



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **CHI/00ML/LBC/2020/0011**

Property : **20-26 York Place, Brighton, East
Sussex, BN1 4GU**

Applicant : **Park Avenue Estates Limited**

Representative : **Dean Wilson LLP**

Respondent : **Orbit South Housing
Association Limited**

Representative : **Bevan Brittan LLP**

Type of Application : **s.168 Determination**

Tribunal Members : **Judge D Dovar**

Date of Decision : **30th September 2020**

DECISION

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Introduction

1. This is an application for the determination of breach under s.168 of the Commonhold and Leasehold Reform Act 2002 in respect of the Respondent's long lease of the Property (which comprises 13 flats). Notification was given on 11th May 2020 that the Tribunal intended to deal with this application on the papers in accordance with Rule 31 of the Tribunal Procedure Rules 2013 unless either party objected, none did, and this determination has therefore been made without a hearing.
2. The breaches alleged arise out of drug use and ancillary anti-social behaviour emanating from one of the flats at the Property, Flat 6 ('the Flat'), which is occupied by a tenant of the Respondent who resides under an Assured Shorthold Tenancy. Accordingly the issue is not just whether the underlying conduct has occurred, but whether in the circumstances that amounts to a breach by the Respondent who say in their defence that they have done all they reasonably can to address the issues that have arisen with their tenant.
3. The Tribunal has read the Statements of Case of each party as well as the Reply by the Applicant. In addition, the Applicant has provided a witness statement from Marcus Clarke-Walker, of the Applicant's managing agent, Coastal Management Limited. The Respondent has provided two witness statements, the first from Paul Fagan who is the Respondent's Tenancy Services Officer and the second from Sarah Clifton who is their Regional Tenancy Services Manager.

4. The application named Orbit Housing Group Limited as the Respondent. The Respondent's Statement of Case points out that the lease is now in the name of Orbit South Housing Association Limited and an Official copy of register of title has been provided which reflects that. Accordingly, the Tribunal has substituted Orbit South Housing Association Limited as Respondent to this application under Rule 10 of the Tribunal Procedure Rules 2013.

Background

5. The Respondent is a non-profit registered provider of social housing. A lease of the Property was granted to its predecessor in title on 12th April 2006 for 999 years from 29th December 2004. The individual flats within the Property have been let for social housing purposes since then. The Respondent's tenants do not populate the entirety of the building containing the Property, the Applicant also lets out flats.

Lease Terms

6. The following are terms relied on by the Applicant:
 - a. By clause 4.5, the lessee covenants to observe and perform the regulations in the Fourth Schedule;
 - b. The Fourth Schedule provides:
 - i. para 4.1, 'Not at any time to use or occupy **or permit** the Demised Premises to be used or occupied except as a private residential flat only' (emphasis added)

- ii. para 4.3 ‘Not to do **or permit or suffer** upon the [Flats] or any part thereof ... any illegal or immoral act or any act or thing which may cause damage to the lessor ... or any adjoining or neighbouring premises.’ (emphasis added)
- iii. para 4.4 ‘Not to do **or permit to be done** any act or thing which may render void or voidable any policy of insurance maintained in respect of the Building or may cause an increased premium to be payable ...’ (emphasis added)
- iv. para 4.15 ‘**...to ensure** ... that no disturbance or annoyance is caused to the tenants or occupiers of the other flats in the Building’ (emphasis added)
- v. para 4.16.1 ‘Not to use **or permit** the user of the hall staircase and passages in and about the Building or any other of the Common Parts otherwise than in accordance with the proper exercise of the Included Rights’ (emphasis added)
- vi. para 4.17 ‘Not at any time to do **or permit** the doing of any damage whatsoever to the Building the fixtures fittings or chattels therein.’ (emphasis added)

Chronology of events

- 7. The following is drawn from the Statements of Case, witness statements, correspondence, documents and video recordings provided by both

parties for this application. Save where indicated otherwise, the factual account is largely uncontentious.

2012

8. On 12 December 2012, an individual known as Mr H. was granted a weekly periodic shorthold tenancy of the Flat by the Respondent. It is said by the Respondent that he has history of mental health issues and is receiving treatment for substance misuse.

