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

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| **Case reference** | **:** | **LON/00BK/LBC/2022/0016** |
| **Property** | **:** | **Flat 19, 10 Orsett Terrace, London W2 6AZ** |
| **Applicant** | **:** | **2-14 ORSETT TERRACE MANAGEMENT COMPANY LIMITED** |
| **Representative** | **:** | **John Beresford, Counsel** |
| **Respondent** | **:** | **Humayan JABAR** |
| **Representative** | **:** | **Sofia Jabar** |
| **Type of application** | **:** | **Section 168 Commonhold and Leasehold Reform Act 2002 - determination of an alleged breach of covenant** |
| **Tribunal members** | **:** | **Judge T Cowen**<br>**Ms Patricia Gravell** |
| **Date of hearing** | **:** | **16 May 2022** |
| **Date of decision** | **:** | **28 October 2022** |

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**DECISION**

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**DECISION OF THE TRIBUNAL**

The Tribunal determines that the alleged breach has not occurred

## REASONS FOR THE DECISION

### The Property and the Lease

1. The Property is a one-bedroom flat in a purpose-built block of 68 flats.

2. The Applicant is, and has been since 1991, the freehold proprietor of the building in which the Property is situated. The Respondent is, and has been since 2008, the registered leasehold proprietor of the Property under a 125-year lease dated 11 September 1987 ("the Lease").

### The Application and the Tribunal's jurisdiction

3. The Applicant's application was made on 8 February 2022 to the Tribunal (in a form which is erroneously dated 8 February 2020) under section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination that a breach of covenant has occurred.

4. Section 168 of the 2002 Act applies to long leases of dwellings. It prohibits the landlord from serving a notice under section 146 of the Law of Property Act 1925 ("s146 notice") unless (i) the tenant has admitted the breach or (ii) it has been finally determined by a court/tribunal/arbitration that a breach has occurred.

5. In this case, the Respondent has not admitted a breach. The Applicant therefore cannot start the forfeiture process without obtaining a final determination. One of the routes for the landlord to obtain a final determination is to apply to this Tribunal under section 168(4) of the 2002 Act. That is what the Applicant has done.

### The Hearing

6. The matter was listed to be heard on 16 May 2022 in person at the Tribunal's hearing centre at Alfred Place in London. The Applicant attended at the appointed time. The Respondent did not.

7. Upon further enquiries by telephone and email, the Respondent said that he knew the hearing was taking place on that day, but thought the hearing was going to be held remotely. The Respondent said that he had been waiting for log-in details, which never arrived. He admitted that he did not contact the Tribunal to ask about log-in details. If he had done, then he would have been informed that the hearing was in person. By the time the Tribunal had made contact with the Respondent on the morning of the hearing, he said that he was not able to attend the hearing in person.

8. We were satisfied that the communications from the Tribunal to the parties clearly stated that the hearing would be held in person.

9. Despite this, the Tribunal (with the invaluable and much appreciated help of the staff) was able to arrange a hybrid hearing at very short notice, to commence in the afternoon of the same day. This was designed to allow the Respondent to attend remotely while all other participants attended in person. The Respondent said that he was not in a position to log-in remotely on the afternoon of the day of the hearing, because he could not get himself in front of an appropriate device with internet access in time. However, his daughter, Sofia Jabar, would be able to attend remotely as his representative. Sofia Jabar is a solicitor, but was not formally instructed to represent the Respondent. Sofia Jabar agreed to proceed on that basis. The Applicant did not object to that proposed arrangement.

10. Strictly speaking, this involved the hearing going ahead in the absence of the Respondent himself. The Tribunal considered rule 34 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013) which deals with such a scenario.

11. The Tribunal was satisfied that the Respondent had been notified of the hearing and considered that it was in the interests of justice to proceed with the hearing, (a) because the Respondent did not have a good reason for failing to attend and (b) because a mechanism has been found which allowed the Respondent's daughter, a solicitor who was familiar with the case, to represent the Respondent. The Respondent's mistake about the nature of the hearing may have been an honest one, but it does not amount to a good reason for non-attendance in the circumstances, and it would not have been just or fair to prejudice the Applicant by adjourning the hearing.

