



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

**Case Reference** : CHI/00HN/LBC/2023/0010

**Property** : Flat 17 Tower Court, 14 Westcliff Road,  
Bournemouth BH2 2HA

**Applicant** : Tower Court Properties Limited

**Representative** : Rawlins Davy Reeves Solicitors

**Respondent** : Mr Paul Arias

**Representatives** : No appearance

**Type of Application** : Breach of covenant (s.168 Commonhold  
and Leasehold Reform Act 2002)

**Tribunal Members** : Judge MA Loveday

**Date and venue of  
hearing** : 25 July 2023 (determination on the papers  
without a hearing)

**Date of Decision** : 25 July 2023

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**DETERMINATION**

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## Introduction

1. This is an application under s.168(4) of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) for a determination of breaches of covenant in a lease of a flat in Guildford. Directions were given on 19 May 2023 when it was indicated that the matter was suitable for a determination on the papers without a hearing.

## Background and lease

2. The application relates to Flat 17 Tower Court, 14 Westcliff Road, Bournemouth BH2 2HA. Tower Court comprises a block of 51 flats, and Flat 17 is on the 4<sup>th</sup> floor. The applicant is the freehold owner of the block.
3. By a deed of surrender and regrant dated 19 August 2005, the applicant demised Flat 17 for a term of 999 years from 29 September 1993. The lease incorporated the terms of earlier leases, in particular a lease dated 17 August 1994 (“the 1994 Lease”).
4. By para 9 of Pt.1 of Sch.6 of the 1994 Lease, the lessee covenanted with the lessor as follows:

“The Lessee shall not do or permit or suffer to be done in or upon the Premises anything which may be or become a nuisance or annoyance or cause damage or inconvenience to the Lessor or to the Lessee or occupier of any other Flat in the Building ...”

By para 2 of Pt.2 of Sch.6 of the 1994 Lease, the lessee entered into a similar covenant with the lessor and the lessees of the other flats.
5. By para 3 of Pt.2 of Sch.6 of the 1994 Lease, the lessee entered into a further covenant with the lessor and the lessees of the other flats:

“Neither the Premises nor any part thereof shall be used for any illegal or immoral purpose ...”
6. The respondent is the registered proprietor of the lease.

## The Act

7. The material provisions of the 2002 Act are as follows:

### **“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.

...

(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.”

### **The applicant’s case**

8. The application is dated 13 March 2023. The form of application states that “numerous complaints relating to the use and smell of cannabis/ CBD coming from the Subject Property have been made by other Lessees/ occupiers within the block. The other Lessees/ occupiers have been caused a significant nuisance and annoyance. The managing agent of the block [has] contacted the Respondent on various occasions to make them aware of the alleged nuisance and annoyance to other residents, but no action to cease the alleged breach was made.
9. In support of the allegation, the applicant produced three witness statements.
10. Mr Elliott Trapnell of Foxes Property Management produced emails from the lessee of 16 Tower Court between May 2022 and April 2023 making numerous complaints about the smell of cannabis. For example, on 5 December 2022, there was an email about cannabis smells “all through the night” which came into the complainant’s apartment. On 9 December 2022, there was a very strong smell of cannabis when coming out of the lift on the 4<sup>th</sup> floor. The lessee of Flat 16 complained about sleepless nights, daily headaches and poor work concentration. Partial logs of incidents dated 9 and 22 February 2023 referred to cannabis being smoked on an almost daily basis in February 2023. On 11 March 2023, the lessee of Flat 16 suggested in an email entitled “Drugs all weekend” that “we are breathing in Cannabis daily...”. On 9 April 2023, the emails complained that “this is affecting my mental and physical health”.
11. Mr Trapnell also personally witnessed the smell of cannabis emanating from the respondent’s address on 9 January 2023, 2 March 2023 and 26 April 2023, all while on the premises. The applicant had written to the respondent on three occasions about the smell, but with no response.
12. Mr Trapnell produced a copy of a Letter before Claim from the applicant’s solicitors dated 20 December 2022. In response, the respondent wrote on 18 January 2023:

“I write in response to your letter dated 20<sup>th</sup> December, concerning allegations of the smell of 'cannabis' emanating from my flat at the above address.

