FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BD/LBC/2023/0002**
Property	**:**	**12 Marina Place, Old Bridge Street, Hampton Wick, Kingston Upon Thames, Surrey, KT1 4BH**
Applicant	**:**	**HNA No 1 Limited**
Representative	**:**	**Martin Horne (Counsel)**
Respondents	**:**	**Josef Vasyl Lackner** **Christian Josef Elias Lackner**
Representative	**:**	**Josef Lackner (in person)**
Type of application	**:**	**Breach of Covenant**
Tribunal Members	**:**	**Judge Robert Latham** **Sarah Phillips MRICS**
Date and Venue	**:**	**22 May 2023 at** **10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**12 June 2023**

DECISION

Decisions of the Tribunal

(1) The Tribunal determines that for the purposes of section 168(4) of the Commonhold and Leasehold Reform Act 2002, the Respondents have beached the terms of their lease by parking two cars in Parking Spaces No.85 and 86 between 4 August 2022 and 2 March 2023. One of the cars had been removed by 17 January 2023. The Respondents were thereby in breach of Clauses 3.32.4, 3.37, 3.40 and 3.41 of their lease.

(2) The Tribunal determines that the Respondent shall pay the Applicant £300 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant.

The Application

1. By an application dated 17 January 2023, the Applicant seeks an order that the Respondents have breached a term of their lease pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 (the "2002 Act"). On 19 January, the Tribunal emailed a copy of the application to the Respondents.

2. The Applicant is the registered proprietor of the headlease interest of the property known as 1 to 16 Marina Place, Hampton Wick, KT1 4BH which is registered at HM Land Registry under title number TGL249378 ("the Building"). The Respondents are the owners of the long leasehold interest of Flat 12 Marina Place, Hampton Wick, which is registered at HM Land Registry under title number TGL249391 ("the Flat"). Under their lease, the Respondents have the right to park cars in “Space No.13”. This space is now numbered “69”.

3. The Applicant complains that for a period of some five years, the Respondents have unlawfully parked cars in Parking Spaces No. 85 and 86. Some of these cars have been untaxed and uninsured.

4. On 16 February 2023, the Tribunal issued Directions. The Directions stated that the application would be heard at a face-to-face hearing on 22 May. The Tribunal advised the Respondent to seek independent legal advice as the proceedings may be a preliminary to court proceedings to determine the tenancy. On 22 February, the Tribunal sent the Directions to the parties.

5. On 2 March, the Respondents removed the cars. On 6 March, the Applicant required the Respondents to give an undertaking that they would comply with the headlease. The Respondents have failed to give this undertaking.

6. On 16 March 2023, pursuant to the Directions, the Applicant filed the Bundle of Documents upon which it seeks to rely. On 16 March 2023, it served the bundle on the Respondents by email and by hand delivering a copy of the bundle to the Flat.

7. By 23 March, the Respondent was directed to serve the bundle of documents upon which he seeks to rely in response to this application. The Respondent has taken no steps to defend this application.

8. On 28 April, the Applicant applied to convert the oral hearing to a paper determination. On 12 May, the Tribunal declined to do so on the basis

that the Respondents had not admitted the breaches and the Tribunal would need to hear evidence so that it could make specific findings in respect of the alleged breaches.

9. On 6 May, the First Respondent wrote to the tribunal in these terms:

> "I do not believe I was in breach of the lease and stated straight away which is noted by the solicitors that the cars would be moved straight away on resolving the dispute that they fail to get back to me on. But instead of wanting to resolve the issue amicably as I had wanted, they just continued to pursue what felt more like a bullying tactic. I did make sure everything they wanted was done to show good will and wanting to resolve this issue but still to this date have not provided me with evidence or willing to discuss the legitimacy of the 5 extra car parking spaces they made up on communal area without consolation. As good will I made sure no cars were anywhere within the disputed area and did as they wished hoping that any issues could be resolved amicably. Also, I have no idea how they can rack up such crazy costs (which is not affordable either), plus at the same time them addressing the issue that I believed that landlord had breached the lease would have solved everything immediately. Which they chose not to do."

The Hearing

10. Mr Martin Horne (Counsel) instructed by Protopapas LLP ("Protopapas") appeared for the Applicant. He adduced evidence from Mr Antony Matthews, who is the Head of Service Charges and Estate Management at Heylo Housing who are the managing agents for the Applicant. Mr Matthews conceded that he had only visited the Estate once in February 2023. He had not seen any cars parked in the garage. His evidence did not assist the tribunal.

11. Mr Josef Lackner appeared on behalf of the Respondents. He occupies the subject flat. Christian Lackner is his brother and no longer lives at the flat. Mr Lackner did not apply to give evidence. Had the Tribunal permitted him to do so, it is probable that he would have done no more than strengthen the Applicant's case. It is common ground that any cars were removed on 2 March 2023. Mr Lackner now understands the consequences of any further breach of covenant.