12. Ms Jabar ably represented her father at the hearing, but had only had very limited time to prepare her submissions. We therefore afforded her the opportunity to file and serve written submissions after the hearing, which she did. We have taken account of those submissions, together with the bundles submitted by the parties and the oral evidence and oral submissions.

13. At the hearing, the Applicant called evidence from Mr Peartree and Mr Fitzsimmons, who are two of its directors, and from Mr Gilroy, who is the resident caretaker at the building where the Property is situated.

## The Issues

14. The Applicant seeks a determination that the Respondent has committed a breach of clause 3(6) of the Lease which is a tenant's covenant:

> "To pay all expenses (including solicitors' costs and surveyors' fees) incurred by the Landlord incidental to

> the preparation and service of a notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court."

15. It is common ground that on 20 May 2020, the Applicant sent a service charge invoice to the Respondent which included a demand for the sum of £5,400. That sum was said, in the invoice, to be for the following item: "JPC Limited: To act regarding multiple breaches of covenant re. disruptive sub-tenants. Time engaged 11.25 hrs @ £400/hr+VAT. Invoice available on request."

16. The invoice was available to the Tribunal in the hearing bundle together with the time sheets showing how the fees were incurred.

17. It is common ground that the costs were incurred by the Applicant in respect of legal fees incidental to alleged breaches of lease by the Respondent ("the Underlying Breaches"). The Applicant does not seek a determination in relation to the Underlying Breaches, because the Applicant's case is that all of those Underlying Breaches have been remedied. Therefore, the only remaining breach claimed by the Applicant is the Respondent's refusal to pay the legal costs incidental to the Underlying Breaches.

18. It is common ground that the sum of £5,400 demanded in that invoice has not been paid.

19. The Applicant therefore says that the Respondent is in breach of the covenant to pay contained in clause 3(6) above.

20. The Respondent's denies that his failure to pay the £5,400 demanded was a breach of covenant. His reasons can be broadly divided into two categories:

    a. **The Underlying Breaches.** The Respondent denies that he committed any of the alleged Underlying Breaches of the Lease. He therefore submits that the legal fees incurred by the Applicant were not "incidental to the preparation and service of" a s146 Notice, because a s146 Notice is a notice specifying particular breaches of the Lease. If there were no Underlying Breaches by the Respondent at the time when the legal costs were incurred, then the legal work cannot have been "incidental to the preparation and service of" a valid s146 Notice.

    b. **The Quantum of the Costs**. The Respondent asserts that the sum of £5,400 was not a reasonable amount for the work done.

## Quantum of Costs

21. We can deal swiftly with the second of these. Our jurisdiction under section 168(4) of the 2002 Act is effectively a binary one. It is to decide whether there was a breach of covenant or not. In the case of an alleged breach which involves the non-payment of money, the statute does not give the Tribunal a jurisdiction or discretion to assess the reasonableness of the amount of the sum allegedly due.

22. The Tribunal does have a separate jurisdiction which enables it to assess the reasonableness of sums alleged to be due under leases, but that jurisdiction is engaged only if one of the parties makes an application under the relevant statutory provision. No such application has been made in this case. It would be neither correct nor just for the Tribunal to enter into a reasonableness exercise in this matter.

23. That leaves the Underlying Breaches issue. Counsel for the Applicant conceded, during his closing submissions, that in order to establish a breach of clause 3(6), it is for the Applicant to prove that there were grounds entitling the Applicant to forfeit the lease. In other words, the Applicant can only succeed if it wins on the Underlying Breaches issue.

24. In our judgment, that concession is correct. Legal costs cannot be said to have been incurred "incidental to the preparation and service of" a s146 notice, if the Applicant was not in a position to serve a valid s146 notice at the time. Any other interpretation would lead to potential abuses by the landlord.