2013

9. On 28 October 2013, Mr H was granted a 5 year fixed term tenancy of the Flat. Whilst the Respondent has not provided the actual tenancy, they have exhibited to their Statement of Case an example tenancy agreement and set out some terms of their standard agreement in the body of that statement. The Tribunal assumes, although it is not expressly stated, that the same or materially similar terms apply to Mr H's tenancy. The sample tenancy prohibits various acts, including the smoking in communal areas of either the tenant or their guests; anti-social behaviour including illegal activities; and the use of the property for criminal or illegal purposes including the use or supply of any illegal controlled drug.

2018

10. In August, there was a physical altercation between Mr H and the tenant of flat 44 (another flat within the Property).

11. Mr H's tenancy was renewed on either 18th or 29th October 2018 for a further five years. The Respondent's Statement of Case provides the latter date, Mr Fagan's witness statement the former. Not having been provided with the actual agreement, it is not possible to resolve this minor discrepancy.
12. At some point in October 2018, the police informed the Respondent that they considered that drugs were being dealt openly from the Flat. It is not clear whether this was before or after Mr H's tenancy was renewed. Certainly, Mr Fagan has stated that the Respondent was aware of minor complaints at the time of renewal, but nothing that would warrant refusing him a renewal.
13. As a result of the information from the police, on 5th November 2018, Mr H was issued with a verbal warning by the Respondent who then informed the Applicant that a warning had been given.
14. Mr Fagan then says that Mr H had been effectively taken over by a group who were selling drugs from the Flat. By February 2019 the police had managed to remove the group.

2019

15. In February 2019, the Applicant was notified by its tenants that they were forming a residents committee in order to deal with the increasing problems they were experiencing from the Flat. The Applicant was informed that the people coming and going from the Flat were aggressive and intimidating.

16. The Applicant states that on 27th February 2019, the front door to the Flat was smashed in and the following day one of the other residents complained to the Applicant about the aggressive and intimidating attitude of those visiting the Flat. The Respondent has not admitted any damage to the front door of the Flat or that if there was any that Mr H was responsible for that.
17. Mr Fagan attended the Flat with the police in March 2019 and the Applicant states that the door, having been fixed, had been smashed in again. Again, the Respondent does not accept that this was the case or that it was the fault of Mr H. Later in March one of the other residents reported to the Applicant that drugs were being used at the Flat.
18. On 18th March, Mr Fagan told the Applicant by email that the Respondent were either going to obtain an injunction in relation to the Flat or assist the police in obtaining a Closure Order. Mr Fagan said that this would '*give neighbours a break...*'. He stated that Mr H had claimed that all his visitors had moved on to another location, but Mr Fagan said that '*I don't believe that for a second.*'
19. On 27th March, Mr Fagan assured the Applicant that they were taking the matter very seriously. He gave the impression that at that point they were considering both pursuing a Closure Order with the police and at the same time they would serve a notice seeking possession; being the first step towards taking possession proceedings.
20. Mr Fagan attended a joint agency meeting on 10th April 2019 at which it seems that the police decided not to pursue a Closure Order (or they

decided shortly after this date). He also states in his witness statement that *'in light of the nature of complaints against Mr H, and taking into account his background, I could foresee (based on my extensive experience of applying for injunctions) potential difficulties with seeking either an injunction or possession at that time.'*

21. Mr Fagan had not relayed his change of heart to the Applicant and when chased as to what steps had been taken, he replied on 17th April that he was meeting with Mr H shortly and would provide an update on action and timescale.
22. In May, a man died in the Flat. A local newspaper article provided by the Applicant suggests that the man was homeless, a friend of Mr H and had died of a methadone overdose. The Coroner is reported as having said that *'if you are naive to methadone and take too much it can kill you.'*
23. On 17th May, as a result of the death, Mr Fagan wrote to the Applicant saying that the Respondent was now actively seeking possession. However, he then says in his statement that *'in the following days'* as the death was not being treated as suspicious nor any action taken against Mr H, he did not consider it could be used to obtain possession. He did not communicate his change in view to the Applicant.
24. He did visit Mr H with the police on 29th May and Mr H voluntarily signed up to a Tenancy Management Plan. This was followed up with a final warning letter to Mr H threatening possession proceedings if he breached the plan.

