FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BE/LBC/2024/0002**
HMCTS code (paper, video, audio)	**:**	**Video hearing**
Property	**:**	**Apartment 2, Clink Wharf, Clink Street, London Se1 9dg**
Applicant	**:**	**1) Mr. John Ross** **(2) Mr. Martyn John Hopper** **(3) Mr. Tom Burke** **(4) Mr. William Adrian Loader**
Representative	**:**	**Dale and Dale Solicitors (Mr Martin Comport)**
Respondent	**:**	**(1) Neil Terence Morgan** **(2) Fiona Susan Morgan**
Representative	**:**	**N/A**
Type of application	**:**	**Application for an order that a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002**
Tribunal	**:**	**Judge H. Carr** **Ms F Macleod**
Date of hearing	**:**	**8th August 2024**

DECISION

Description of hearing

This has been a video hearing. The documents that the Tribunal were referred to were a bundle of documents from the Applicants comprising 83 pages and witness statements. The Respondents have provided witness statements from themselves dated June 4th 2024 and updated witness statements from themselves dated 5th August 2024. The email correspondence they have sent to the tribunal has also been considered.

The order made is described below.

Decisions of the Tribunal

(1) The Tribunal determines that there has been a breach of clause 4.3 of the lease pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002.

(2) The reasons for the decision are set out below.

The background to the application

1. The Applicant seeks an order that a breach of covenant or a condition in the lease has occurred pursuant to Section 168(4) of the Commonhold and Leasehold Reform Act 2002. The application concerns alleged breaches at **Apartment 2, Clink Wharf, Clink Street, London SE1 9DG** ("the property").

2. The application was made on 23rd November 2023 but not issued until January 2024. On 21st March 2024, prior to the issue of directions, the Respondent applied for an order that the application be struck out. The grounds for the application were that the proceedings for determination of a breach were 'harassing, vexatious, groundless and meritless. It is personally motivated and forms part of an ongoing harassment campaign'.

3. The tribunal issued directions relating to the strike out application on 25th March 2024. It issued directions relating to the substantive application on 9th April 2024. In those directions it was stated that 'The Respondent's application relies on factual assertions that cannot properly be determined on a strike out application on the current state of the papers. It is therefore appropriate to make directions for the substantive determination of the application'. The directions made no reference to the earlier set of directions, and the tribunal assumes that the judge drafting those directions was unaware that previous directions had been issued.

4. The parallel sets of directions were referred to in correspondence between the tribunal and the Respondents, with advice from the clerk

sent by email dated 23rd May 2024 to the effect that both sets of directions should be followed

5. The Respondents wanted there to be a separate strike-out hearing, but the tribunal took no action on that request. If it had been considered it is likely that the tribunal would have determined that the strike out be heard either as a preliminary issue at or as part of the substantive hearing of the issue, as this would have been the most efficient means of responding to the strike out application.

6. The matter was listed for a face-to-face hearing on 8th August 2024. The Respondents asked for an adjournment which was refused by Deputy Regional Judge N Carr. She gave extensive reasons for her decision. The matter was converted to a video hearing following submissions from the Respondents that they were able to participate by video.

The hearing and preliminary matters

7. Mr Comport attended the hearing representing the Applicants. Mr Natt, the surveyor who was instructed to inspect the subject property, also attended and gave evidence. Mr Unsdorfer, the representative of the managing agent who had provided a witness statement was unable to attend. Mr Comport accepted that the tribunal would give that witness statement appropriate weight given the witnesses non-attendance.

8. The Respondents did not attend. Mr Morgan applied for an adjournment at 19.17 on 7th August 2024.

9. The basis for the adjournment was that the Respondents' daughter had become unwell earlier that day, his wife urgently returned to London earlier and he himself would be returning to London imminently for the same reason.

10. The Respondent noted in his application that Mr Unsdorfer was also unable to attend the hearing. In the opinion of the Respondent the non-attendance of Mr Unsdorfer made the hearing 'entirely pointless and abortive anyway'. The Respondent says that the application from the very outset was demanded without proper basis and that the Respondents have been selectively targeted totally in bad faith in breach of the lease and in breach of the implied requirement for good faith.

11. The application for the adjournment included an application for discovery. The Respondent argued that the hearing would be ineffective because there needed to be disclosure before any hearing takes place of the original electronic version of an email dated 13th March 2024 sent by Future Time Pictures Limited with attachments

and metadata intact and (b) the disclosure of all other documents of whatsoever nature with Future Time Pictures Limited and its employees and officers.

12. Mr Comport, for the Applicants, indicated that he was in the hands of the tribunal with regard to the adjournment. In connection with the application for discovery he pointed out that the email in question postdated the application. He said that the suggestion that it would reveal information about the sender of the email was misconceived. There is no evidence, other than the assertions of the Respondents, that there is a conspiracy between Future Time Pictures Limited and the Applicants.

