FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00MR/LBC/2023/0004
Property	**:**	211a New Road, Portsmouth, Hampshire, PO2 7QU
Applicant	**:**	Gary James Hall
Representative	**:**	Mr C Stead, counsel
Respondent	**:**	Romualda Galtry
Representative	**:**	Miss P Pattni, counsel
Type of Application	**:**	Breach of Covenant S168(4) Commonhold and Leasehold Reform Act 2002
Judicial members	**:**	Judge D Whitney Mr M J F Donaldson FRICS Mr E Shaylor MCIEH
Date of hearing	**:**	18th July 2023
Date of decision	**:**	21st July 2023

DECISION

Background

1. The Applicant seeks an Order under S168 (4) of the Commonhold and Leasehold Reform Act 2002 that the Respondent has breached covenants in their lease outlined in part 5 of the application form. The application was received on 3 February 2023.

2. The Tribunal issued directions on 10th May 2023. The directions fixed a hearing to take place at Havant Justice Centre on 18th July 2023. The directions were substantially complied with and a hearing bundle running to 174 pdf pages was produced. References in [ ] are to pdf pages within that bundle.

3. We record that the Respondents had made application for Mr David Wilkinson, the Respondent's witness to give evidence by way of video as he was resident in Ireland. This application was refused as currently no agreement exists with Ireland for witnesses to attend tribunals within the UK by video.

The Property

4. The property can be best described as a mid terrace building which has been converted into two flats. The Applicant acquired the freehold in November 2020 (office copy entries are at [40 and 41]) and was already the leaseholder of the upper self contained flat. The ground floor flat was owned by Mr Galtry who passed away in April 2021 and owned the same subject to a lease [45-59]. Letters of administration were granted to the Respondent dated 20th July 2021 [61].

The Law

5. The relevant law is set out in Section 168 of the Commonhold and Leasehold Reform Act 2002:

"Section 168 No forfeiture notice before determination of breach

(1)A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2)This subsection is satisfied if—

(a)it has been finally determined on an application under subsection (4) that the breach has occurred,

(b)the tenant has admitted the breach, or

(c)a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

(3)But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(4)A landlord under a long lease of a dwelling may make an application to the appropriate tribunal for a determination that a breach of a covenant or condition in the lease has occurred.

(5)But a landlord may not make an application under subsection (4) in respect of a matter which—

(a)has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(b)has been the subject of determination by a court, or
(c)has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(6)For the purposes of subsection (4), "appropriate tribunal" means—

(a)in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b)in relation to a dwelling in Wales, a leasehold valuation tribunal."

Hearing

6. The hearing was attended by the Applicant who was represented by Mr Stead of counsel. The Respondent attended and was represented by Miss Pattni of counsel. Both counsel had filed and served skeleton arguments and bundles of authorities. The Tribunal confirmed it had read the skeleton arguments and the contents of the electronic bundle.

7. We set out below a precis of the most pertinent parts of the hearing. The hearing itself was recorded.

8. The Tribunal reminded counsel it would wish to hear any submissions to any orders pursuant to Section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 (see paragraph 27 of initial directions [34]).

9. Mr Stead confirmed he would wish to argue that the non payment of ground rent and service charges were breaches of lease. He accepted

arguments may be raised over whether or not this application is the correct forum for the same.

10. It was agreed that the Applicants statement of truth would also stand as his witness evidence. The Tribunal declined to allow Mr Stead to ask him further questions as all evidence he sought to rely upon should be within his statement. In light of this Miss Pattni confirmed she would not wish to cross examine him. Mr Wilkinson was the only witness for the Respondent and he was not in attendance.

11. Mr Stead contends that the Tribunals jurisdiction is narrow. The question is simply was there a breach? It does not matter whether or not this has been remedied. In his submissions relying upon the case of Glass v. McCready [2009]UKUT 136 (LC) simply that a breach has been remedied does not prevent this Tribunal determining that there was a breach.

12. Turning first to the satellite dish he suggests this is a breach of Clause 7 of the Fifth Schedule:

"7. No external wireless or television aerial or mast shall be erected or fixed on or to a flat (except one television aerial for each flat) without the written consent of the Lessor"

13. Mr Stead explained there was no evidence of any agreement with the previous freeholder. He suggested that a satellite dish is not a television aeriel. In his submission the dish is a breach of this covenant if no written consent can be supplied.