25. The voluntary Tenancy Management Plan which was to last for 12 months, stated *'If you breach the terms of your voluntary Tenancy Management plan ... then our next step will be to pursue legal action by way of possession proceedings through the court...'*
26. The final warning was in respect of *'1. Taking and allowing visitors to your property to take illegal drugs within your property. 2. Allowing large numbers of people to visit your flat without legitimate reason. Who in turn cause noise and Anti Social Behaviour ...'*
27. On 26th June 2019, Mr Fagan wrote to the Applicant stating he was assessing the strength of taking possession action and said he would be in touch *'ASAP'*. He did not mention his change of approach. The Applicant had presented further complaints regarding keeping dogs at the flat, more damage to the front door and associated drug use. Mr Fagan didn't consider these were relevant as they pre-dated the signing of the plan.
28. On 9th July 2019, Mr Fagan in association with various agencies drafted a multi-agency safeguarding plan for Mr H, this followed the meeting in April.
29. Despite a number of chasing emails from the Applicant through July and Mr Fagan's confirmation that he would be in touch as soon as possible, there was no further response from him. The Applicant then handed the matter to their solicitors who sent a letter on 2nd August 2019 outlining a number of alleged breaches of the terms of the lease. On 3rd September 2019, the Respondent responded, apologising for the distress and

inconvenience caused, stating that Mr H had been spoken to and that tenant management plans had been implemented '*where necessary*'. It was also stated that since that had happened it appeared there had not been any further incidents and that all reasonable action was being taken to prevent any repeat of such incidents.

30. On 9th September 2019, following a complaint, the Applicant viewed its CCTV footage of the previous day which showed men enter and leave the Flat and then settle down in the communal hallway to pass around and smoke a small pipe oblivious to the residents passing.
31. The video was sent onto the Respondent who had now instructed their own solicitors. Mr Fagan states in his witness statement that the individuals were not known to the Respondent and '*there was nothing in the footage to suggest any criminal wrongdoing by any of our tenants*'. Accordingly he decided to take no action in response to the conduct shown on the video.
32. On 20th September 2019, the Respondent's solicitors whilst accepting that Mr H had a history of drug use, considered that there had been no breach of lease given that the Respondent had taken all necessary and appropriate action. Further in relation to the recent incident they contended that:

'Factually, the CCTV shows three men smoking a substance in the communal area. The nature of the substance, and whether the smoking of it amounted to an illegal act, would of course need to be proved. ...

From our information, none of the three individuals in the CCTV is our client's tenant of any of the Premises, and furthermore, Mr Fagan of our client does not know or recognise them. ...

It is not enough for your client simply to demonstrate that illegal or immoral acts have taken place or that damage has been caused (which so far as we are aware has not yet been proven). It must be shown that our client either did, permitted or suffered the behaviour complained of. ...

... Our client has undertaken a pro-active management approach ... due to the individual circumstances of the tenant, who is a vulnerable young man, we are unable to divulge the details of the action that our client has been taking ... our client is entirely satisfied that the action it has taken in relation to addressing the drug-related problems which are of concern to your client has been reasonable, proportionate and effective.”

33. Further correspondence and a meeting ensured.
34. As a result of which by the end of 2019, the Respondent stated that it was pursuing the re-location of Mr H.

2020

35. In early January 2020, the Applicant reported further complaints of drug use in the communal areas linked to the Flat and as a result they

hired additional security for the building. The Respondent sought further details, but it does not appear that any was provided.

36. By 3rd April 2020, the Applicant received reports that there were breaches of the Covid Social Distancing Regulations occurring in relation to the Flat. The police were involved and the matter was reported to the Respondent.
37. On 27th April 2020, the Respondent was notified that the CCTV footage showed four individuals visiting Flat 6 and that on the previous day Mr H had a further five visitors and he had been visiting the resident of Flat 9. The Respondent replied the next day requesting the footage and stated that they were working with solicitors and police to progress the allegations.
38. On 7th May 2020, the Applicant made this application to the tribunal.
39. On 27th May 2020, the Respondent made an application for an injunction against Mr H. An injunction was obtained on 9th June 2020 under s.7 of the Anti-Social Behaviour, Crime and Policing Act 2014. The injunction prohibits Mr H from breaching the social distancing guidance, causing a nuisance, using any drugs or allowing a visitor to do so or allowing any illegal substances to be brought into the building.
40. Mr H breached the injunction shortly after it was granted and the Respondent is now seeking to commit him for breach.