The decision of the tribunal

13. The tribunal determined to refuse the application for the adjournment and the application for discovery.

The reasons for the determination of the tribunal

14. The application for the adjournment was not supported by evidence, or indeed any detail relating to the condition and circumstances of the Respondents' daughter. There was no information as to when the parties would be available for a hearing.

15. Despite the Respondents asserting that their case is about good faith, the matter before the tribunal is a simple and factual question of breach and the applicant is entitled to a timely determination.

16. There is sufficient information about the Respondents' position on the breach available to the tribunal to enable it to decide the issue of breach of covenant.

17. The Respondents have had it made clear to them that the tribunal cannot manage the case via correspondence by email. No Order 1 form has been completed in connection with the request for an adjournment nor for the discovery application. The application for discovery is also made very late in the proceedings.

18. The application for discovery is refused. The tribunal did not consider that there was sufficient or indeed any evidence to support the allegations that there was a cover up as to the identity of the sender. The tribunal also considers that an email sent after the application was submitted to the tribunal was of very limited relevance to the breach complained of.

19. In addition to the adjournment and discovery applications there are three further preliminary matters to be considered by the tribunal set out below.

Is the refusal of access to the property in effect an admission?

20. Mr Comport argued that there was in effect an admission by the Respondents as there is evidence from Mr Morgan that he instructed his tenants to refuse access to the surveyor. In those circumstances he argued that the tribunal's jurisdiction was ousted. There was in effect nothing for it to determine.

The decision of the tribunal

21. The tribunal determines that it has jurisdiction to determine whether there has been a breach.

The reasons for the decision of the tribunal

22. Mr Comport conceded that he was reluctant to rely on a technical point in the absence of the Respondents who are litigants in person and the tribunal agreed.

23. It also notes that this argument was raised very late in proceedings and it would be unjust for the Respondents case not to be considered by the tribunal on this basis.

Does the application for a strike out succeed?

24. The Respondents applied for the application to be struck out on the grounds set out in paragraph 2 of this decision.

25. Mr Comport argued that the application for a strike out was misconceived. The Respondents' argument was that the decision to require access to the property constituted harassment and a vindictive campaign against them. They also argue that the application is groundless. As the Respondents admit that they instructed their tenants to refuse the surveyor admission to the property the application cannot be groundless.

26. Mr Comport also argued that it was open to the tribunal to consider the arguments of the Respondents about the inappropriateness of the request to have access to the property as part of the substantive application and that therefore the Respondents would lose nothing if the tribunal refused the strike out application.

The decision of the tribunal

27. The tribunal determined that the strike out application would not be heard as a preliminary matter.

The reasons for the decision of the tribunal

28. The tribunal agrees with Mr Comport that the application was misconceived. The Respondents' application asserted that there was no basis for the substantive application but that the application was motivated by personal hostility toward the Respondents. This does not undermine the substantive application before the tribunal which is solely concerned with whether there has been a breach of covenant.

29. The tribunal will consider the arguments of the Respondents as part of its determination of the substantive issue which is where it considers the points may be of relevance.

Should the Respondents be allowed to submit their second witness statement dated 5th August 2024?

30. The Respondents asked the tribunal to admit witness statements

31. Mr Comport argued that there were several reasons why the tribunal should not allow the witness statements to be admitted.

    (i) The witness statements were submitted very late – they were received by the Applicants at lunchtime on 6th August 2024

    (ii) They contain wholly irrelevant material which do not advance the tribunal's understanding of the application

    (iii) The witness statements contain personal attacks on people who are not able to rebut those statements as they have no opportunity to respond

32. On the other hand Mr Comport argued that there were reasons to admit the statements. In particular the content of the statements is such that they would have no impact upon the determination of the substantive issue, and it would be fair to allow the tribunal to have full access to the position of the Respondents.

The decision of the tribunal

33. The tribunal determines to allow the Respondents to submit their witness statements

The reasons for the decision of the tribunal

34. The tribunal notes the comments of Mr Comport about the extreme lateness of the witness statements and the personal hostility contained in the witness statements towards people who are not able to respond.

35. It also notes that the witness statements also contain submissions and authorities and therefore in the particular circumstances of this case the tribunal will allow the witness statements to be submitted so that the tribunal has full knowledge of the Respondents' arguments.

The substantive matter

The law

36. Section 168 of the Commonhold and Leasehold Reform Act 2002 provides as follows with sub-section (4) shown in bold:

> *(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 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.*

37. The Applicants are the registered proprietor of the freehold of Clink Wharf. The freehold title includes the subject property. The Applicants hold the property on trust for the benefit of all the leaseholders in the property. This includes the Respondents.

38. The Respondents are the registered proprietor of the leasehold property at Apartment 2 Clink Wharf, Clink Street London. The Respondents acquired the property on 27th August 2013.

