FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LBC/2024/0017**
Property	**:**	**Flat 204, John Aird Court, Harrow Road, London, W2 1UX**
Applicant	**:**	**The Lord Mayor & Citizens of Westminster**
Representative	**:**	**Mr. Pye – Litigation Team Manager**
Respondent	**:**	**Zulmira Albuquerque**
Representative	**:**	**N/A and did not attend**
Type of application	**:**	**Determination of an alleged breach of covenant under s.168(4) Commonhold and Leasehold Reform Act 2002**
Tribunal members	**:**	**Judge Sarah McKeown** **Mrs. A. Flynn MA MRICS**
Date and Venue of hearing	**:**	**28 August 2024 at 10 Alfred Place, London, WC1E 7LR**
Date of decision	**:**	**29 August 2024**

DECISION

Decisions of the tribunal

(1) Breaches of the following covenants and/or conditions in the lease of the Property dated 29 January 1991 have occurred on the part of the Respondent:

(a) breach of clause 2 and paragraph 17 of the Seventh Schedule of the Lease as the Respondent has permitted or suffered to be done on the Property any act or thing which may be or become a nuisance or inconvenience to the Lessor or any other owner or occupier of any of the Flats or to the owner or occupier of any adjoining or neighbouring property";

(b) breach of clause 2 and paragraph 5 of the Seventh Schedule of the Lease as the Respondent did not, to the satisfaction of the Lessor, keep in good and substantial repair and condition and properly cleansed throughout the term granted…";

(c) breach of clause 2 and paragraph 7 of the Seventh Schedule of the Lease as the Respondent did not permit the Lessor with or without workmen and all other persons authorised by it at reasonable times and upon reasonable notice… during the term hereby granted to enter upon and view and examine the condition of the Property and prepare a schedule of all landlord's fixtures and fittings herein and for any other purposes";

(d) breach of clause 2 and para. 3 of the Sixth Schedule as the Respondent did not allow the Lessor its servants or agents at all reasonable times with or without workmen and others as often as need or occasion shall require to have access to and enter the Property and remain therein for such reasonable time as is necessary for the purpose of executing repairs or carrying out any other works to any part of the Estate or to any cisterns tanks sewers drains gutters pipes wires cable ducts and conduits or other things serving any part of the Estate which cannot otherwise be executed and of complying with their respective obligations either hereunder or under any covenants relating to another other Flat…".

(2) Any application by the Applicant for an order for costs against the Respondent pursuant to rule 13 of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 must be made to the Tribunal within 28 days of the date on which the Tribunal sends this decision. If any such application is made, the Tribunal will issue any necessary direction and it will be considered by this Tribunal, on the papers, unless either party requests a hearing or the Tribunal determines that a hearing is necessary.

The Application – p.4

1. The Applicant is the freeholder of Flat 204 John Aird Court, Harrow Road, W2 1UX ("the Property"). The Property is a two-bedroom flat in a purpose-built block.

2. The Applicant seeks a determination, under subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act"), that the Respondent tenant is in breach of various covenants contained in the lease.

3. The Applicant's application alleges breach of para. 5 and para. 7 of the Seventh Schedule (referred to as the Sixth Schedule, but having clauses sets out are those contained in the Seventh Schedule) and states as follows:

4. First, that there are hoarded items in the Property which pose a fire safety risk. It is said that the Lessee has stored a large amount of possessions in the Property, including flammable materials such as newspapers, papers etc, which would increase the intensity and rapid spread of a fire.

5. It is said that there are several boxes on the balcony and the Lessor is concerned that they could pose a fire safety risk.

6. It is said that there is an outstanding repair associated with the Flat and that the Lessee has failed to provide access on a number of occasions to allow the Lessor to connect a new lateral main into the Property. It is said that this work was part of major works in 2008 and no access has been given. It is said that the Lessor is unable to allow contractors to enter the Property to do the work because of health and safety reasons and that the work can only be completed once the items have been removed.

7. The Grounds of Application (p.14) allege that the Respondent is in breach of para. 5 (referred to as the Sixth Schedule but having regard to the Lease, it is the Seventh Schedule), para. 7 and para. 17 of the Seventh Schedule, as well as para. 3 of the Sixth Schedule (see below). It is said that the breaches are:

   (a) Hoarding large amounts of items in the Property (including on the balcony);
   (b) Not keeping the Property properly cleansed to the satisfaction of the Applicant;
   (c) Failing to provide access to the Applicant upon request;
   (d) Failing to provide access to the Applicant to undertake work (relating to a 2008 Major Works Project).