14. The second breach was the siting of plant pots to the front of the Property (see [78-81] for photographs). Mr Stead suggests that the plant pots are a breach of clauses 5 and 6th of the Fifth Schedule:

"5. The pathway shall not be encumbered with rubbish litter or other things

6. No vehicle shall be parked in the pathway or the front of the building nor shall any articles be placed thereon or the same be obstructed in any manner whatsoever"

15. Mr Stead conceded that this breach had now been remedied by the removal of the plant pots. In his submission this did not prevent this Tribunal determining that there had been a breach of lease.

16. Mr Stead suggested that the fixing of the Ring Doorbell holder to the front door of the Property within the communal hallway was a breach of Clause 9 of the Third Schedule:

"9. Not to apply paint varnish stucco cement or other materials to the exterior of the ground floor flat save of quality and colours as shall have previously been approved by the Lessor such approval not to be

unreasonably withheld"

17. Mr Stead suggests the doormat outside the Respondents front door in the communal doorway was a breach of clause 7 of Schedule 3:

"7. Not to obstruct by deposit of materials or otherwise obstruct the free passage thereover of the Lessor or other persons entitled to rights of way over the pathway and connion (sic) entrance leading frcxn (sic) New Road to the building"

18. Mr Stead did accept that it would be a stretch to satisfy us that this was a breach of the lease.

19. Mr Stead suggests the failure by the Respondent to serve notice of the Letters of Administration until December 2022 was a breach of the lease. Pursuant to Clause 19 of the Third Schedule :

"19. Within one month after every assignment mortgage legal charge assent transfer or underlease to produce the same and give written notice thereof to the Lessor's Solicitors for registration and to pay them a registration fee of Ten pounds in respect thereof (exclusive of Value Added Tax or any other tax or charge thereon) and in the case of a devolution of the interest of the Lessee on the death of the Lessee if the same is not effected by an assent within twelve months after such death the Probate or Letters of Administration shall be produced and the fee paid as aforesaid"

20. Mr Stead suggested that either notice of assent should be provided within 12 months of the death of the leaseholder or within 13 months notice of the letters of administration and fee should be paid. Mr Stead said this should therefore have happened by May 2022 at the latest, but in fact the Respondent did not give notice until December 2022. He submitted this was a serious breach as his client was entitled to know who the owner of the flat was and this should not be left.

21. Mr Stead then made submissions as to the various allegations of nuisance. He relied upon clause 12 of the Third Schedule:

"12. Not to do or permit or suffer to be done in or upon the ground floor flat or any part thereof any act or thing which may be or become a nuisance annoyance or disturbance or cause damage or inconvenience to the Lessor or other the owners or occupiers of the upper floor flat in the building or whereby the Policy of Insurance on the building (including the ground floor flat) may be invalidated or the rate of premium thereon increased or which would tend to depreciate the value of the ground floor flat or the other flat in the building or any adjoining building of the Lessor"

22. Mr Stead relied upon the allegations as set out in the statement of case of the Applicant [14-22]. In particular the reference to the

alleged homophobic note [69] and allegation of spitting in or around August 2021 referred to in a police report [71-74]. It is also alleged there has been a more recent allegation of spitting referenced in the letter from the Applicant's solicitor [167-168] referring to an incident on 22nd April 2023.

23. Mr Stead also said that Mr Hall felt harassed due to the fact when he was looking to work on his own satellite dish the Respondent threatened to report this to the police.

24. Mr Stead explained Mr Hall considered the note to be harassment as he is a gay man and felt it was telling him to leave his flat.

25. The allegation of nuisance caused by the cat urine smell coming from the Respondents flat is set out in the statement of case [19]. Mr Stead suggests that the test is that it is a question of the lessor's opinion.

26. Mr Stead addressed the question of ground rent and service charges. In respect of the ground rent, whilst it was accepted that there was not any demand which satisfied section 166 of the Commonhold and Leasehold Reform Act 2002, he suggested the Respondent did not dispute she was liable to pay the same.

27. In respect of the service charges Mr Stead accepts the documents as required under the lease, notably the accountant's certificate [91] were not served until April 2023. He accepts this is after the commencement of these proceedings, but said there is a breach.

28. Mr Stead invited the Tribunal to place little or no weight on the statement of Mr Wilkinson who was not cross examined on the same and the majority of the statement was not direct evidence, but hearsay. He accepts that it may be said the correct forum for the service charges would be an application pursuant to Section 27A of the Landlord and Tenant Act 1985. He suggested there was no dispute as to the basic facts. His client had been compelled to bring the case as was evidenced by the correspondence within the bundle.

