to undertake named and specific works. While this is understandable, as the Applicant first needs to inspect the flat internally to assess what, if any, works it proposed to undertake on its own volition. In the absence however of a request for access being made available for the purposes of doing something, as per clause 14(b), the Tribunal cannot find that the Respondent has breached this Lease clause.

22. Clause 3(15) – The Applicant asserts that the Respondent failed to comply with a "notice order direction or other thing from any competent authority", in particular referring to the Abatement Notice dated served on the Respondent by Leicester City Council on 17 March 2017. The Applicant states:

"LCC have repeatedly written to the Lessee about the poor condition of Flat 2. This culminated in an application for a warrant for entry to the City Magistrates Court which was granted in September 2016. However, LCC could not gain entrance to Flat 2 as it had been blocked from floor to ceiling by the Lessee's belongings.

In March 2017 a further statutory notice was served upon the by LCC requiring him to clean his rooms to allow proper circulation and surface cleaning. A further application to City magistrates was made by LCC in July 2017, which anticipated forced entry."

23. Conclusion – While, for whatever reason, no further follow up action appears to have been taken by the council following the service of the Abatement Notice, there was significant non-compliance and non-engagement with the Council's initial communications resulting in the council being forced to serve a statutory notice and obtain warrants of entry. These are not actions which any authority would undertake without first having tried to engage with the occupant. The terms of clause 3(15) are sufficiently wide, "or other thing from any competent authority" for this Tribunal to find that on the balance of probabilities that the Respondent has breached this Lease clause.

24. Clause 3(17) – The Applicant contends that the Respondent's failure to keep the flat in good repair could render the insurance policy for the block as void or voidable and therefore is a direct breach of clause 3(17). The Applicant enclosed a copy of the block's current insurance policy, including its terms and condition and highlighting in particular the following statement:

"The property is and will be maintained in a good state of repair."

25. Conclusion – The block is currently insured and given that there is no evidence to suggest that the Applicant has brought this matter to its insurers attention, as required under the terms of the policy, we can only assume either:

a. The disrepair is not so severe as to in the Applicant's opinion warrant disclosure to the insurers or risk the policy being rendered void, or
b. It is so, but the Applicant has decided not to disclose this material fact to its insurer.

26. Either way, we consider that without actual evidence of disclosure and a considered view one way or the other from the insurer there is insufficient evidence to find that the Respondent has breached this Lease term.

27. Conclusions - clauses 4(b) & 8A – Having reached the above conclusion the Tribunal also finds that the aforementioned clauses have not been breached because the Respondent's actions or lack of them patently have not impinged upon the Applicant's ability to obtain appropriate insurance cover for the block.

28. Clause 4c – The Applicant draws the Tribunal's attention to the Section 146 Notice it served on the Respondent on 18 November 2010. Specifically, the schedule of works specified therein which the Applicant contends the Respondent has failed to action.

29. Conclusion - clause 4(c) – It is clear that these works have not been actioned and that the Respondent's failure has had a direct and adverse impact on neighbouring properties and the common parts of the block. We therefore find that the Respondent has breached this Lease covenant.

30. The First Schedule, sub clause 2 – The Applicant asserts that the Respondent has in the past stored his belongings in the common areas and cites the photographic evidence submitted as demonstrating this.

31. Conclusion – There is clear photographic evidence of material being stored in the communal entrance area, we therefore make a finding that the Respondent has breached this Lease clause.

32. The First Schedule, sub clause 4 – The Applicant submits that "the Landlord believes the sink and the waste pipes at Flat 2 are in a state of poor repair but have been prevented from inspection of the same by the Lessee.

33. Conclusion – A mere belief is insufficient evidence for this this Tribunal to be able to make a finding that this clause has been breached.

34. Conclusion - First Schedule, sub clause 5 – Given the Tribunal's finding respect of clause 3(3), set out in paragraph 12 above, the Tribunal finds that the Respondent has breached this clause within the Lease.

35. Conclusion - First Schedule, sub clause 16 – For the same reasons the same finding is made in respect of this Lease covenant.

36. First Schedule, sub clauses 17 & 23 – The Applicant has provided photographs of the Respondents two cars. One appears in a dilapidated condition and possible immobile, which is parked in a visitor car space, while the other car looks to be in good condition and parked in front of the Respondent's garage. The Applicant contends that neither car has, as required by the Lease terms, the consent of other lessees because one is simply abandoned and immobile in the visitor parking areas and the Respondent refuses to move the other car to allow the Applicant to paint the garage door.

37. Conclusion - First Schedule, sub clause 17 – The photographs submitted by the Applicant do not show any garage doors that have been painted recently. It is unclear to the tribunal if this work has been commissioned and if so, whether a formal request was made to the Respondent to ask him to temporarily move his car so as to allow these works to be undertaken. Without this evidence, and again while it may well be likely that the Respondent may refuse to comply, it is premature to make a finding that this Lease clause has been breached.

38. Conclusion - First Schedule, sub clause 23 – In contrast there is clear photographic evidence of an abandoned, dilapidated and immobile car being left in the visitors parking area. In the absence of any response from the Respondent denying ownership, we have no hesitation in finding that this is in breach of this sub clause 23 of the First Schedule.

39. First Schedule, sub clause 21 – The Applicant contends that the Respondent has been seen by other residents walking around in various states of undress, which is causing alarm and concern to other residents. The Applicant advises that this has been reported to the police and this issue is referred to in correspondence between the Applicant and other third parties.

40. Conclusion - First Schedule, sub clause 21 - In the absence of a response from the Respondent and given the contemporaneous third-party correspondence where this behaviour is mentioned, the Tribunal accepts the assertions made. We can see how this behaviour would constitute a nuisance within the terms of this Lease clause and therefore find that the Respondent's actions are indeed a breach. Having made this finding, it is unnecessary to consider further the implications of the alleged damp and bad odours emanating from the Respondent's flat in respect of this Lease clause.

41. First Schedule, sub clause 22 – For the reasons specified generally above the Applicant contends that the Respondent is in breach of this user clause.

42. Conclusion - First Schedule, sub clause 22 – The Respondent is occupying the flat as his principle private residence. There is no nuisance which flows from such an occupation per se. It is not being used for illegal or immoral purposes. While the manner in which the Respondent is living and behaving is, as determined above, causing a nuisance, this has nothing to do with and is distinct from the actual use to which the flat is being put which is legitimate and similar we would imagine to most if not all the other lessees.

Conclusion on breach of covenant

43. In conclusion, we therefore find that multiple breaches have occurred in respect of the Lease clauses. The Applicant is therefore entitled to a determination to that effect and these breaches are detailed at the start of this decision.

N Walsh
Regional Surveyor
16 March 2020