Permitted, ensure

41. Before dealing with the specific allegations of breach it is worth setting out the basis upon which the Respondent could be found in breach of covenant as a result of the actions of its tenant.
42. The Respondent is not actually in occupation of the Property, it has sub-let the flats. To that extent it is not directly responsible for the underlying acts complained of. Therefore a significant part of this application focuses on the steps the Respondent has taken to address the issues raised by the occupation of Mr H.
43. If the underlying conduct of Mr H and his associates is established, then the question is whether the Respondent could be said to have either permitting that underlying conduct or in one respect failed to ensure that it does not occur.
44. Paragraphs 4.1, 4.3, 4.4, 4.16.1 and 4.17 of the Fourth Schedule all provide that not only must the Respondent not carry out certain acts, but the Respondent must not 'permit' them either. Paragraph 4.3 additionally prohibits the 'suffering' of the act. Finally, paragraph 4.15 provides that the Respondent must 'ensure' that the conduct does not occur.
45. In relation to permitting or suffering, the Applicant relies on an extract from Woodfall's Law of Landlord and Tenant at paragraph 11.199 which states that

'the word 'permit' means one of two things, either to give leave for an act which without that leave could not legally be done, or to abstain

from taking reasonable steps to prevent the act where it is within a man's power to prevent it. ... a tenant permits or suffers a breach of covenant if he abstains from taking legal proceedings against his under-tenant, when there could be no good defence to any such proceedings; it depends on the circumstances of each case whether a covenantor may reasonably be expected to take legal proceedings in order to stop a breach of covenant on the part of his sub-tenant.'

46. This proposition is drawn from various authorities which have been recently reviewed by the Upper Tribunal in *Marchitelli v 15 Westgate Terrace Ltd* [2020] UKUT 192 (LC). That decision also refers to the extract set out above as well as noting that in *Berton v Alliance Economic Investment Co* [1922] 1 KB 742 it was considered that 'to suffer' did not add anything to 'permit'. Further, the Deputy President in *Marchitelli* stated

'in determining whether a tenant has omitted to take steps which it was reasonable to take, all of the facts and circumstances must be taken into account. The question is whether a reasonable person in the position of the tenant would have taken steps to prevent the prohibited use which the tenant failed to take.'

47. In relation to 'ensuring' that the conduct does not occur, the Respondent contends that it is a lesser obligation than permit or suffer and does not make them vicariously liable for their tenant's actions. Whilst the Tribunal accepts the latter proposition, it does not agree with the former. There is no basis for making this requirement any less burdensome than

to permit or suffer. The Respondent refers to the dictionary definition, being to ‘*make certain that (something) will occur or be the case.*’ If anything, that would suggest that the obligation ‘to ensure’ sets a higher standard as whilst lack of permission may not be sufficient to prevent conduct occurring, ensuring something does not happen tends to indicate a more absolute requirement that it must not happen at all.

48. As the Respondent sets out, there are a range of measures and steps that can be taken to address a particular situation. The Respondent’s own Case Management Policy sets out a sensible series of steps, in what appears to be an approximate order of severity: from no action, to verbal warning, to written warning, to Tenancy Management Plan, and then at the end of the list is Service of Legal Notice, then Joint action with Local Authority or Police, Application for possession and finally application for an injunction.
49. That menu also recognises that there are various stages to obtaining possession from a tenant, not least the service of a legal notice and an application for possession.
50. When considering whether the Respondent has taken reasonable steps, all these potential actions should be borne in mind.

Alleged Breaches

51. The Tribunal will deal with each alleged breach in turn.

Para 4.1 – private residential flat only

52. The Applicant considers that the use of the Flat as a hub for drug abusers is a breach of this covenant and that the Respondent has been aware of that at all material times.
53. The Tribunal does not consider that this allegation is made out. Whether or not there has been drug dealing or use at the Flat, there is nothing to suggest that it is not the residence of Mr H and that that is the main use of the property. There is also nothing to suggest in the evidence that any drug dealing from the Flat is more than an ancillary part of his occupation.

Para 4.3 - illegal or immoral acts

54. The Applicant specifically relies on a number of points to make out its allegation of breach of this paragraph.
- a. that Mr H is obviously taking drugs from his flat and is permitting others to do so;
 - b. the death from an overdose on 2nd May 2019;
 - c. the visit on 8th September of three individuals who then congregated in the common parts to consume drugs;
 - d. the breach of COVID-19 lockdown measures between 3rd April and 3rd May 2020 when numerous individuals visited the Flat.
55. The Respondent is equivocal over the various allegations levelled against Mr H. However, in broad terms it says there is no breach as it has not permitted the same as has taken timely and appropriate action.