25. It follows that the only remaining issue is whether the Respondent committed any of the Underlying Breaches. If he had committed any one of them at the time when the Applicant incurred the claimed legal costs, then the Applicant would have been entitled to prepare a section 146 notice and the costs incurred would have been incidental to that preparation.

## The Underlying Breaches

26. The Applicant alleges that the Respondent committed Underlying Breaches of the following tenant's covenants in the Lease:

    a. Clause 3(4): to keep the Property in repair.

    b. Clause 3(11): not to use the Property for illegal or immoral purposes.

    c. Clause 3(12): not to do anything which would amount to a nuisance or annoyance.

d. Clause 3(13)(a): to comply with the regulations in the First Schedule, in particular:

(i) Regulation 6 – not to obstruct the common parts

(ii) Regulation 7 - not to do anything which would detract from the use or appearance of the estate

e. Clause 3(14)(a): an absolute covenant against alienation of part or sharing occupation

f. Clause 3(14)(b): a qualified covenant against alienation of the whole without prior consent

g. Clause 3(14)(d): to give to the landlord notice of alienation within one month

27. The Applicant also relied upon what they called "House Rules" which stipulated that the only subletting of whole which would be permitted would be assured shorthold tenancies with a minimum term of three months and that holiday lettings would not be permitted.

28. The alleged breaches of those covenants can be grouped as follows:

*Alleged disrepair*

a. The bottom lock on the front door of the Property and the letterbox had been cut out and removed.

*Alleged unlawful subletting*

b. The Respondent allowed the Property to be used for short-term lets.

c. The Respondent underlet, shared or parted with possession of part of the Property. On 15 April 2020, the Metropolitan Police were informed by a "Miss Hughes" that the Property was in multiple occupancy.

d. The Respondent underlet, shared or parted with possession of the whole of the Property without the consent of the Applicant.

e. The Respondent failed to give the Applicant notice of any underletting or provide the Applicant with a certificate copy of any underlease

*Alleged acts of nuisance, obstruction and illegal use*

f. The Property was used / occupied by individuals who were coming and going at unsociable hours and who were also using the Property for the purposes of taking drugs. This caused the smell of cannabis to permeate through the building.

g. The communal carpets were damaged by the occupiers or their associates.

h. The occupants of the Property allowed other persons to reside and sleep in the communal areas

29. Before dealing with each group of alleged Underlying Breaches in turn, it is worth outlining briefly the factual background which gave rise to these allegations.

**Background to the allegations**

30. It is common ground that the Respondent does not occupy the Property himself.

31. It is also common ground that in April and May 2020, which was during the strictest parts of the COVID-19 lockdown, the Property was being used by persons who behaved in an anti-social manner. In particular, a woman known as "Marie" seems to have been responsible for many of the incidents which occurred. Marie first appeared at the Property on 11 April 2020 and left on 4 May 2020.

32. There are several sources of evidence that Marie (and others):

a. appeared to be taking drugs in and around the Property

b. may have caused the damage to the front door of the Property

c. caused mess (such as cigarette butts on carpets) in the common parts of the building

d. slept in the corridors of the building on one occasion when they were locked out, thereby creating an obstruction to the common parts

e. posed a security risk by allowing other visitors to enter the building.

33. The police were called on at least one occasion. The Respondent did not personally witness these events, but accepts that these incidents happened.

34. It also seems to us to be undeniable that the conduct described above would be in breach of the tenant's covenants in the Lease if they were caused or permitted by the Respondent.

35. The Applicant accepts that the Respondent did not personally commit any of these acts, but that he permitted them to happen.

36. The Respondent's case is that he has sublet the Property for the last 10 years to a man called Yahya Mohamad. (We note that the Applicant is not relying on the alleged subletting to Yahya Mohamad as a breach of the covenants of the Lease for the purposes of this application). The Respondent further asserts that Mr Yahya Mohamad was abroad for the period during April and May 2020 and that during that time a homeless woman, "Marie", somehow gained access to the Property and occupied it together with others.