8. It states that the Applicant's officers visited the Property on 1 December 2015 and became aware of the hoarded items. It is said that the inspectors found evidence of bags piled up at the door, along the communal hallway and stairs.

The Applicant then wrote to the Respondent between December 2015 and March 2016, but the Respondent did not comply with the Applicant's requests. The Applicant obtained an injunction on 16 March 2016 (which ended on 1 February 2018) which prohibited the Respondent from depositing or storing any items on, in or around the communal area of the Building.

9. During an inspection on 27 April 2016 it was noted that the Respondent had placed more items in the communal areas. The Applicant made an application for contempt of court, and on 17 August 2016 the Respondent was found to be in contempt and was fined.

10. On 31 October 2015, the police were called to the Property (in respect of an unrelated incident) and the police raised concerns about the hoarding. There were concerns about the Respondent's mental state. A referral was made to Westminster Social Care. They attempted to visit the Property on 4 November, 12 December and 20 December 2016 but they could not gain access. An assessment was carried out on the last occasion, and the conclusion was that the Respondent did not have the capacity to manager her hoarding.

11. It is said that the Respondent failed to provide access to the Applicant's contractors to connect a lateral main.

12. In 2019 there was a visit to the Property and officers took pictures of the Property, which had piles of hoarded items. It is said that the poor condition of the Property meant that the Applicant could not instruct its contractors to undertake work in the Property. Requests were made for the Respondent to remove or dispose of items, but this was not done.

13. The Respondent informed the Applicant that she would be temporarily moving to Portugal. This was prior to the Covid restrictions. The Respondent gave no date for her return to the Property. The Respondent states that she currently resides in Portugal (at the address given).

14. On 17 October 2022, the Applicant's contractor issued the Respondent with a Danger Notice and disconnected the electricity supply to the Property on 17 November 2022.

15. A Letter Before Action was sent to the Property and the address in Portugal on 24 May 2023. The Respondent has failed to comply with the requests in that letter.

16. A Breach Letter was sent to the Respondent on 18 December 2023 (again, sent to the Property and to the address in Portugal). She was notified she was in breach of her Lease and asked to take action to remove the items from the balcony and provide access to the Applicant. There was no response. A further Breach Letter was sent (to both addresses) on 12 January 2024. On 1 February 2024, the Respondent did telephone the Applicant and said that she was in Portugal as her husband was received medical treatment there and that she could not return to the UK until mid-June 2024. She said she had no one who could provide access to the Property. She said that the condition of the Property.

17. On 5 February 2024, Miss. Frimpomaah of the Applicant, visited the Property. It is said that it was clear that it was not occupied.

18. It is said that the Applicant has never been known to Adult Social Care's services, that the assessment is out-dated and the Applicant does not know whether the Respondent suffers from a disability or protected characteristic, but even if she does, a determination of breach of lease would be a proportionate means of achieving a legitimate aim.

Directions – p.28

19. On 20 May 2024, the Tribunal gave directions for progression of the application. The order provided, among other things, that the Respondent had to email the Applicant by 8 July 2024, a statement in response setting out grounds for opposing the application, any witness statement, any legal submissions and any other documents relied upon.

Respondent's non-attendance and proceeding with the hearing

20. The Respondent did not attend the hearing and has not engaged with the application. On 27 August 2024 the Respondent telephoned the Tribunal (at 15:32) and stated that she could not attend the hearing as she is in Portugal. She was told to put this in writing and to email the Applicant and the Tribunal, and she said that she has problems with her phone and technology.

21. Rule 34 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 states that, if a party fails to attend a hearing, the Tribunal may proceed with the hearing if the Tribunal-

(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

(b) considers that it is in the interests of justice to proceed with the hearing.

22. The Tribunal is satisfied on the balance of probabilities that the Respondent is both aware of the proceedings and has been notified of the hearing. The Tribunal is satisfied that the Respondent has received a copy of the application (see p.237 on). The Tribunal wrote to the Respondent at the address in Portugal on 25 July 2024 (p.251) stating that she had not complied with directions (which had been sent to the Property and the Portuguese address) and that if she did not reply to the letter, the Tribunal may issue her with a notice to debar her from taking further part in the proceedings (and the potential for making an costs order). It wrote again on 25 July 2024 in similar terms (also to the Portuguese address).