56. It is therefore necessary to review the background to the matter in order to determine whether firstly the alleged underlying conduct has occurred and secondly whether the Respondent has taken reasonable steps to address that conduct.
57. On 5th November 2018, a verbal warning was given for openly dealing drugs. The Tribunal is satisfied that the underlying conduct is made out and that the Respondent considered that to be the case. The giving of a verbal warning for dealing drugs from the Flat appears a little light given that Mr Fagan appears to have had no reason to doubt what the police had told him and it is not said that Mr H denied it. At this time it is not clear whether Mr H had alleged that he was being cuckooed; but that might warrant a lesser response. For something that was clearly a serious criminal offence and given prior issues, if not the imposition of a Tenancy Management Plan, then at least a written warning would seem to be warranted. However, given the uncertainty as to whether Mr Fagan considered at this point that Mr H may not be in control of the Flat, the Tribunal does not consider that there is sufficient evidence to establish a breach at this point.
58. By 18th March 2019, Mr Fagan had told the Applicant that there would be either a Closure Order or Injunction. At that point in time the police had removed the cuckooing group and it appears that Mr Fagan did not trust what Mr H was saying and clearly thought the situation was serious enough to move to that level of action. It appears therefore at this point that there continued to be drug use and dealing from the Flat.

59. This was confirmed to the Applicant 9 days later on 27th March. Further, Mr Fagan also said they would serve a notice of seeking possession at the same time. He had evaluated the situation then and decided that those were the proper and appropriate steps to take.
60. However, by mid-April he had changed his mind. The only information provided by him at that time is that there was a joint agency meeting on 10th April 2019 (a matter high on the list of actions) at which or shortly after it appears that the police decided against seeking a Closure Order. No reason is given for that. Neither is any reason given for Mr Fagan's change of view as to either an injunction or even serving a notice seeking possession. The Respondent has provided no evidence to support their change in view at this point in time, when it is sufficiently proximate to the anti-social behaviour complained of by the Applicant and its tenants and which, only a week or so before, was considered by the Respondent to warrant a Closure Order, an injunction and the service of a notice seeking possession. In his lengthy and extensive witness statement, Mr Fagan provides no detail as to why he changed his mind on this point.
61. At various stages the Respondent has been guarded over certain details in an understandable desire not to breach Data Protection and/or Mr H's rights, however, they have provided a fair amount of information about his background, his troubles and his drug issues. The Tribunal finds the failure to properly justify this change difficult to comprehend, particularly when so much detail has been given.

62. On the evidence before the Tribunal, it is therefore difficult to see how this change of view leading to no action at all being taken at this time is reasonable. In the period leading up to this point both parties were in agreement that in light of Mr H's conduct a Closure Order and or an Injunction and or a notice seeking possession was the reasonable step to take. Therefore the failure to take either of the latter two steps by mid April 2019 was a breach by the Respondent of its covenant not to permit or suffer any illegal or immoral act. The dealing of drugs and drug use from the Flat being both illegal and immoral.
63. Even if the police were not going to pursue a closure order, they could have obtained evidence from the police to support an injunction on the basis of open drug dealing at the premises which had not ceased when the group had been removed. Further, the service of a notice seeking possession did not require anything other than serving the notice. Ultimately such a notice does not mean that the tenancy comes to an end, it merely puts the Respondent in a position to take further action to seek possession at a later stage if that is warranted.
64. Indeed instead of informing the Applicant that he was no longer pursuing either the Closure Order or an injunction or the service of a notice, when Mr Fagan did communicate with the Applicant On 17th April, he said he was meeting Mr H shortly and would update them on the action to be taken and the timescale. He gave no hint that in fact there was to be no action and no timescale.