37. The Applicant accepts that the Property was let to Yahya Mohamad over 10 years ago (see the Applicant's solicitors' email of 3 March 2021). But the Applicant's case is that the Property has not been sublet continuously to Yahya Mohamad for the last 10 years. Rather, the Applicant contends that the Property has been sublet to various different individuals by the Respondent on short-lets.

38. In the alternative, the Applicant contends that the letting to Yahya Mohamad must have been a letting of only part, thereby allowing the Respondent to sublet the other part(s) to other individuals on a short term basis.

39. The Applicant relies on a list of various names of people who have been seen in the Property from 2013 to 2020. That list is contained in the said email of 3 March 2021.

40. The implication of the Applicant's case is that the Respondent has been in control of the Property throughout and is therefore responsible for the behaviour of the people who were using the Property in April/May 2020.

41. The Applicant also relies on an email dated 9 April 2020 from the Respondent in which the Respondent refers to "the new tenant". The Applicant says that this shows that in April 2020 there was a new letting by the Respondent which cannot have been Mr Yahya Mohamad, who could not be described a s new tenant.

42. It is an important feature of this case that neither side has produced any tenancy agreements evidencing any of the alleged sublettings.

43. We shall now deal with each group of alleged Underlying Breaches in turn.

**Alleged disrepair**

44. There are no photographs of the alleged damage to the front door of the Property.

45. The Applicant does not allege that the Respondent damaged the door himself.

46. None of the Applicant's witnesses gave any detailed evidence about the alleged damage to the door. The Respondent in his witness statements said that any damage which was done at the Property was rectified by him immediately. The Applicant's case is that the Underlying Breaches (including this one) have been remedied.

47. In order to establish that there has been a breach of the tenant's covenant to repair, the Applicant has to do more than prove that there was some damage done to a part of the Property. The covenant is to repair (by implication within a reasonable time of the disrepair occurring). It is not a covenant to prevent any disrepair from occurring.

48. To the extent there was any disrepair or damage to the front door of the Property, there is no evidence that the Respondent failed to repair it. On the contrary, there is evidence that the Respondent did repair whatever in the Property was damaged.

**Alleged unlawful subletting**

49. There is simply no evidence that the Respondent sublet the Property in breach of the terms of the Lease. The parties agree that from 2011, the Respondent had sublet the Property to Yahya Mohamad. There is no suggestion that this 2011 subletting was unlawful and the proposed s146 notice (for which the relevant legal costs were incurred) was not intending to be grounded on any such allegation.

50. The Respondent's case is that Mr Yahya Mohamad has continuously been his subtenant since 2011 up to and including the period of the alleged breaches in April/May 2020. The Applicant has given evidence of a list of occupiers (or alleged occupiers), other than Mr Yahya Mohamad, since 2013.

51. In our judgment, that is not evidence of unlawful sublettings by the Respondent. There is no evidence that Yahya Mohamad's subtenancy came to an end and was replaced by subtenancies granted to these other individuals. It is equally likely that these other occupiers were sub-undertenants or licensees or simply house-guests of Yahya Mohamad. There is equally no evidence that multiple occupancy of the Property was evidence that the Respondent had sublet part to Mr Yahya Mohamad.

52. It is true that the Respondent referred in his 2020 emails to "the new tenant" and stated in the same correspondence that he had "got rid of the tenant at your request before". The Applicant invites us to infer from this that Yahya Mohamad's subtenancy must have expired allowing the Respondent to let in a new tenant and get rid of a previous one. We do not agree. The Respondent is not a lawyer or a qualified property professional. He may have been referring to Yahya Mohamad's sub-undertenant colloquially as a "new tenant" and he may have been involved in encouraging Yahya Mohamad to get "rid of" a previous tenant. We do not think that the inference suggested by the Applicant sufficiently satisfies the balance of probabilities test so as to establish that the Respondent himself had granted any unlawful subtenancies.

