



FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)

Case Reference : CHI/24UD/LBC/2023/0002

Property : Flat 14 Elizabeth Court, The Crescent,  
Eastleigh SO50 9TA

Applicant : Elmbirch Properties Limited

Representative : Remus Management Limited

Respondent : Ms Ezri Tigan

Representative :

Type of Application : Breach of Covenant S168(4) Commonhold  
and Leasehold Reform Act 2002

Tribunal : Judge Tildesley OBE

Date of Decision : 19 May 2023

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DECISION

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## The Application

1. The Applicant holds the freehold of the property known as Elizabeth Court, The Crescent, Eastleigh SO50 9TA under title number HP 349590.
2. Elizabeth Court is a purpose built block of 33 flats constructed in the mid 1990's. The respective leases restrict occupation to residents aged over 55 years and enjoys the services of a visiting warden.
3. The Respondent owns the leasehold title of Flat 14 which is registered under title number HP558754. The Respondent holds title under a lease dated 21 August 1998 and made between Robert Griffin of the one part and Linda Beryl Jukes of the other part for a term of 125 years starting the 1 March 1999 on payment of rent of £50 per annum rising to £250 per annum.
4. The Applicant alleges that the Respondent has breached the covenants in the lease by storing an electricity mobility scooter in the communal lounge of the property and by using the landlord's supply of electricity to charge the scooter. The Applicant seeks an Order under S168 (4) of the Commonhold and Leasehold Reform Act 2002 that the Respondent has breached the covenants in the lease. The Respondent has not admitted the breaches.
5. On 24 February 2023 the Tribunal directed that the Application would be heard on the papers unless a party requested a hearing within 28 days. No party requested a hearing. The Tribunal required the parties to provide statements of case. The Respondent has not supplied a statement of case. The Tribunal is satisfied that the Respondent is aware of the proceedings. The Tribunal received a letter from the Respondent dated 26 February 2023 where the Respondent referred to the "application against her by Remus" and that she intended to sue the Respondents for disability discrimination.
6. On 4 May 2023 the Tribunal reviewed the bundle and determined it was suitable for a paper determination.

## The Evidence

7. Mr Paul Taylor for the Applicant stated in his witness statement that  

"Since September 2022 the Respondent had been storing an electric mobility scooter in the communal lounge, charging it using the landlord's electricity supply, without permission on both counts. According to Mr Taylor, this had led to great unrest from other residents due to the increased safety risk, as well as them paying to charge the scooter. On the 5 October 2022 Remus wrote to all leaseholders to confirm the Applicant's stance on Mobility Scooters. The letter explained that the property was built in the 1990's when the use of mobility scooters was much less than it is today and that there was no provision to have a charging area, and with 32 apartments no

space to add this in retrospectively. The letter stated that mobility scooters must be able to be taken to the apartment where it could be charged and that it was not permitted to store or charge mobility scooters in communal hallways and lounge. On the 6 October 2022 Mr Taylor spoke to the Respondent in the Salisbury office for over 90 minutes. Following the conversation Mr Taylor believed that they had reached an agreement. According to Mr Taylor the Respondent had agreed to ask her electrician to see if he could tap into the external lamp post, to include adding in a sub meter, and that Mr Taylor would seek permission from the Applicant for the Respondent to erect a shed in the communal grounds to store her scooter. Mr Taylor said he had never heard anymore on this proposal".

8. On the 12 October 2022 Mr Taylor wrote to the Respondent stating:

"I have confirmed our stance on this subject. But to be clear, we cannot give permission for the scooter to be both stored and charged in the common ways/lounge. The vehicle is a fire risk that we just cannot permit. We also cannot allow you to use the communal electricity, this is in fact deemed as theft as permission has not been granted by ourselves or the Freeholder. Whilst I note your request to the Warden, any lack of response will not be deemed as permission. As discussed the building was built more than 30 years ago, and at that time there were not mobility scooters such as we have today. Sites such as these do not easily allow for changes as time goes by, and in the case of Elizabeth Court, the lease does not allow for improvements so any such change would need to be agreed at the First Tier Tribunal, which would be a costly exercise on its own".