65. Then there was death in the Flat. It is pretty clear that a man died from an overdose of methadone. Given that all of the Respondent's actions to date had failed to prevent such an event occurring and given that they themselves considered that Mr H was vulnerable and had issues with substance abuse, their ultimate reaction to this event is surprising. Mr Fagan's first reaction is to tell the Applicant on 17th May that they were actively seeking possession. At this point in time he must have weighed up the factors and considered this was the reasonable step to take. Therefore, if not before, then certainly at this point that should have triggered at the very least a notice of seeking possession. The failure to do so was another breach in that this amounts again to permitting an illegal or immoral act.
66. Whether or not the death was as a result of unlawful activity or caused a nuisance or annoyance to others, whatever reason the Respondent had for not taking action earlier, it should have been clear by now that not only was Mr H continuing to associate with others with substance issues, but that it was likely the Flat was still being used by others to take substances. This was not likely to stop unless action was taken, there was action available to the Respondent which they did not take with the result that they were permitting illegal and or immoral acts.
67. Despite his initial reaction, Mr Fagan says that they did not pursue possession given that the death was not being treated as suspicious nor was Mr H having any action taken against him. That appears to miss the point in that it was the event itself which should have caused concern and led to action. He also appears to have lost sight of the need to

provide the other residents with a break. Further, again, he did not inform the Applicant of this change in approach. In their Statement of Case it is said that it later transpired that the incident did not directly involve Mr H. However, no further detail is given as to that; nonetheless the death did occur in the Flat and it is difficult to understand how it can be said not to have involved him.

68. Again when on 26th June 2019, Mr Fagan wrote to the Applicant saying he was assessing the strength of taking possession action, he did not mention that he had changed his mind as to the action to be taken and that there were no immediate plans to seek possession. No doubt his failure to keep the Applicant informed led them to seek legal assistance from their solicitors.

69. The next significant date is 8th September 2019. The Tribunal has viewed the CCTV footage for that day and it clearly shows two men entering the Flat briefly, then they are joined by a third and they sit down in a communal hallway, the ground floor lift lobby, and pass round a small pipe which they smoke.

70. This was passed onto the Respondent. Mr Fagan did not take any action over this as in his statement he considered that it did not suggest any criminal wrongdoing by any of his tenants. This is the same line that the Respondent's solicitors adopt when the Applicant contends that this conduct is a breach of covenant. Firstly they do not admit that it is drugs that are being used; although Ms Clifton in her statement says the video shows '*what appeared to be illegal drugs being taken*'. Secondly they

say that it was not a tenant of the Respondent and that Mr Fagan did not know any of them. They firmly asserted that the Applicant must show that the Respondent permitted the behaviour complained of. Finally in their Statement of Case they state that no action was taken as the Respondent was unable to link the individuals to Mr H. This is despite the fact that they are seen coming and going from the Flat.

71. The Tribunal finds these responses hard to reconcile with the facts.
72. If this had been a one off event, then there might be an issue as to what the men were doing in the Flat for a brief moment of time before sitting in the hallway to smoke a pipe, but even then, suspicions would be high. However, this was not a one off event, there had been a history of drug dealing at the Flat. To seriously contend that these three individuals were not smoking drugs in the communal hallway and that they were not connected with Mr H demonstrates at best an unfortunate blindness to the reality and at worst a more cynical attempt to throw the Applicant off taking any action. Further against the background of open drug dealing and a death in the flat, to assert that the action taken has been effective was not only demonstrably wrong but was not going to provide the Applicant with any confidence that the matters were going to be resolved.
73. The Respondent said it could not give all the details to the Applicant about the steps it had taken. In which case it was even more important for the Respondent to communicate properly and constructively with the Applicant. Given the equivocal response to the CCTV footage and the

denial of any link to Mr H, it was no surprise that the Applicant was concerned that it was not addressing matters properly.

74. The failure to take steps, either by way of injunction or the service of a notice seeking possession at this point was another breach in that it was permitting the illegal and or immoral acts. The particular acts being the dealing of drugs or association with drugs in the Property.
75. The subsequent steps that were taken to obtain an injunction and the proceedings for committal were a little too late. Further it is notable that the injunction was not just to prevent breach of the Covid Regulations, but was also to prevent drug use in the Property. Given that Mr Fagan does not state there was any new evidence of drug use at the Flat, the injunction in that regard must have been obtained on the basis of the prior evidence in his possession. This only reinforces the view that further measures should have and could been taken at an earlier stage.
76. The Respondent contends that it was not reasonable for it to take possession proceedings because they may not have been successful given various defences that would have been available to Mr H. The Tribunal does not consider that the Respondent had yet reached the point where it needed to weigh up the merits of taking possession proceedings. Preliminary steps should have been taken and then, if necessary, the merits could have been assessed at a later date.
77. However, in any event, the Tribunal is not satisfied that the Respondent's view of the merits of any possession action justified not taking the steps they should have as outline above. Further the Tribunal

does not agree that there assessment of the merits justified not taking action.