12. The Applicant has been sending documents to three email addresses. Mr Josef Lackner's email address is "joe_lac@hotmail.com". The Applicant had rather been sending mail to joe.lac@hotmail.com. The two other email addresses were those used by his father, Josef Lackner. Mr Lackner, Senior, operates a lettings business. The Tribunal is satisfied that the Applicants have had access to all the relevant papers. Mr Lackner did not bring any documents to the hearing. The Tribunal ensured that he had access to the most important documentation.

13. Given that the breach has now been remedied, Mr Horne conceded that it was now unlikely that the Applicant would issue proceedings in the County Court to forfeit the lease. There is potentially a claim for costs. On 6 March 2023, the Applicant indicated that it was seeking to recover costs of £5,235.25 + VAT. On the Friday before the hearing, the Applicant had sent the tribunal an N260 summary statement of costs seeking costs in the sum of £10,344 (inc VAT). At the end of the hearing, Mr Horne indicated that he was minded to make a penal costs application under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. However, having been warned of the high threshold set for such an award by the Upper Tribunal in *Willow Court Management Co v Alexander* [2016] UKUT 290 (LC), he did not proceed with this application. However, it is possible that the Applicant may seek to recover its costs through an administration charge.

The Law

14. Section 168 of the Commonhold and Leasehold Reform Act 2002 provides that:

"(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.

15. In approaching this application, we have regard to guidance provided by Martin Rodger QC, the Deputy President, in *Marchitelli v 15 Westgate Terrace Ltd* [2020] UKUT 192 (LC); [2021] 1 P&CR 9 (at [49]):

"The purpose of proceedings under s.168(4) of the 2002 Act, is to establish the facts on which steps to forfeit an extremely valuable lease will then be founded. Before forfeiture proceedings may be commenced the landlord is required by s.146(1) of the 1925 Act, to serve a notice "specifying the particular breach complained of" and if that breach is remedied and compensation is paid no forfeiture will occur. Before a s.146 notice may be served the FTT must determine that "the breach" has occurred (s.186(2)(a) of the 2002 Act). It follows, therefore, that the determination required of the FTT must be sufficiently specific to provide the basis of a s.146 notice."

The Leases

16. The development at Marina Place consists of five blocks which share an underground carpark. Flat 12 Marina Place is in a block known as 1 to 16 Marina Place (Block E). This is a block of social housing. The four other blocks are privately leased.

17. There are three relevant leases:

(i) The Applicant's sub-lease in respect of Flat 12 Marina Place, dated 29 October 2004 (at p.24-46). The original parties to the lease were (a) Merlion Housing Association Two Thousand Limited ("the Lessor"); and (b) Lucie Juliet Alice Ormerod and Anne Marie Beth Luthman ("the Lessee"). Merlion Housing Association Two Thousand Limited is now part of the Applicant group of companies. On 4 August 2008, the Respondents were registered with the leasehold interest having paid a £290,000 (p.152-154).

(ii) The Headlease in respect of 1-16 Marina Place, dated 28 October 2004, is at p.47-113. There are three parties to this lease: (a) Fleetglade Limited ("the Landlord"); (b) Merlion Housing Association Two Thousand Limited ("the Tenant"); and (c) Merlion Group PLC ("the Guarantor"). The Applicant's Land Registry Official Copy of the Title is at p.160-163.

(iii) The Car Parking Lease, dated 28 October 2004 which is at p.114-151. There are three parties to this lease: (a) Fleetglade Limited ("the Landlord"; (b) Merlion Housing Association Two Thousand Limited, ("the Tenant"); and (c) Merlion Group PLC ("the Guarantor"). The Applicant's Land Registry Official Copy of Title is at p.157-159.

The Respondents' Lease

18. The Third Schedule, Paragraph 1 grants the Lessee: "The right to pass and re-pass over the Common Parts for all reasonable purposes in connection with the use and enjoyment of the Premises and (insofar as

the estate roads and parking area other than the parking spaces specifically demised to individual lessees are concerned) with or without private motor vehicles.

19. The Third Schedule Paragraph 6 of the Lease grants the Lessee: "The right to park one private motor vehicle with a current MOT certificate (not being a van or other commercial vehicle) in the Car Parking Space. The Car Parking Space is defined as "the car parking space shown for the purposes of identification only edged green on Plan 2 and numbered "

20. The Applicant relies upon the following terms in the Respondents' lease:

(i) By Clause 3.32.4, the Lessee covenant: "Not to park any vehicle on or about the Common Parts". The definition of “common parts” extends to the parking areas.

(ii) By Clause 3.37, the Lessee covenant: "At all times to observe and perform the covenants on the part of the tenant and the conditions contained in the Headlease".