23. It is clear from the telephone call received from the Respondent on 27 August 2024 that she was aware of the hearing. Despite this, she only contacted the Tribunal the day before the scheduled hearing.

24. Further, it is in the interests of justice to proceed with the hearing. The telephone call received from the Respondent, the day before the hearing, was the first and only engagement from her. She gave no indication that she would be returning to London (or, if she is, when this might be). The Tribunal has had regard to the health and safety issues raised by the Applicant in the application and the reasons it gives as to why it needs this application determined.

Inspection

25. The Tribunal attended at John Aird Court, Harrow Road for a planned inspection on the morning of 28 August 2024. As the Respondent had not given her consent for the Tribunal to enter the Property, and as the Tribunal was aware from the contents of the telephone call on 27 August 204 that the Respondent would not be at the Property, the Tribunal had no plans to enter the Property, but attended to consider the exterior of the Property, and to view it from the exterior. We proceeded to the fourth floor of the building to meet the officers from the Applicant. The Property was noted to be on the fourth floor of a 1950's block.

26. When we arrived, the front door of the Property had been removed, allowing some insight into the interior of the Property from the communal hallway. Even if the Tribunal had been minded to enter the Property, it would have been impossible to do. The doorway and beyond was entirely blocked by items. The items reached up to the ceiling for the most part, but there was a ladder placed on top of some of the items, which may have been used to gain access to the interior of the Property. There was a large amount of post at the threshold.

27. The Tribunal left the building and viewed the balcony from the outside. The balcony to the Property was filled with items, which appeared to mostly be old cardboard boxes (with unknown contents), which were leaning and appeared to be in danger of collapse. The items appeared to be held within the balcony by some netting/wiring. It looked exactly like the photograph at p. 214. From the other side of the exterior, it could be seen that various items were within the Property and stored up against the windows.

Documentation

28. The Applicant has provided a bundle of documents (references to which are "p.") which runs to 258 pages. References herein are to that bundle. This includes the witness statement of Ms. Frimpomaah (p.34).

29. She explains that an injunction was obtained in 2003 as against the Respondent relating to the storage of items outside the Property and in the communal areas of the Estate. In 2015, the Applicant received a complaint from a resident about items stored in the communal areas, and the Applicant wrote, on a number of occasions to the Applicant and visited the Property.

30. She states that on 1 December 2015, a representative from the London Fire Brigade visited the building and found bags piled up outside the Property and items stored leading to the communal hall and stairs. No access to the Property was granted. The Applicant then told the Respondent to remove the items, but this was not done. The Respondent itself removed the items and stored them (until eventual disposal).

31. A further injunction was granted by the County Court on 16 March 2016. On a visit on 27 April 2016, the Applicant discovered that the Respondent had not complied with the injunction and she was continuing to store items in the communal areas of the Building. The Applicant tried, on a number of occasions, to encourage the Respondent to remove the items inside the Property and in the communal areas.

32. On 20 June 2016, a hoarding risk assessment was carried out and the Respondent was scored very highly on all questions (high scores are not a good thing, the lower the scores, the better).

33. An application for contempt of court was made and on 16 August 2015, the Respondent was found to be in contempt of court.

34. On 31 October 2016, the police were called to the Property (for an unrelated incident) and they raised concerns about the hoarding at the Property and advised the Respondent to undertake a welfare check. The Applicant agreed to make a referral to Adult Social Care. Several attempts to gain access to the Property were not successful until 16 November 2016 and

the report concluded that the Respondent could not make decisions relating to her hoarding.

35. A further application for committal was made in November 2017.

36. She also states that in 2008, the Applicant had tried to gain access to the Property to connect the new lateral mains (as part of a Major Work Project). There is no documentation on the Applicant's Management System to show the actions taken to try and gain access and most of the employees who managed the protect no longer work at the council. She does exhibit a photograph of the wires outside the Property which are still not connected to the Property.

37. In 2019, the Applicant did gain access and took photographs of the condition of the Property. After that visit, it was determined that the Applicant could not allow its contractors to undertake work at the Property. The Respondent was informed that she had to remove the items to allow contractors to safely attend the Property to connect the lateral mains, but she did not do so.

38. On 17 October 2022, the Respondent was issued with a Danger Notice and the Applicant's contractor disconnected the electric supply on 17 November 2022.