78. If a notice seeking possession had been issued in March 2019, and proceedings issued either thereafter or after the death or after 8th September, firstly Mr H would not have been able to seriously contend he was not in breach of his tenancy agreement or causative of anti-social behaviour. This would also be in accordance with the Respondent's own policies. Therefore proceedings pursuant to section 8 of the Housing Act 1988 had been undertaken for proceedings, then Respondent would have made out grounds for possession required under that route. It would therefore be a matter of discretion of the Judge as to whether to order possession. On the evidence before the Tribunal it seems more than likely that at the very least a suspended possession order would have been granted if not an outright order.
79. It is said in the Statement of Case that Mr H is '*likely to have a disability*' and so the Equality Act 2010 may be engaged to prevent any possession order being made. No details of the suspected disability are provided. The Tribunal has no way of assessing for itself whether or not the Respondent's assessment was sufficient. Unless the Respondent had properly taken the steps to ascertain whether or not this was the case, the Tribunal cannot see how it can properly take such an assertion into account.
80. Finally reliance is placed on Article 8 of the European Convention of Human Rights and that seeking possession is a breach of his right to

respect for his home. To that extent the Respondent relies on *Manchester City Council v Pinnock* [2010] UKSC 45 as a guide as to the defence Mr H may have utilised. However, the Tribunal does not see how this assists the Respondent. Even if this article was engaged on the basis that the Respondent is treated as a public authority, *Pinnock* reiterates that where possession would otherwise be ordered, such defence is exceptional. This is even more so where possession is given following a route whereby the judge has a discretion in making such an order; which would have been the case. Given the background to this matter, it is difficult to see how Mr H would bring himself within that remit.

81. Therefore, if the Respondent had chosen to pursue proceedings on the basis of anti-social behaviour and unlawful conduct it is difficult to see any other outcome than at the very least a suspended possession order. None of that was possible though because the Respondent did not serve a notice seeking possession.

Para 4.4 and 4.17 – insurance and damage to the Property

82. The front door to the Flat is said to have been damaged on more than one occasion which is said to not only constitute damage but also may increase insurance premiums.
83. The Respondent denies it has permitted this and has taken appropriate action.

84. Firstly, the Tribunal was provided no evidence that this may increase or render void any insurance and so that breach is not made out.
85. Secondly, with respect to the evidence of damage to the door, again this needs to be put into the context of whether or not the Respondent could be said to have permitted it. It isn't clear who damaged the door, it is a fair assumption that it was in relation to Mr H's drug activities. The first instance was in February 2019, and the second appears to have been around March 2019.
86. The failure of the Respondent to take the action it said it was going to take in March 2019 is a breach of this covenant in that by failing to take the reasonable step of either serving a notice seeking possession or an injunction in light of damage having been done to the door twice, was for these purposes permitting damage to the fixtures of the Building.

Para 4.15 – disturbance and annoyance to others

87. Whether 'to ensure' is equivalent to 'permit' or a lower threshold, for the reasons given in relation to paragraph 4.3, the Tribunal determines that this covenant was also breached at the same time and for the same incidents.
88. Not only was there a tacit admission by Mr Fagan that Mr H's conduct was causing a disturbance and annoyance to other residents when in his email of 18th March 2019 he said that the Closure Order would give the neighbours a break, but the Tribunal considers that the drug use in the communal parts and the breach of Covid Regulations, which were

reported to the Applicant would all cause a disturbance and annoyance to the other residents. Further, the Applicant has provided emails of complaints from residents and considers that these demonstrate that the conduct did cause a disturbance and annoyance to them.

Para 4.16.1 – use of common parts

89. It is said the Respondent is permitting the use of common parts in ways which are not in accordance with the included rights. It relies on the use to congregate and use drugs, and highlights the incident on 8th September 2019.
90. The only incidence of this use is that of the 8th September 2019. Given the other conduct complained of related to dealing at the Flat and comings and goings from the Flat, the Tribunal does not consider that it can be said that the Respondent permitted this particular conduct.

Conclusion

91. The Tribunal therefore determines that for the purposes of s.168 of the Commonhold and Leasehold Reform Act 2002, there has been breaches of clause 4.5, by virtue of a failure to abide paragraphs 4.3, 4.15 and 4.17 of the Fourth Schedule.

JUDGE DOVAR

Appeals

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.

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.

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.

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.