29. At this point the Tribunal had a short adjournment before hearing from Miss Pattni.

30. Miss Pattni suggested it was not for her client to prove that she was not in breach of the lease. It was for the Applicant to prove the breaches relied upon. She relied upon her skeleton argument.

31. She explained the Property is her client's home. It had been purchased by her late husband in 1991. Mr Hall had purchased the freehold and upon her client's husband's death all matters relating to the flat fell to her. English was not her first language although Miss Pattni had confirmed at the start of the hearing that Mrs

Galtry had sufficient English to follow the proceedings and that she was not seeking the services of an interpreter

32. Miss Pattni highlighted that we had no evidence from Mr Hall as to what information he was provided when he purchased the freehold. All we know is that he believed there were breaches of lease, but no explanation as to what enquiries he made as part of the sale process.

33. Miss Pattni dealt with the question of the assent. In her submission there was no time period by which the notice of assent should be given. In any event even if she was wrong on that point, this was remedied before the proceedings and there was no prejudice to Mr Hall and he would not be able to forfeit the lease on this basis.

34. Addressing the alleged breaches relating to ground rent and service charges, in her submission it is impermissible for the Applicant to rely upon the supposed breaches. She suggests it is not for the Respondent to make the Applicant's case save that the Applicant admits the demands do not comply fully with statute and the lease terms.

35. In regard to the satellite dish Miss Pattni suggested that as Mr Stead contended that as the dish was not a television aerial it cannot be a breach of that covenant as suggested in paragraph 45 [19] of the Applicant's statement of case.

36. Turning to the question of other objects Miss Pattni suggested this was not a lease which referred to nothing being placed in the internal communal areas and the internal hallway is not referred to in clause 7 of Schedule 3. In her submission the Ring doorbell holder being attached to the front door is not a breach of paragraph 9 of the Third Schedule as that clause refers primarily to decorating materials

37. On the claims of nuisance, Miss Pattni suggested that the allegations contained no complete details as to "how, when and where". The facts relied upon were supposition or conjecture, particularly in relation to the question of cat urine smell given both flats have cats.

38. Miss Pattni specifically denied that the allegation of threatening to call the police could amount to a breach. It was part of the history of allegations and cross allegations.

39. Miss Pattni accepted that clause 17 of the Third Schedule [52] did potentially allow the Applicant to recover costs. It states:

"17. To pay all costs charges and expenses (including Solicitor's costs and Surveyor's fees) incurred by the Lessor for the purpose of or incidental to r the preparation and service of a Notice under Section 146 of the Law of Property Act 1925 notwithstanding

forfeiture may be avoided otherwise than by relief granted by the Court"

40. She however asked, given any breaches which may be proven have been remedied, why are we here? She reserved her right to make an application under Rule 13 for unreasonable costs.

41. In reply Mr Stead suggests that there is evidence in that the Applicant personally signed the statement of case which stands as his evidence.

42. The plant pots have only been removed following the commencement of the proceedings.

43. Mr Stead said the breaches alleged are not minor in nature. The application was properly constituted and brought. There was a spread of breaches and his client ought to be able to recover its costs as the action has been taken in contemplation of forfeiture.

44. As to costs he said that it is right that no orders are made preventing his client looking to recover their costs given proceedings have been properly brought. He further suggests there are no specific applications under section 20C or paragraph 5A of Schedule 11,so the Tribunal should not make any order.

45. Mr Stead did invite the Tribunal to determine that the Respondent should refund the Tribunal fees.

Decision

46. We thank both Counsel for their measured and considered submissions. As Miss Pattni suggested it is clear that the relationship between the parties, who are neighbours, has broken down.

47. We will address each of the breaches that were advanced by Mr Stead. Whilst it seems other matters may have been referred to at times, such as door handles, we have limited our determination to those matters which were relied upon at the hearing.

48. We are satisfied that a landlord can make an application for a determination of a breach even when a breach has been remedied by the time of the determination. However it is for the landlord to advance the case and produce evidence of a breach. Not for the leaseholder to rebut the same.

49. We were surprised at the lack of evidence relied on and advanced by the Applicant. His evidence was his statement of case being a document containing a statement of truth and signed by him. As a

general comment this lacked detail as to certain of the breaches relied upon.