9. On the 19 October 2022 Mr Taylor wrote again to the Respondent stating:

"Following our recent communication both written and verbal, I write to confirm permission has not been given, and will not be given to store or charge the scooter in any communal area. I am aware you have been informed by Hampshire Fire & Rescue Service this is not permitted and issued written guidance from them. However, we continue to receive daily reports that the mobility scooter is being charged in the communal lounge, with residents reporting you are telling them you have permission, which you do not. This practise must cease with immediate effect. Whilst we are empathetic to your mobility issues, we cannot allow such as issue to put other residents at risk. Should this practise continue, we will have no other option than to involve solicitors, such costs are chargeable to you through the lease provisions, however, we would prefer if we did not have to go down this route".

10. Mr Taylor produced an email from Dave Knight of Hampshire Fire and Rescue Service dated 28 October 2022 which said that the Respondent had contacted them regarding the parking of her mobility scooter. Mr Knight stated that the Applicant's actions addressing this issue were reasonable, correct and appropriate.

11. Mr Taylor stated that on the 1 November 2022 the Applicant instructed solicitors to take proceedings against the Respondent.
12. The Applicant exhibited in the hearing bundle three photographs of the mobility scooter connected to an electricity supply in the communal area of the property.
13. The Respondent did not submit any evidence in connection with this application. The hearing bundle included a letter from the Respondent to the Applicant's solicitors dated 23 November 2022 which said:

"With regard to HAVING to charge my scooter on two occasions recently due to hospital appointments on the Monday, I will not do this again, instead I have booked hospital transport for the next appointment [which is on a Monday as well] which is a drain on hospital resources where things like transport is in very short supply. But as I need to use my scooter on Sunday in Southampton for voluntary work that I do, there is nowhere that I can charge it to ensure I have a full battery for Monday hospital trips. But the full impact of this will be discussed in court where Remus have lied about the facts in question".
14. The Respondent was unable to take the mobility scooter to her flat because it was located on the first floor of the property and the scooter was too big for the lift.

#### Consideration

15. The purpose of bringing proceedings under section 168(4) is to enable a landlord under a long lease of a dwelling to serve a section 146 notice to forfeit the lease for breaches of covenant by the tenant other than non-payment of rent. If proceedings are brought the Tribunal is required to determine whether the tenant has committed an actionable breach of covenant. A finding against a tenant potentially could result in the tenant losing a valuable asset and in this case her home.
16. The term actionable breach was considered by Judge Huskinson in *Swanston Grange (Luton) Management Limited v Eileen Langley Essen* LRX 12/2007. Essentially the Tribunal's jurisdiction under section 168(4) is limited to a finding of fact on whether a breach has occurred. Judge Huskinson added that the Tribunal can decide whether the landlord was estopped from asserting the facts on which the breach of covenant is based. Judge Huskinson, however, went on to say the Tribunal's jurisdiction did not extend to determining whether the breach has been remedied. This was a question for the court in an action for forfeiture.
17. In the Tribunal's view the structure of section 168 is such that an action under section 168 (4) should only be brought if the tenant does not admit the breach. In the Tribunal's view, it follows from the structure of

section 168 and the potential severe consequences for the tenant, the landlord is responsible for proving the breach on the balance of probabilities. It also follows the landlord should give the tenant an opportunity to admit the breach and put matters right before bringing proceedings under section 168(4) of the 2002 Act.

18. The essential facts of this case are not in dispute. The Tribunal is satisfied that the Respondent had parked her mobility scooter in the communal lounge and had used the landlord's supply of electricity to charge the scooter. The Applicant, however, did not produce logs of when the scooter was situated in the lounge. The Tribunal, therefore, could not make a reliable assessment of the frequency and duration of the storage of the mobility scooter in the lounge. The question for the Tribunal is whether the Respondent's actions constituted a breach of covenant of the lease.

19. The Applicant relied on the following clauses of the lease.

20. Clause 2 which states that

"The Tenant hereby covenants with the Lessor and with and for the benefit of the owners and lessees from time to time during the Term of the other flats comprised in the Building that the Tenant and the persons deriving title under him will at all times hereafter observe the restrictions set forth in Part II of the First Schedule hereto"

21. Part 11 of the First Schedule is headed: "Restrictions imposed in respect of the Flat". The Applicant relied on the following paragraphs of Part 11 to substantiate its case:

"2 Not to use the flat nor permit the same to be used for any purpose from which a nuisance can arise to the owners lessees or occupiers of the other flats in the building or in the neighbourhood nor for an illegal or immoral purpose".