(v) Clause 3.40, the Lessee covenant: "At all times to observe and perform the covenants on the part of the tenant and the conditions contained in the Car Parking Lease".

(vi) By Clause 3.41, the Lessee covenant: "Not to do or suffer any act or thing or in relating to the Car Parking space which will or may contravene any of the tenant's obligations in the Car Parking Lease or any provisos agreements and declarations as are contained in the Car Parking Lease"

21. The Applicant had relied on the following terms of the Respondent's lease, but Mr Horne conceded that they had no relevance to the alleged breach of covenant:

(i) By Clause 3.38, the Lessee covenant: "Not to do or suffer any act or thing upon or in relation to the Premises which will or may contravene any of the tenant's obligations in the Head Lease or any provisos agreements and declarations as are contained in the Headlease". Mr Horne conceded that "Premises" does not extend to the underground car park.

(ii) By Clause 3.39, the Lessee covenant: "At all times to observe and perform all regulations that the Lessor and/or any superior landlord may from time to time in its absolute discretion think fit to make for the management care and cleanliness of the Car Parking Space and the comfort safety and convenience of the Users of the parking area in which the Car Parking Space is situate". There is no evidence that the Lessor has made any such Regulations.

The Headlease

22. The Applicant relies upon the following terms in the Headlease which are relevant as the Respondent Lessees covenanted to observe the covenants in the Head Lease:

(i) Clause 3.23: "to perform and observe the covenants on the part of the Tenant contained in the Car Park Lease"

23. The Applicant had relied on the following terms of the Headlease, but Mr Horne conceded that they had no relevance to the alleged breach of covenant:

(i) Clause 3.16: "Nothing shall be done in or upon the Demised Premises to cause inconvenience or nuisance to other occupiers of the Estate or to prejudice the character and value of the Estate as high-class residential apartments high class commercial offices and high class leisure facilities". Mr Horne accepted that the car park is not part of the demised premises.

(ii) Clause 3.16.10: "Not to obstruct or suffer the Access Area or any part thereof to be obstructed". The “access area” is coloured brown on Plan 2 annexed to the lease. This does not include the car parking area.

(iii) Clause 3.16.11: "Not to park or permit the parking of any vehicle in or on any part of the Access Area save as expressly herein permitted".

(iv) Clause 3.16.20: "in using the Demised Premises the Tenant shall not do or permit to be done whether by any act to the damage or annoyance of the Landlord or other occupiers of other parts of the Estate".

The Car Parking Lease

24. The Applicant relies upon the following terms in the Car Parking Lease which are relevant as the Respondent Lessees have covenanted to observe the covenants in the Car Parking Lease:

(i) By Clause 3.9, the Tenant covenants: "not at any time to obstruct or cause to be obstructed any part of the Estate or to part or to permit to be parked any motor vehicle in such position so as to prevent or impede the free movement or parking of other motor vehicles in the Car Park or the free movement of traffic through the Estate.

25. The Applicant had relied on the following terms of the Car Parking Lease, but the following clauses have no relevance to the alleged breach of covenant:

(i) By Clause 3.8.1, the Tenant covenants: "not to use or permit the use of the Demised Premises save for the purpose of parking spaces for

private motor cars owned or used by the Tenant or its subtenants of the Building from time to time and not in any other manner or for any other purpose nor for any purpose nor for any immoral or unlawful purpose or for the sale by auction and then only subject to the Regulations and to the covenants on the part of the Tenant contained in the Tenant's Lease". The “demised premises” are defined as the 15 car parking spaces edged red on Plan 3 annexed to the lease. The Respondent did not park his cars in this area.

By Clause 3.8.2, the Tenant covenants that: "Neither the Tenant nor any subtenant nor any person under the control of the Tenant or any subtenant shall pass or leave anything of a harmful nature through any conducting media in or serving the Demised Premises or do anything at the Demised Premises which shall cause any damage or disturbance to the Landlord or any owner tenant or occupier from time to time of the Estate".

The Background

26. The Estate, known as Marina Place, consists of five buildings adjacent to the River Thames. The Respondents’ flat is situated in a building known as 1-16 Marina Place. The Building consists of 15 flats. There is an underground car park on the Estate which initially had 84 car parking spaces. Each of the 15 flats have been allocated a car parking space which are now numbered 69 to 83 in the area edged red in the Car Parking Lease at p.149. The Respondents’ sub-lease grants them the right to use Car Parking Space 13, which is now numbered 69.