53. We remind ourselves that the onus of proving unlawful subletting lies entirely with the Applicant. The burden is not on the Respondent to explain the status of any particular occupier. The Applicant has not satisfied that burden.

**Permitting or suffering nuisance etc**

54. In relation to the alleged acts of nuisance, obstruction and illegal use, the Applicant does not allege that the Respondent committed any of them himself. The Applicant's case is that the Respondent permitted or suffered those acts to be done.

55. It is therefore necessary to consider what constitutes permitting or suffering, as a matter of law.

56. The starting point for liability for nuisance is *Coventry v Lawrence* [2014] UKSC 46, which dealt with a landlord's liability for nuisance committed by his tenant in general. The Supreme Court said at paragraphs 11 and 12 and 22:

> 11. …In order to be liable for authorising a nuisance, the landlords "must either participate directly in the commission of the nuisance, or they must be taken to have authorised it by letting the property".

> 12. … it must be a "virtual certainty", or there must be "a very high degree of probability", that a letting will result in a nuisance before the landlords can be held liable for the nuisance.
>
> 22. … As a matter of principle, even if a person has the power to prevent the nuisance, inaction or failure to act cannot, on its own, amount to authorising the nuisance."

57. This case has the additional element that:

> clause 3(11) (which deals with use) includes a covenant by the Respondent not to "**permit** the same to be used otherwise than for residential purposes". (emphasis added)
>
> and clause 3(12) (which prohibits nuisance and annoyance), is expressed as a covenant "not to do or **permit or suffer** to be done." (emphasis added)

58. This takes the Respondent's obligations beyond those stated in *Coventry v Lawrence*. The phrases "permit" and "suffer" were considered in *Berton v Alliance Economic Investment Co*. [1922] 1 K.B. 742 in which Atkins LJ said:

> ""the word permit means one of two things, either to give leave for an act which without that leave could not be legally done, or to abstain from taking reasonable steps to prevent the act where it is within a man's power to prevent it."

59. These two limbs of the definition of "permit" were adopted and expanded on by the Upper Tribunal in *Marchitelli v 15 Westgate Terrace Ltd* [2020] UKUT 192 (LC). In that case, the Upper Tribunal commented that the phrase "suffer" has been treated as virtually synonymous with "permit".

60. In this case, there is no allegation that the Respondent actively authorised the nuisance, nor that he sublet with the very high degree of probability that a nuisance would occur. There is also no allegation that the persons who committed the anti-social acts were doing so as the Respondent's agents. The only question therefore is whether the Respondent abstained from taking reasonable steps to prevent the acts where it was within his power to prevent them.

61. That issue itself has two limbs:

    a. Was it within the Respondent's power to prevent the acts?

    b. If so, did he take reasonable steps to do so?

62. It is not clear to us that the Respondent did have any power to prevent the acts. Did he have the power to evict the wrongdoers from the Property? There is no evidence that he was the direct landlord of Marie and the other wrongdoers.

63. It also appears to be common ground that the Respondent had sublet the Property at the time of the antisocial conduct. There is a dispute whether that subletting was authorised (ie Yahya Mohamad's subtenancy allegedly since 2011) or unlawful (ie the prohibited short-lets alleged by the Applicant), but all seem to agree that the Respondent was not the person entitled to immediate possession of the Property at the time of the incidents. The Respondent therefore had no power to evict Marie and others, whether they were licensees/tenants of the Respondent's subtenant or even if they were trespassers. This is because a leaseholder who has sublet a property is not entitled to an order for possession as long as the subletting remains.

64. Similarly, the Respondent would not have the power to enforce any covenants against the wrongdoers, because it is not alleged (and there is no evidence) that he had any privity of contract with them.

65. There is no evidence of the terms of his agreements (if any) with his own subtenant (whether Mr Yahya Mohamad or anyone else), so there is no way of knowing whether the Respondent would have had the power to evict his own subtenant as a result of the antisocial conduct.