I would like to assure all parties concerned that I do not partake of this class B drug. I do however on occasions smoke CBD for pain relief, which as far as I am aware is completely legal. There is, admittedly, a resulting odour associated with this, and I acknowledge that this has apparently caused discomfort to one or more of my neighbours. I would like to extend

my sincerest apologies to them for any inconvenience caused, and I shall take measures to prevent this happening in the future. It had not actually occurred to me that it was bothering other residents to this extent - I am more than willing to rectify this going forward now that I have been made aware of the problem.”

13. However, there continued to be complaints about Flat 17, and on 26 April 2023 Mr Trapnell again personally witnessed the smell of cannabis coming from the flat.
14. Mr Jordan Franklin of Foxes Property Management produced a brief statement stating that on 2 December 2022 he also witnessed “the smell of cannabis emanating from the respondent’s flat, while visiting Tower Court in the course of my business...”
15. Mr Russell Jamieson, a Director of the applicant, gave a statement which confirmed Mr Trapnell’s account. On 2 March 2023, he had also witnessed “the smell of cannabis emanating from the respondent’s flat, while visiting Tower Court in the course of my business...”

### **The respondent’s case**

16. The directions provided (at para 12) that the respondent should file a statement of case with supporting documents and any witness statements by 3 July 2023. The respondent chose not to do so.

### **The tribunal’s determination**

17. The tribunal is required to determine the question of whether there has been a breach of covenant on the civil standard of proof.
18. The tribunal is required to determine the question whether there has been a breach of covenant on the civil standard of proof. Where a serious allegation is made in a civil case, such as an allegation of criminal conduct, the standard of proof is still the civil standard of proof on the balance of probabilities. However, the civil standard is flexible in its application, and if a serious allegation is made, then more cogent evidence may be required to overcome the unlikelihood of what is alleged: *Phipson on Evidence* at 6-57.
19. As to the facts:
  - a. Given that no statement of case or other material has been submitted to rebut the assertions made by the three witnesses, the tribunal accepts their evidence. On numerous occasions, the respondent has smoked cannabis substances in Flat 17 (or allowed them to be smoked), and the smell of cannabis could be sensed outside the flat in the internal common parts. This is supported by the admission made by the respondent in his letter of 18 January 2023 that he had “on occasions smoke[d] CBD for pain relief”. The tribunal further rejects the suggestion by the respondent that there was only occasional smoking of these substances. The email logs and witness statements suggest that cannabis smells occurred on a very regular, and sometimes daily, basis.

b. The tribunal further accepts the gist of the hearsay evidence in the emails from the lessee of flat 16 about the effect of these smells. The smell of cannabis was strong enough to be sensed in at least one other flat. In the case of flat 16, it was sufficiently strong and intrusive to cause the lessee sleepless nights, daily headaches and poor work concentration. The truthfulness of these statements is strongly supported by the sheer number of complaints made by Flat 16 to the managing agents over a period of time, often expressed in forceful terms. Again, apart from the uncontested evidence in the emails, the respondent himself acknowledged in his letter of 18 January 2023 that “there is, *admittedly*, a resulting odour associated with” his smoking and that “this has apparently caused discomfort to one or more of my neighbours”.

20. In the circumstances, the tribunal is in no doubt that the smoking of cannabis substances in the flat was a “nuisance”. The smell and smoke were unreasonable and caused substantial interference in the use and enjoyment by the applicant of the common parts. Although some tolerance might well be had to tobacco smoke emanating from a flat, a person of reasonable sensibilities would take a very different view in relation to the smell of cannabis. Given the evidence that the smell and smoke could be sensed within Flat 16, the respondent also interfered with the ordinary use and enjoyment of that flat. Finally, there is also evidence that the smell and smoke caused “annoyance” and “inconvenience” to the lessee of Flat 16, which the respondent appears to admit in his letter and for which he apologises.

21. It follows that the tribunal is satisfied the respondent is in breach of the covenants against causing a nuisance etc. in para 9 of Pt.1 and para 2 of Pt.2 of Sch.6 of the 1994 Lease.

22. As to the allegation that the premises were being used for illegal or immoral purposes, contrary to para 1 of Pt.2 of Sch.6 to the 1994 Lease, the material available to the tribunal is thin. Interestingly, the pleaded case in the application is that the respondent used “CBD/cannabis” in the flat, although whether that was a consciously drawn distinction is unclear. In para 11 of his witness statement, Mr Trapnell alleges that “the Applicant claims that the smoking of cannabis is illegal and therefore immoral, being a Class ‘B’ drug and its use prohibited under the Misuse of Drugs Act 1971.