27. The background to this dispute is that the headlessor has sought to create 7 additional car parking spaces. Five of these are in an area at the bottom of the ramp by which tenants obtain access to the car park. Two of these spaces, numbered 85 and 86, are in the area close to the 15 parking bays reserved for the Building. They restrict access to their parking area. Mr Lackner challenges that headlessor right to do this. He has parked cars in this space as an act of protest. It is not for this Tribunal to make any finding on whether the headlessor was entitled to add these two spaces. Mr Lackner accepted that two wrongs would not make a right and that his lease granted him no right to park cars in these spaces.

28. The Applicant complains that the Respondents have parked unauthorised vehicles in Spaces 85 and 86 for more than five years. Although there were occasions when some cars were removed, these were immediately substituted by other vehicles. This information was drawn to the Applicant's attention by the freehold company, Marina Place Limited ("Marina") and their managing agents for the Building, HML Group Limited ("HML").

29. On 4 August 2022 (at p.175 and 176), Protopas served two "Abandoned Untaxed Vehicle" Notices on cars parked in Spaces 85 and 86. The

vehicles were a Red Land Rover registration 4111 JAC and a Red Vauxhall Arena van registration V142 FRB. The notices stated that the solicitor had been notified that the vehicles had no valid road tax or MOT. They invited the owners to contact them immediately or arrange for the vehicles to be removed. They stated that the vehicles would be removed within 28 days of the notice being issued. Mr Lackner accepts that these were his vehicles. He did not make contact with the solicitor or remove the cars. Neither did the solicitor arrange for the cars to be removed.

30. On 1 September 2022 (at p.181), Irwin Alvisse, a senior property manager with HML Group Limited, the managing agents for the Building, wrote to the Respondents requiring them to move the cars. On 15 September 2022 (p.181), Mr Lackner replied by email stating that the vehicles were not abandoned and that he would make sure that the vehicles are taxed and insured. He further stated that the vehicles had been parked in Spaces 85 and 86 on purpose because "you have drawn 5 spaces illegitimately on communal areas and allocated them to other directors. If all the spaces are completely removed and promised not to be reinstated and will remain as per plan we will have the cars removed. This is the dispute that has led them to be there".

31. On 16 September 2022, the Red Land Rover registration J111 JAC was removed and substituted with a Black Mercedes Van registration KV60 FMP. On 16 September 2022, the Black Mercedes Van registration KV60 FMP was removed and substituted with a Green Range Rover Overfinch registration 77 JXL. This vehicle did not have a valid MOT.

32. On 30 November 2022 (at p.164-173), the Applicant served a Section 146 Notice on the Respondents by first class, recorded delivery post and also by email. The Respondents did not respond to the Notice.

33. On 17 January 2013 (at p.2-17), the Applicant issued the current application. When the application was issued, the Red Vauxhall Arena Van registration V142 FRB remained unlawfully parked in Space 86. It did not have a valid road tax or MOT certificate. The second vehicle had been removed.

34. On 19 January, the Tribunal sent a copy of the application to the Respondents. On 22 February, the Tribunal sent a copy of the Directions to the Respondents.

35. On 2 March, the Respondents removed the remaining vehicle. On 6 March (at p.174), the Applicant wrote to the Respondents requiring them to give an undertaking that they would comply with the terms of the Lease, Headlease and Car Parking Lease. They were also required to pay legal costs of £5,235.25 + VAT. The Respondents have not given this undertaking. They did not agree to pay the costs which were demanded.

The Tribunal's Findings

36. Mr Matthews was the only person to give evidence. He has only visited the Estate on one occasion in February 2023. He had not seen any cars parked in the garage.

37. Although the Applicant alleges that the Respondents had parked cars in Spaces No. 85 and 86 for five years, there was no evidence to support this. There were no letters or photographs. Mr Horne stated that he had photographs which the Applicant had not included in the bundle. However, these were undated.

38. We are satisfied that the Respondents parked two cars in Spaces No.85 and 86 between 4 August 2022 and 2 March 2023. One of the cars had been removed by 17 January 2023. The Respondents had no right to park vehicles in these spaces. They were thereby in breach of Clauses 3.32.4, 3.37, 3.40 and 3.41 of their lease.

39. The Respondent should not have parked any vehicles in these spaces. We are satisfied that the two vehicles specified in two notices, dated 4 August 2022, were not taxed and had no MOT.

40. The fact that the headlessor had added 7 additional parking spaces is no justification for the Respondents' conduct. At the hearing, Mr Lackner accepted this. The Respondents have not parked any vehicles in these places since 2 March 2023. Mr Lackner is aware of the consequences should he park any cars in these spaces in the future.

Refund of Fees

41. At the end of the hearing, the Applicant made an application for a refund of the fees that it has paid in respect of the application hearing pursuant to Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules"). The Applicant has paid a total of £300. In the light of our findings, the Tribunal orders the Respondent to refund the tribunal fees of £300, which have been paid by the Applicant, within 28 days of the date of this decision.

Judge Robert Latham
12 June 2023

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).