"3 Not to do or permit to be done any act or thing which may render void or voidable any policy of insurance of any flat in the building or may cause an increased premium to be payable in respect thereof."

"12 Not to obstruct or cause to be obstructed any part of the building or of the estate surrounding used in connection with the tenants of the other flats or premises in the building".

"16 To comply with such further rules and regulations as the lessor may reasonably make for the good management of the building and estate and for the benefit of the tenants of the flats in the building"

22. The Tribunal will consider in turn each of the restrictions in part 11 of the First Schedule cited by the Applicant in support of its case.

23. Paragraph 2: The Applicant contended that the presence of the motor scooter in the building was causing a nuisance to the other flat owners,

and that the Applicant was committing the offence of theft by using the landlord's electrical supply to charge the scooter. The Tribunal reminds itself that the wording of paragraph 2 related to the use of the flat for a purpose from which nuisance can arise or for an illegal or immoral purpose. The definition of flat in the lease does not include the common areas including the communal lounge. The Applicant adduced no evidence that the Respondent was using the flat for any purpose from which a nuisance could arise and or for an illegal purpose. The Tribunal finds that the Applicant has failed to prove on the balance of probabilities that the Respondent has breached the restriction in paragraph 2.

24. Paragraph 3: The Applicant argued that the storage and charging of a mobility scooter was likely to cause an increased premium to be paid for the property, given that this was a breach of fire regulations. The Tribunal observes that Mr Knight's email of 28 October 2022 did not specifically state that the placing of the motor scooter in the communal areas was a fire risk. The Tribunal also notes that the Applicant permitted the storage and charging of mobility scooters in individual flats which suggested that the Applicant was satisfied that the insurance covered the keeping and charging of mobility scooters inside the building. Finally the Applicant supplied no evidence from the insurance company or its broker that the Respondent's actions rendered void or voidable the insurance policy or would result in an increased premium for the insurance. The Tribunal finds that the Applicant has failed to prove on the balance of probabilities that the Respondent has breached the restriction in paragraph 3.
25. Paragraph 12: The Applicant submitted that the storage of the mobility scooter was causing an obstruction in the community room which the Applicant said was not a large room. The Applicant adduced no witness evidence that the scooter was causing an obstruction and no evidence of the measurements of the communal room. The Applicant's case rested on the three photographs which showed that the scooter was located in the corner of the room. The Tribunal formed the view that it was not obvious from the photographs that the scooter was causing an obstruction. The Tribunal finds that the Applicant has failed to prove on the balance of probabilities that the Respondent had breached the restriction in paragraph 12.
26. Paragraph 16: The Applicant made a bare assertion that the Respondent's actions were in breach of the Applicant's rules and regulations. The Applicant in its grounds of claim did not identify the specific rules and regulations which the Respondent had broken. The Tribunal notes that Mr Taylor's letter of 12 October 2022 addressed to the Respondent identified that the use of BBQ on communal grounds would be prohibited under such further rules or regulations made under paragraph 16. In contrast Mr Taylor did not assert in the same letter that the storage of a mobility scooter in the communal lounge constituted a breach of rules and regulations made under paragraph 16. The Tribunal finds that the Applicant has failed to prove on the balance

of probabilities that the Respondent had breached the restriction in paragraph 16.

## Decision

27. The overriding duty of Tribunal is to deal with cases justly and fairly. This means that the Tribunal must make its decision on the evidence presented by the parties. The Tribunal is not entitled to reach a decision based upon supposition and conjecture. In this case the Tribunal decided the Applicant had failed to have regard to its responsibilities to support its case with reliable evidence and coherent analysis of the various provisions of the lease cited by it. The Tribunal concluded that the Applicant had not demonstrated on the balance of probabilities that a breach of covenant in the lease had occurred by the Respondent storing her mobility scooter in the communal lounge. The Tribunal, therefore, dismisses the Applicant's application under section 168(4) of the 2002 Act.
28. The Respondent should not interpret this decision as giving her permission to store the mobility scooter in the lounge or to charge the scooter using the landlord's supply of electricity. The effect of this decision is simply this, the Applicant has not in this instance discharged its obligation to adduce evidence that crosses the threshold of balance of probabilities to demonstrate that a breach of covenant in the lease has occurred.

## RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to [rpsouthern@justice.gov.uk](mailto:rpsouthern@justice.gov.uk) to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. 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.
3. 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.
4. 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.