39. Ms. Frimpomaah states that, during a visit to the Estate in May 2023, the Applicant's officers noted a significant number of hoarded items on the balcony of the Property and photographs were taken. Ms. Frimpomaah states that, at the date of the witness statement, the balcony remains in the same state,

40. She details that the Applicant moved to Portugal before the Pandemic restrictions and that the Respondent has not made contact since 2019.

41. On 24 May 2023, a Letter Before Action was sent to the the Property and the address in Portugal. The letter stated, among other things, that the Respondent was in breach of Sixth Schedule of her Lease. There was no response.

42. On 21 December 2023, Ms. Frimpomaah sent a Breach Letter to the Respondent, notifying her she was in breach of para. 5 and 7 of the Seventh Schedule of the Lease and requiring immediate action. The letter was sent to the Property and the address in Portugal. There was no response.

43. A second Breach Letter was sent on 18 January 2024 (again, to both addresses). The Respondent telephoned Ms. Frimpomaah on 1 February 204. She said that she had been residing in Portugal and would not be returning to the UK until mid-June 2024. She said she had no one who could provide

access to the Property. She said that the state of the Property did not pose any health and safety risks to the Building or to residents.

44. On 5 February 2024, Ms. Frimpomaah visited the Property, looked through the letterbox and used her phone to film the front area of the property, She was only able to see a large number of letters on the floor inside the Property.

45. Among other things, she states that there is an upcoming major work project, to be commenced by the Applicant towards the end of Autumn 2024, involving replacement of all windows at John Aird Court. Even if access were to be provided, the contractors may not be able to undertake works for reasons of health and safety. The Respondent would be required to remove the hoarded items before they could attend.

46. She states that the Respondent does not have an email address, so a copy of the application was sent to her to the Property and to the address in Portugal on 28 March 2024.

47. She exhibits:

(a) BF1 - Office Copy Entry showing the Applicant has the freehold title – p.48;
(b) BF2 - The Respondent's Lease – p.63;
(c) BF3 - Office Copy Entry showing the Respondent as leaseholder – p.80;
(d) BF4 - Injunction order dated 24 June 2023 – p.83;
(e) BF5 – To and from the fire service in December 2015 – p.87;
(f) BF6 – application for injunction and injunction order dated. – p.90;
(g) BF7 - Self-neglect and hoarding assessment dated – p.160;
(h) BF8 - Committal application – p.167;
(i) BF9 - Order re contempt application dated 16 August 2016 – p.203;
(j) BF10 - Picture of the wires outside the Property which was not connected – p.205;
(k) BF11 - Pictures showing the condition of the Property in 2019 – p.207;
(l) BF12 - Electrical Danger Notification dated 17 October 2022 – p.211;
(m) BF13 - Picture of the balcony taken in May 2023 – p.214;
(n) BF14 - Letter Before Action dated 24 May 2023 – p.216;
(o) BF15 - Breach Letter dated 21 December 2023 – p.223;

(p) BF16 - Breach Letter dated 18 January 2024 – p.230;
(q) BF17 - Video clip taken on 5 February 2024;
(r) BF18 - Proof of postage and confirmation of receipt of the application – p.237.

The Hearing

48. After the inspection, the Tribunal returned to Alfred Place. The Applicant subsequently attended, and the hearing proceeded.

49. The first issue the Tribunal raised was the Respondent's absence and whether the hearing should proceed. The Applicant asked to proceed as it said that there needed to be a resolution of the application. Mr. Pye relied on the numerous attempts made to contact the Respondent, the phone call she had made the day before, and the letters sent to her. He said that the matter had been going on for several years and there had been no meaningful engagement from the Respondent.

50. The Tribunal decided that it would proceed with the hearing and gave brief reasons. Full reasons are set out in this decision.

51. The Applicant relied primarily on para. 17, Seventh Schedule. The Applicant relied on the length of time the issues had been ongoing. It was said that the initial issues (pre-2015) concerned the communal areas, which had been resolved, but the issues concerning the Property itself had been live since about 2015-16. It was said that breach of this covenant was demonstrated by the following:

52. The emails at p.87 demonstrated that health and safety issues was the main concern. In 2015 the Property was already in quite a serious state. The Applicant then felt that the only way to proceed was to apply for an injunction, and she was given notice of that hearing on 11 March 2016 (p.91). The Respondent relied on the photographs starting at p.104 (taken in December 2015), p.106, p.108-9 which it was said showed the inside of the Property. Also, it relied on the photographs from 2019 (p.207) and it was said that this showed items in the communal areas, and that what could be seen behind the front door was not dissimilar to what had been seen today at the inspection. The Respondent also relied on the injunction granted in 2016, which was not complied with, and the contempt order. It was confirmed that there was the second application for contempt (in November 2017) but this was not proceeded with. At that time, it was thought that the Respondent may engage with Adult Social Care. In addition, it relied on the issues with the balcony detailed at paragraphs 32 of the witness statement of Ms. Frimpomaah and the photograph at p.213. The Respondent also relied on the letter sent to the Respondent on 24 May 2023 (p.216) which was said to have

been sent as a result of the community visit and health and safety fire risk. It was said that the condition of the Property was a nuisance, breach of covenant and causing a risk. The Respondent relied on what had been seen today at the inspection.

53. The Applicant also relied on para. 5, Seventh Schedule. In relation to this, the Applicant relied on the same matters already raised.

54. In addition, the Applicant relied on para. 7 of the Seventh Schedule. The Tribunal was referred to the letters at p.216 on in the bundle. There was some discussion with the Tribunal about the interpretation of the paragraph and the right of access that it actually conferred. It was admitted that there was nothing in the bundle demonstrating that the Applicant had requested access from the Respondent at a particular time on a particular date, but it was said that there had been a number of requests for access asking the Respondent to contact the Applicant (including at p.211), which she had failed to do, and that this constituted a failure to grant access.

55. The Applicant played the video clip referred to at BF17 in Ms. Frimpomaah's witness statement.

56. The Tribunal raised the issue of the Equality Act 2010 (as referred to in Ms. Frimpomaah's witness statement). The Tribunal queried how far it had to consider this as it was only making a determination as to whether there had been a breach of the terms of the Lease. The Applicant stated that it had made reference to it to demonstrate that it was aware of its obligations under the Act and had had regard to them.

The Lease – p.63

57. The Lease is dated 29 January 1991 and is between the Applicant and the Respondent. It grants a term from 24 May 1983 for one hundred and twenty-five years. It includes the following definitions:

"the Estate": the Estate described in the First Schedule.

"the Property": the property described in the Second Schedule.

"the Demised Premises": the premises described in the Third Schedule.

58. By clause 2 the Respondent covenants with the Applicant to observe and perform the covenants contained in the Seventh Schedule.

59. Clause 7 of the Lease provides as follows:

"… if and whenever the Lessee shall not observe and perform all and every the covenant conditions restrictions regulations obligations and agreements on the part of the Lessee herein contained then in any such case it shall be lawful for the Lessor or any persons authorised by the Lessor in that behalf to re-enter the Demised Premises or any part thereof in the name of the whole and repossess and again enjoy the Demised Premises as in their first former state…".

60. The demise set out in clause 1 of the Lease is expressed to be subject to the matters set out in the Sixth Schedule. Para. 3 of the Sixth Schedule states as follows:

"The right for the Lessor its servants or agents and the Owners or occupiers or any other Flats their servants or agents at all reasonable times with or without workmen and others as often as need or occasion shall require to have access to and enter the Demised Premises and remain therein for such reasonable time as is necessary for the purpose of executing repairs or carrying out any other works to any part of the Estate or to any cisterns tanks sewers drains gutters pipes wires cable ducts and conduits or other things serving any part of the Estate which cannot otherwise be executed and of complying with their respective obligations either hereunder or under any covenants relating to another other Flat…".

61. Para. 5 of the Seventh Schedule of the Lease states:

"To the satisfaction of the Lessor to keep in good and substantial repair and condition and properly cleansed throughout the term hereby granted the Demised Premises…".

62. Para. 7 of the Seventh Schedule provides:

"To permit the Lessor with or without workmen and all other persons authorised by it at reasonable times and upon reasonable notice… during the term hereby granted to enter upon and view and examine the condition of the Demised Premises and prepare a schedule of all landlord's fixtures and fittings herein and for any other purposes and all defects and wants of repairs on any such view found the Lessor may thereupon serve the Lessee with notice in writing specifying any repair necessary to be done and for which the Lessee is liable under the covenants".

63. Para. 17 of the Seventh Schedule provides that the Respondent covenanted:

"Not to permit or suffer to be done on the Demised Premises any act or thing which may be or become a nuisance or inconvenience to the Lessor or any other owner or occupier of any of the Flats or to the owner or occupier of any adjoining or neighbouring property".