66. On top of all that, there was in April and May 2020 a complete moratorium on possession orders against residential proceedings as part of the temporary COVID-19 rules. So it not clear whether anyone could have obtained a possession order against the occupiers at that time.

67. All of the above is largely speculation and highlights the lack of evidence in this case. There is simply no evidence of anything which would have been in the Respondent's power and which would have prevented the antisocial behaviour.

68. Even if the Respondent did have the power to prevent the antisocial conduct, we are satisfied on the evidence that he cannot be said to have abstained from taking reasonable steps.

69. The Applicant emailed the Respondent on 3 April 2020, then again on 4 April and 8 April. The Respondent replied to the correspondence on 9 April 2020, which was not an unreasonable response time in the circumstances. He then took a little time to look into who was in occupation, which was also a reasonable step to take. His email of 17 April 2020 demonstrates that he mistakenly first thought that the Applicant was talking about someone else, a Mr Ibrahim, who had

already left the Property. That was an honest and reasonable mistake to make. The Respondent then spent the next few days trying to establish his legal position in the matter, which also was a reasonable step to take.

70. The evidence of how the wrongdoers were actually removed is a little unclear. It appears that the locks on the Property were changed at some point at the end of April or beginning of May. It is not clear who changed the locks. This seems to be what prompted the wrongdoers to sleep in the communal areas. The police were then called and attended to remove them from the communal areas on 4 May 2020. It appears to be common ground that this finally brought the antisocial behaviour to an end. The wrongdoers had been locked out of the Property and then removed by the police from the building. They apparently did not return.

71. It is not clear exactly what the Respondent did during those last few days, and he was not available to be questioned about it at the hearing. We do know, however, that his email of 30 April 2020 stated that at that point he was still trying to get hold of his immediate subtenant, which we regard as a perfectly reasonable step to be taking in the circumstances. There is also evidence from the caretaker of the building that he saw the Respondent in the building on 30 April 2020, which demonstrates that the Respondent was taking reasonable steps to see what was going on at the Property. Again, we could not ask the Respondent about this, because he was not available to give oral evidence.

72. However it may have happened, in the end the wrongdoers were removed within about 4-5 weeks of the first complaints about their behaviour. Given the physical and legal constraints of the lockdown, together with the uncertainty as to who (if anyone) was responsible for letting them in in the first place and the status of whoever was in occupation, we do not regard that as an unreasonable amount of time. In our experience, we are aware of many pre-COVID landlord and tenant cases in which nuisance and antisocial behaviour has taken a great deal longer to resolve, despite considerable efforts on the part of the landlords.

73. We also remind ourselves that the proper test is not whether the Respondent acted as quickly and effectively as possible, nor whether it was the Respondent who ultimately solved the problem. The proper test is whether he abstained from taking reasonable steps so as to be taken to have permitted the nuisance.

74. Taking all the evidence together, we find that the Respondent did not abstain from taking reasonable steps to prevent the nuisance.

75. We have therefore decided that:

a. There is no evidence that it was in the power of the Respondent to prevent the nuisance etc; and

b. In any event, there is no evidence that the Respondent abstained from taking reasonable steps.

## Waiver

76. The Respondent alleged that the Applicant had waived the right to forfeit for the alleged breach. Since we have determined that the alleged breach did not occur, we make no finding on the waiver issue.

## Conclusion

77. We find as a result of all of the above that the Underlying Breaches were not committed by the Respondent. It follows that, at the time when the relevant legal costs were incurred, the Applicant was not in a position to prepare or serve a valid section 146 notice. It further follows that the £5,400 legal costs which are the subject of the Applicant's invoice were not incurred incidental to the preparation or service of a valid section 146 notice. This means that the Respondent was not required under the terms of the Lease to pay that invoice and so his non-payment of it was not a breach of the Lease.

78. For these reasons, the Tribunal has made the order set out above.

**Name:** Judge T Cowen **Date:** 28 October 2022

## Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).