50. Turning to the evidence of Mr Wilkinson we find that this is of little direct assistance to us. Mr Wilkinson did not attend and was not therefore cross examined. Further he had little direct knowledge of matters and relied upon accounts given to him. We accept his evidence only where supported by documents or the evidence of the Applicant.

51. We find that there was a breach of the requirement to give notice of the letters of administration. We prefer the submission of Mr Stead that clause 19 of the Third Schedule required if there was no assent within 12 months of death, copies of the letters of administration and fee to be paid within a further 28 days i.e. within 13 months of the death of the tenant and for any fee to be paid. We accept that is the proper interpretation of that clause.

52. We accept it is important that a freeholder knows in whom possession is vested at any time. That is perhaps demonstrated by the fact that it appears currently there is an application pending at the Land Registry but due to delays this has not been processed. A landlord is entitled to understand who at any time is the tenant.

53. We find notice was not given on or before May 2022. Both parties accept and we record that the breach was remedied in December 2022 and so there is currently no outstanding breach.

54. We find that the plant pots to the front of the Property in the area between the front wall and the wall adjacent to the street were placed in breach of Clause 7 of the Third Schedule and clauses 5 and 6 of the Fifth Schedule.

55. We are satisfied that these pots were placed in the area known as "the pathway and connion (sic) entrance leading frcxn (sic) New Road to the building". We are satisfied that there is no evidence that the Respondent was entitled to place anything in this area. Further we are satisfied the Applicant was entitled to request the Respondent to remove items left in this area over which she has rights of way only. In failing to do so we are satisfied that a breach of lease occurred. We do however once again record that it is accepted that this breach was remedied at some point after the commencement of this application by the Respondent removing the plant pots.

56. We were asked to find that the attachment of a holder for a Ring doorbell to the front door and siting of an entrance door mat immediately outside the doorway to the Respondent's flat was a breach of covenant.

57. Turning to the latter the doormat was in what we will call the communal hallway off which both flats are entered after you have

entered the front door to the building. Mr Stead did not push this as a breach. We are not satisfied this is a breach of clause 7 or 9 of the Third Schedule. Clause 7 only applies to areas outside the front door to the building. Not the communal hallway. Clause 9 refers to the exterior of the building.

58. In respect of the doorbell again we are not satisfied that this is a breach of clauses 7 and 9 of the Third Schedule. We rely on the reasons set out in paragraph 57 above. We would add we have considered whether or not it can be said the front door to the Respondent's flat can be the exterior but we are not so satisfied. In any event in our judgment the attachment of a doorbell is simply normal door furniture one would expect to find.

59. We turn now to the question of ground rent and service charges.

60. We are not satisfied there has been a breach of covenant in connection with the payment of ground rent. The Respondent accepts that ground rent is payable under the lease. However to be payable a valid demand which satisfied Section 166 of the Commonhold and Leasehold Reform Act 2002 must be served and there is no evidence, and it appears to be accepted by the Applicant, that one has been served. Until, this has been given no ground rent is payable and so there can be no breach.

61. Similarly in connection with service charges we need to be satisfied that the sums claimed are payable and reasonable under the lease and statute. If there is dispute then more properly an application pursuant to Section 27A of the Landlord and Tenant Act 1985 should be made. Mr Stead acknowledged that this is the case.

62. It is accepted that the demands pre-dating the issue of this application do not comply with the strict requirement of the lease as to certification. An accountant's certificate was in the bundle [91] but it is dated 31st March 2023 and we are told it was served at some point in April 2023 together with the summary [92]. Certain of the figures within the summary are challenged such as solicitor's costs, the communal door cost, and the lack of consultation and whether or not the certificate itself is valid.

63. We are not satisfied on a balance of probabilities that there was evidence before us that there is a breach of the Respondent's liability to the Applicant to pay a service charge. We make no other findings and if the parties cannot agree what if any sums are payable, each must rely upon the advice they receive.

64. The next head of breach relates to nuisance annoyance or disturbance. Essentially there were two types of action relied upon, firstly harassment and nuisance specifically directed to Mr Hall and secondly in respect of the smell of cat urine coming from the

Respondents flat. Both were said to be breaches of clause 12 of the Third Schedule.

65. As set out above we were surprised at the lack of evidential detail provided for such allegations. The allegations were almost entirely based upon generic allegations. It is far more usual to receive detailed analysis setting out what exactly happened, the circumstances and the date and time almost as in a diary format.