The Law

64. Section 168 of the Commonhold and Leasehold Reform Act 2002 states, among other things:

(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 a leasehold valuation tribunal 3 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.

65. The Applicants are seeking a "final" determination from the Tribunal that a breach of the Lease has occurred.

66. In *Marchitelli v 15 Westgate Terrace* [2021] 1 P&CR 9, it was held, among other things, that in a covenant not to "permit" a certain use, the word "permit" means either to give leave for something which without that leave could not legally be done, or to abstain from taking reasonable steps to prevent the act which it is within a person's power to prevent, and the word "suffer" has been treated as synonymous. It was also held that a determination must be sufficiently specific to provide the basis of a s.146 notice and the terms of such a notice must be sufficiently clear that no lessee could have any reasonable doubt as to the particular breaches which are specified. Unless the Tribunal makes specific findings of fact concerning the breach and the tenant's part in it on a claim under s.168(4), the court will face an impossible task when it is required to determine whether to forfeit the lease or to grant relief against forfeiture. It is essential that the court is in a position, from the Tribunal's decision, to assess the seriousness of the breach,

the culpability of the appellant, and the appropriate response to an application for relief against forfeiture.

67. It was noted in that case that Woodfall's Law of Landlord and Tenant, para. 11.199, provided that the word "permit" means either to give lease for something which without that leave could not legally be done, or to abstain from taking reasonable steps to prevent the act which it is within a person's power to prevent. That statement of principle was taken from the judgment of Atkin LJ in *Berton Alliance Economic Investment Co* [1922] 1 KB 742 at 759.

68. *Berton* concerned the use of premises by individuals let into occupation by the sub-tenant of the covenantor. Atkin LJ explained what had to be shown to establish a breach by the covenantor:

"It is clear that a person under a covenant not to use premises in a particular way cannot commit a breach of the covenant except by his own act or that of his agent. The same is true of a covenant not to permit. The use in one case and the permission in the other must be something which can be predicated on the defendant or the defendant's agent. It is not sufficient to show that the premises have been used in a way which would constitute a breach of the covenant; it must further be shown that the user is by the defendant or his agent, or that it is permitted by the defendant or his agent".

69. Bankes LJ said:

"Whether that is a breach of the covenants is the same question as whether the appellants have omitted to take some step which it was reasonable for them to take in view of the facts and circumstances".

70. In *Marchitelli* Martin Rodger QC said that in determining whether a tenant has omitted to take steps which it was reasonable to take, all of the facts and circumstances must be taken into account. The question is whether a reasonable person in the position of the tenant would have taken steps to prevent the prohibited use which the tenant failed to take.

Decision of the Tribunal and Reasons

71. The Applicant must satisfy the Tribunal on the balance of probabilities that the Respondent is in breach of one of the covenants or conditions of the Lease as set out above.

Has the Respondent permitted or suffered to be done in the Property any act or thing which may be or become a nuisance or inconvenience to the Lessor or any other owner or occupier of any of the Flats or any adjoining or neighbouring property – para. 17, Seventh Schedule

72. This was not a covenant relied on in the application notice itself (p.4), but it is relied on in the "Applicant's Grounds of Application" (p.14).

73. The first issue is whether there has been an act or thing done in the Property which may be or which has become a nuisance or inconvenience to the Applicant or any other owner or occupier of the Flats or any adjoining or neighbouring property?

74. As the covenant specifies "in the Property", the Tribunal has not had regard to the allegations of items being stored in the communal areas, but has considered the allegations made concerning the condition of the Property itself. The Tribunal is satisfied that there has been an act/thing done in the Property which may be or which has become a nuisance or inconvenience to the Applicant or any other owner or occupier of the Flats or any adjoining or neighbouring property having regard to the items stored in the Property and the condition of the Property, in particular the following:

(a) the photograph at p.207 which shows a large number of items piled up behind the front door of the Property;

(b) the photograph at p.214 showing the items stored on the balcony, taken in May 2023;

(c) the letter of 24 May 2023 (p.216, p.219) stating that the Applicant needed to clear the balcony as the amount of stored goods were a fire risk to the building and to other residents;

(d) the letter of 21 December 2023 (p.223, p.226) stating that the amount of items stored in the Property was a fire risk (to the building and residents);

(e) The Applicant wrote to the Respondent on 18 January 2024 (p.230, p.233) in similar terms to the letter of 21 December 2023;

(f) The condition of the Property as observed by the Tribunal at the inspection, which appeared to be very similar to the photographs at p.207 and p.214.