23. The following are the material provisions of the Misuse of Drugs Act 1971:

**“5 Restriction of possession of controlled drugs.**

(1) Subject to any regulations under section 7 of this Act for the time being in force, it shall not be lawful for a person to have a controlled drug in his possession.

(2) Subject to section 28 of this Act and to subsection (4) below, it is an offence for a person to have a controlled drug in his possession in contravention of subsection (1) above.”

**“8 Occupiers etc. of premises to be punishable for permitting certain activities to take place there.**

A person commits an offence if, being the occupier or concerned in the management of any premises, he knowingly permits or suffers any of the following activities to take place on those premises, that is to say—

(a) ...

(d) smoking cannabis, cannabis resin or prepared opium.”

The definitions of terms such as “controlled drug”, “cannabis” and “cannabis resin” in s.37(1) of the 1971 Act are complex.

24. In this case, there is no suggestion that any of the witnesses are experts about CBD, cannabis, cannabis resin or related products. Neither is the tribunal an expert tribunal in relation to these matters. There is no evidence of a conviction in criminal proceedings, a police caution or a finding of any other court or tribunal. And importantly, there is no admission by the respondent that what he was smoking was proscribed under either s.5 or s.8 of the 1971 Act. Indeed, he suggests the opposite. Without departing from the standard of proof in civil cases, the tribunal would require more convincing evidence than what has been put forward in this application, before finding that the respondent was using Flat 17 for any “illegal” purpose. The product being smoked may or may not have engaged ss.5 or 8 of the 1971 Act, but the evidence is simply not there to enable the tribunal to resolve this question either way. It follows that the tribunal rejects the argument that the respondent was in breach of para 1 of Pt.2 of Sch.6 to the 1994 Lease.

**Conclusions**

25. The tribunal determines under s.168(4) of the Commonhold and Leasehold Reform Act 2002 that the respondent has breached the following covenants of the 1994 Lease, which were incorporated into the lease of Flat 17:
- a. Para 9 of Pt.1 of Sch.6, that the “Lessee shall not do or permit or suffer to be done in or upon the Premises anything which may be or become a nuisance or annoyance or cause damage or inconvenience to the Lessor or to the Lessee or occupier of any other Flat in the Building...”
  - b. Para 2 of Pt.2 of Sch.6, that the “Lessee shall not do or permit or suffer to be done in or upon the Premises anything which may be or become a nuisance or annoyance or cause damage or inconvenience to the Lessor or to the Lessee or occupier of any other Flat in the Building...”

Judge Mark Loveday  
25 July 2023

## **Appeals**

1. 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.
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.

## APPENDIX: SCHEDULE 1 TO THE LEASE

### THE FIRST SCHEDULE THE DEMISED PREMISES

1. The premises specified in the Particulars as shown for identification purposes edged red on the Plan A annexed hereto and forming part of the Building including:
- (a) The internal plastered or plaster board coverings and plasterwork of the walls bounding the premises and the doors and door frames and window frames fitted in such walls (other than the external surfaces of such doors door frames and window frames) and any glass fitted in such doors and window frames and
  - (b) The plastered or plaster board coverings and plaster work of the walls and partitions lying within the premises and the entirety of any non- supporting walls and partitions and the doors and door frames fitted in such walls and partitions and
  - (c) The plastered or plaster board coverings and plaster work of the ceilings and the surfaces of the floors including the whole of the floorboards (if any) and
  - (d) All conducting media which are laid in any part of the Building and serve exclusively the premises (excluding any such deemed to be property of the relevant statutory undertaker)
  - (c) All fixtures and fittings in or about the Demised Premises and not hereafter expressly excluded from this demise

But not including:

- (i) any part or parts of the Building (other than any conducting media expressly included in this demise) lying above the said ceilings or below the said floor surfaces
- (ii) any of the main walls roofs foundations timbers beams and joists of the Building or any of the supporting walls or partitions therein (whether internal or external) except such of the plastered and plaster board surfaces thereof and the doors and door frames fitted therein as are expressly included in this demise
- (iii) any conducting media in the Building which do not serve the Demised Premises exclusively