66. Mr Stead in particular refers to various authorities all of which we have considered and taken account of in making a determination. We remind ourselves that we do have to find the facts relied upon are made out.

67. We record that as to personal harassment of Mr Hall a number of incidents are relied upon. It is suggested he was spat upon on two occasions by the Respondent.

68. The first allegation [19] at paragraph 56 of the statement of case contains no details of the date, time and circumstances. Further the police report [71-73] was made in February 2022 and was in reference to a note which we will deal with separately but refers to a previous incident "was spat at back last august by my neighbour in 211A". Supposedly a second incident of spitting took place as referred to in a letter from the Applicant's solicitors to the Respondent's solicitors [167] on 22nd April 2023. We have no direct evidence from Mr Hall on this point.

69. Mr Hall also suggests that a note left on a letter addressed to a Mr J Terry which states: "211B!!! leave 2 boys !!! H Hall and J Terry" was homophobic abuse directed to him (see [19] paragraph 55).

70. Finally there was an occasion when Mr Hall was on a ladder outside the front of the building. He says to remove his own satellite dish. Mrs Galtry thought he was interfering with her satellite dish and asked him to stop or she would call the police. This is said to have caused a nuisance, annoyance or disturbance.

71. We are not satisfied on a balance of probabilities that as a matter of fact Mr Hall has proved these incidents amount to a breach of covenant. In respect of the spitting we have too little information as to when these events took place and the circumstances. The evidence given by Mr hall is generic at best and not sufficient for us to make a finding

72. Turning to the note, whilst we note the statement of case refers to other incidents of homophobic abuse, again no detail is given. On its own we are not satisfied on a balance of probabilities that the note is sufficiently abusive as to constitute a breach

73. In respect of the incident over the satellite dish, we are not satisfied that being told someone is calling the police amounts to a breach of the lease. This happened at a time when it would appear relations had broken down. Whilst we have no doubt the police would have had far better things to be doing than engaging between two neighbours, we are satisfied that the Respondent was entitled to say that was what she intended to do given her concerns. It remains unclear whether she did, save we are told there are various counter allegations she would make.

74. This leaves the question of the smell of the cat urine.

75. It is accepted both occupants have cats. Mr Hall obviously says it is not his. The allegation is generalised. We would have expected some sort of diary of when the smell was noticed and even possibly statements from third parties. There is nothing of this nature. We find that we are not satisfied on a balance of probabilities that cat urine has been smelt emitting form flat 211A so as to amount to a breach of clause 12 of the Third Schedule.

76. The Applicant contends that the attachment of a satellite dish to the front of the Property is a breach of clause 7 of Schedule 5. Mr Stead suggested that a satellite dish is not an aerial and that the Respondent can produce no written consent for the erection of the same.

77. We prefer Miss Pattni's argument that if it is said the satellite dish is not a television aerial it cannot be a breach of clause 7 of the Fifth Schedule and we do not find this breach made out.

78. We turn now to the question of costs. We note the Respondent does not, within her statement of case, make any applications pursuant to paragraph 5A and Miss Pattni, on her behalf orally or within her skeleton argument did not make such application. As a result we record that there was no application pursuant to paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 before us.

79. Miss Pattni, within her skeleton argument, does invite us to make an order under section 20C of the Landlord and Tenant Act 1985. The directions foresaw the making of such applications orally at the hearing. Mr Stead resisted such applications.

80. In determining this we make no finding as to whether or not the costs may be recovered as a service charge under the terms of the lease. The making of such orders are not simply a question of "win or lose". They are at the discretion of the Tribunal. In our judgment we should make an order that none of the costs of these proceedings may be recovered as a service charge pursuant to Section 20C.

81. Mr Stead invited us to order that the Tribunal fees should be reimbursed. We have considered this carefully. Again the making of such orders is discretionary. Our discretion is broad. In the circumstances of this it can be said that the Applicant has been successful in a finding being made of two breaches. One remedied prior to the proceedings and the second during the course of the same. On the other breaches we have found the allegations have not been established. In our determination no order for reimbursement should be made.

82. We note that it was suggested that the Respondent reserved their right to make an application under Rule 13 that the Applicant has acted unreasonably. We remind the parties that the making of such orders are rare and the test is set out in the Upper Tribunal decision in Willow Court Management Company (1985) Limited v Alexander [2016] UKUT 0290 (LC).

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

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.