75. The Tribunal then has to ask whether the Respondent has permitted or suffered such matters? The Tribunal is satisfied (and does find) that the Respondent has done so, and that she has therefore been in breach of clause 2 and paragraph 17 of the Seventh Schedule of the Lease. There is no suggestion

that anyone but the Respondent is responsible for the matters set out herein, and the Tribunal finds that they were the Respondent's own act.

Has the Respondent kept the Property in good and substantial repair and condition and properly cleansed – para. 5, Seventh Schedule

76. For the reasons set out above (in relation to para. 17 of the Seventh Schedule), the Tribunal finds that the Respondent has not kept the Property in good condition, has not kept it properly cleansed, and has not done so to the satisfaction of the Applicant. The Tribunal finds, therefore, that there has been in breach of paragraph 5 of the Seventh Schedule to the Lease.

Has the Respondent permitted the Applicant at reasonable time and upon reasonable notice to enter and view and examine the condition of the Property … or for any other purpose - para. 7, Seventh Schedule

77. There was some discussion between the Applicant and the Tribunal as to the interpretation of this paragraph. The Tribunal finds that the Applicant was required to give access (at a reasonable time and upon reasonable notice) if the Applicant wished to view and examine the condition of the Premises. In any event, the requirement to give access is also "for any other purposes" and so the Respondent had been obliged to give access to the Applicant when it was requested. Requests for access were made as follows:

(a) The Applicant wrote to the Respondent on 20 October 2022 (p.211) stating that it urgently needed access and asking her to arrange to provide access as soon as possible. An email address and telephone number were given, but the Respondent did not contact the Applicant to arrange access;

(b) The Applicant wrote to the Respondent on 24 May 2023 (p.216, p.219) stating that access to the Property was needed to be undertaken clearance works to the balcony. She was asked to contact an officer of the Applicant urgently, but she did not;

(c) The Applicant wrote to the Respondent on 21 December 2023 (p.223, p.226) stating that there was an outstanding repair in the Property (connection of the lateral mains) and access was required immediately. It was also stated that access was required to undertaken clearance works as the amount of items stored in the Property was a fire risk (to the building and residents);

(d) The Applicant wrote to the Respondent on 18 January 2024 (p.230, p.233) in similar terms to the letter of 21 December 2023.

78. The Applicant had not given dates or times to the Respondent but had required her to make contact to arrange access. It was explained during the course of the hearing by the Applicant that this was due to the arrangements with the Applicant's contractors and, of course, it allowed the Respondent to suggest a convenient time for her. No contact was made to arrange access in response to any of the requests identified. The Tribunal finds that this is a breach of paragraph 7 of the Seventh Schedule of the Lease.

Has access been given to the Applicant (its servants or agents) at all reasonable times, as often as need or occasion shall require to have access to and enter the property for the purpose of executing repairs or carrying out any other works to any part of the Estate or to any cisterns tanks sewers drains gutters pipes wires cable ducts and conduits or other things serving any part of the Estate which cannot otherwise be executed and of complying with their respective obligations either hereunder or under any covenants relating to another other Flat – para. 3, Sixth Schedule

79. This is not a covenant on the part of the Respondent, but is an exception or exemption to the demise set out in clause 1 of the Lease. The Tribunal raised this issue with the Applicant and it was agreed that the Lease was not worded as well as it could have been.

80. Having considered the issue, the Tribunal takes the view that the Respondent did agree to be bound by the terms of the Lease, and agreed that the demise of the Property to her was subject to this exception/exemption. The Tribunal finds that it is a condition of the Lease, and that the Respondent has breached such condition, by reason of the requests for access in the letters of 21 December 2023 and 18 January 2024 referred to above.

Costs

81. The Applicant stated that it wished to apply for reimbursement of all of its costs. The Tribunal determined that such an application would have to be on notice and, even though the Respondent had not attended the hearing, she ought to have the opportunity to response to such an application (as required by rule 13(6). Rule 13(5) requires a party to make such an application within 28 days of the date on which the Tribunal sends this decision notice (and the Tribunal reiterates that any such application must be made within that period). If such an application is made, it will be considered by this Tribunal,

on the papers, unless either party requests a hearing or the Tribunal determines that a hearing is necessary.

Judge Sarah McKeown

29 August 2024

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