The issue

39. The only substantive issue for the Tribunal to decide is whether a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002.

40. The allegation of breach relates to Clause 4.3 of the lease which provide that the lessee is obliged -:

4.3 Permit the Lessor and the Lessor's surveyors or agents with or without workmen and others properly authorised at all reasonable times and after giving at least 48 hours notice in writing (except in case of emergency) to enter into and upon the Demised Premises or any part thereof to view and examine the state and condition thereof and the Lessee shall make good all defects decays and wants of repair then found of which notice shall be given in writing by the Lessor to the lessee and for which the Lessee may be liable hereunder within two months after the giving of such notice (or sooner if requisite)

Allegations of Breaches

41. On 26th October 2023 the managing agents of the property, Parkgate Aspen, and following water leak and damage to apartment 7, the flat beneath the subject property, gave notice to the Respondents that they required access to Flat 2 Clink wharf by the landlord's surveyor, Mr Natt, for the purpose of determining the source of the water leak and the state of repair of the flat.

42. The notice required the access to be on Friday 3rd November 2023 at 9.00 am.

43. The notice made clear that failure to comply would constitute a breach of the lease and made reference to forfeiture proceedings pursuant to s.146 of the POA 1925. It was also made clear that the inspection would take no longer than 30 minutes.

44. The Applicant has provided statements from Mr Natt and Mr Unsdorfer

The Respondent's position

45. In essence the Respondents' case is that the application has been made in bad faith for personal, spiteful, vindictive and targeted purposes

46. The Respondents challenge the evidence provided by the Applicants. They suggest that from the very first contact the Applicants were planning to take forfeiture proceedings over a staged photograph of a small amount of water on a stone floor next to a radiator.

47. They refer to a prior dispute between themselves and Mr Oliver, owner of apartment 4 which is located directly above the Respondents' apartment. The dispute concerns water leaks which the Respondents say caused extensive damage to their property. They argue that the Applicants took no interest in resolving the dispute despite the serious and significant leaks, the number of people affected and the value of the repairs.

48. They point out that the owner of Apartment 7 who was the origin of the complaint that the surveyor was attending to investigate refused to let Mr Natt into his property.

49. In their submissions of 5th August 2024 they make a number of points

    (i) The application is breach of 5.1 of the lease, ie a breach of the covenant of quiet enjoyment

    (ii) There has been a breach of the Braganza duty as the exercise of the discretionary powers under the contract have not been exercised in good faith but in an arbitrary, capricious or irrational way.

    (iii) The grounds on which the Applicants' sought entry is concocted and spurious.

    (iv) The Respondents have been targeted as no action has been taken against other leaseholders who are in breach of their lease.

The Applicants response to the Respondents' position.

50. The Applicants say that the Respondents' arguments are irrelevant to the matter in hand which is a determination of the breach.

The Tribunal's decision

51. The Tribunal determines that the Respondent has breached clause 4.3 of the lease to the property

Reasons for the Tribunal's decision

52. The Applicants are correct in arguing that the issue before the tribunal is a very straightforward one. The Applicants made a request for access and the Respondents refused access. That is a clear breach of the covenant set out in clause 4.3 of the lease.

53. The Respondents have a history of disputes with the Applicants and other property owners in the block and it does appear that the history has led to feelings of antipathy and mistrust. However that history and indeed those feelings are irrelevant to the factual question of breach which the tribunal is required to determine. There is no question that there was a breach of the clause. The Respondents themselves state that they instructed their tenants to refuse access. They may have had what they believed to be good reasons to do so, but those reasons are not the concern of the tribunal.

54. The Respondents raise the issue that a threat of forfeiture was made right from the moment of initial contact. Mr Comport told the tribunal that that threat is one that is required by law in order to protect the Applicants' costs position. The tribunal would confirm that position. The Applicants would only be entitled to costs under the lease for work done in anticipation of forfeiture and that is a valid explanation for the mention of forfeiture right at the commencement of the dispute.

55. In relation to the specific arguments raised by the Applicants

(i) Allegations of breaches of the lease by the Applicants are not a matter for this tribunal but for the county court

(ii) The tribunal does not consider that a generally implied duty of good faith is relevant to a straightforward case of breach of the term of a lease. It is difficult to see how there has been a breach of the duty in the context of an investigation of water ingress carried out by the Applicants as representatives of all of the leaseholders in the property.

(iii) There is no evidence that the grounds for requiring entry were concocted or spurious, and anyway the clause in the lease does not require the request to be reasonable.

(iv) The Applicants are not required to demonstrate that they have treated all leaseholders in the same way in taking proceedings under s.168 of the Act. They simply have to show that there has been a breach of the clause of the lease.

56. The proper venue for the determination of costs relating to this application is the County Court.

Name: Judge H Carr **Date:** 19th 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 Chamber).