FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BK/LBC/2023/0036**
Property	**:**	**Flat 88, Park West, Edgware Road, London. W2 2QJ**
Applicant	**:**	**Coinface Ltd.**
Representative	**:**	**Mr. P. Wright of counsel instructed by GSC Solicitors LLP**
Respondent	**:**	**Mr. Razak Mausa Amran Al-Hamami**
Representative	**:**	**Unrepresented**
Type of Application	**:**	**For the determination of an alleged breach of covenant**
Tribunal Members	**:**	**Tribunal Judge Stuart Walker** **Tribunal Member Jane Mann MCIEH**
Date and venue of Hearing	**:**	**3 October 2023 10, Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**9 October 2023**

DECISION

The Tribunal determines that the Respondent has not breached the covenant contained in clause 2(9) of the lease.

Reasons

The Application

1. The Applicant seeks a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("section 168") that a breach of covenant has occurred.

2. The application was made on 24 May 2023. In this application the Applicant alleged that the Respondent was in breach of clause 2(9) of his lease with the Applicant in that he had failed to provide the Applicant with access to the property.

3. Directions were issued on 6 July 2023. Under the directions both parties were required to provide a digital indexed and paginated bundle of documents. A bundle was provided by the Applicant which consisted of 169 pages. Page numbers in what follows are references to the printed page numbers which appear in this bundle.

4. The Tribunal was also provided with a skeleton argument from Mr. Wright consisting of 4 pages together with a second witness statement from Mr. Leon Kirby and a further 20 pages of exhibits.

5. No bundle was provided by the Respondent, despite the directions requiring one by 10 August 2023. Indeed, until 25 September 2023 the Tribunal had heard nothing from him. On that day he wrote to the Tribunal asking for the hearing to be adjourned or the application dismissed on the basis that he had carried out repair works and so access was no longer required.

6. Then on 2 October the Respondent e-mailed to the Tribunal stating that he was unable to attend the hearing as he had collapsed at home. He was contacted by the Tribunal and stated that he wanted the hearing adjourned. He was asked for medical evidence to support his application, but nothing was provided apart from an e-mail on the day of the hearing confirming that he had a GP appointment.

7. The relevant legal provisions are set out in the Appendix to this decision. The Tribunal bore in mind throughout its deliberations that the burden was on the Applicant to show that a breach of covenant had occurred on the balance of probabilities.

The Hearing

8. The hearing was attended on behalf of the Applicant by Mr. Kirby, an employee of the Freshwater group of companies of which the Applicant is part. The Applicant was represented by Mr. Wright of counsel instructed by GSC Solicitors LLP. The Respondent did not attend and was not represented.

9. Neither party requested an inspection, and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

10. The Tribunal began by considering the Respondent's application to adjourn the hearing and whether to proceed in their absence. The Tribunal bore in mind that the Respondent had failed to comply with the directions requiring the production of a bundle of documents. He had failed to seek any extension of time in order to comply, and had

failed to advance any positive case whatsoever. No medical evidence had been provided to substantiate his assertion that he was unable to attend for medical reasons.

11. The Tribunal was not satisfied that it was in the interests of justice to adjourn the hearing. It considered rule 34 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. There was no doubt that the Respondent had been notified of the hearing. In the absence of any positive case advanced by the Respondent and in the absence of medical evidence to show that the Respondent was unable to attend, the Tribunal considered that it was in the interests of justice to proceed.

12. Mr. Kirby adopted his witness statements and the Tribunal then heard submissions from Mr. Wright.

The Factual Background

13. Given what follows it is not necessary to set out much in the way of background save to identify the clause of the lease which the Applicant alleged had been breached. That clause is clause 2(9) under which the Respondent covenanted;

> "*to permit the Lessor and its agents and workmen after reasonable notice in writing at all reasonable times during the said term to enter upon the Flat to view the condition thereof and take any measurements plans or sections thereof or of any part or parts thereof and to give to or leave upon the Flat for the Lessee notice in writing of all defects and wants of repair there found AND within two months next after every such notice well and sufficiently to repair and make good such defects and wants of repair.*" (page 57)

The Applicant's Case

14. The Tribunal invited Mr. Wright to clarify the Applicant's case and were told the following. Firstly, although the clause in question referred to both the provision of access and the doing of works, no part of the Applicant's case was based on any failure to do works.

15. Secondly, although the Applicant had written many letters to the Respondent in which it was made clear that the Applicant wished to gain access to the property (see pages 16 onwards), it was accepted that in none of those letters was the Respondent told that the Applicant wished to gain access on a particular date at a particular time.

The Case of New Crane Wharf

16. In the light of these concessions the Tribunal provided Mr. Wright with a copy of the Upper Tribunal's decision in the case of New Crane Wharf Freehold Ltd. -v- Jonathan Mark Dovener [2019] UKUT 98 (LC). The hearing was adjourned for him to consider that case and for him to make submissions in the light of it.

17. The decision in New Crane Wharf concerns a clause very similar to that in this case insofar as it relates to the provision of access. It stated as follows;

> "*to permit the Lessor and its agents and workmen at all reasonable times on giving not less than forty eight hours notice (except in case of emergency) to enter the Demised Premises*"

18. The only difference between that clause and the one in this case was that here reasonable notice was needed whereas in New Crane Wharf there had to be 48 hours notice.

19. In New Crane Wharf the First-tier Tribunal had concluded that there had been no breach. It observed as follows at para 38 – as set out at para 12 of the judgment;

> "*The Applicant's case therefore seems to be that, through failing to respond positively to the Applicant's solicitors' statement that their client wished to gain access to the property, the Respondent was in breach of the obligation to permit entry. We do not accept this analysis.*"

20. The Upper Tribunal accepted the First-tier Tribunal's assessment and observed – at paras 17 and 23– that a letter requiring access to be given by a certain time is not notice stating when access is required, but rather is merely an invitation to the tenant to propose a time. In other words, a valid notice must state the time at which access is required.

21. Mr. Wright having had time to consider the New Crane Wharf decision, the hearing resumed. He informed the Tribunal that in the light of that decision he was forced to concede that there had been no breach in this case.

22. The Tribunal agreed with his conclusion. It concluded that in order to establish a breach of clause 2(9) it was first necessary for the Applicant to give notice to the Respondent that access was required on a particular date at a particular time. It is not enough simply to invite the Respondent to propose a date and time when access would be given. It had been accepted by Mr. Wright that no such notice had been given in this case and so it was clear that no breach had occurred.

23. For the reasons given above the Tribunal dismissed the application.

Name: Tribunal Judge S. J. Walker **Date:** 9 October 2023

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against 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.

Appendix of relevant legislation

Commonhold and Leasehold Reform Act 2002

Section 168

(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.