FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BD/LBC/2024/0047**
Property	**:**	**38B Park Road, Hampton Wick, Surrey, KT1 4AS**
Applicants	**:**	**Mark Buckley and Carol Dukes**
Representative	**:**	**David Giles (Counsel) instructed by Rose & Rose Solicitors LLP**
Respondent	**:**	**Mark Nicholson**
Representative	**:**	**No appearance**
Type of application	**:**	**Breach of Covenant**
Tribunal Members	**:**	**Judge Robert Latham Andrew Morrison BSc MSc MRICS C.Build E MCABE AIFireE**
Date and Venue	**:**	**8 January 2025 at 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**6 February 2025**

DECISION

Decisions of the Tribunal

(1) The Tribunal declines to make any determination that any breach of covenant for the purposes of section 168(4) of the Commonhold and Leasehold Reform Act 2002 for the reasons specified in this decision.

(2) The Tribunal makes no order for the refund of the tribunal fees which have been paid by the Applicants.

Introduction

1. The Applicant landlords have applied for a determination that the Respondent tenant has breached covenants in his lease. The case has been prepared on the basis that the Respondent occupies his flat pursuant to a lease dated 28 March 2013. However, during the course of the hearing, it became apparent that this lease does not reflect the substance and reality of the agreement whereby the Respondent occupies his flat. He pays a weekly rent, rather than a service charge. The Applicants have not provided the necessary documentation to enable the Tribunal to determine the true nature of his occupation. In the absence of this, the Tribunal is not willing to make any finding of breach of covenant.

2. The Tribunal might have considered adjourning the case to permit the Applicants to provide this evidence. However, there is a further difficulty to the Applicants' case. The main allegation is one that the Respondent has refused access. There is no evidence that he has done so. The Applicants have asked the Respondent on a number of occasions to contact them and arrange for a convenient time for them to inspect his flat. He has failed to respond. The Applicants have failed to notify the Applicant that they require access at a particular time and date. Neither have they been refused access at a time and date notified to the Applicant.

3. Whilst this application has been dismissed, the Respondent should not see this as a victory. Had the Applicants provided all the evidence necessary for the Tribunal to determine the respective rights and obligations of the parties, it is probable that the Tribunal would have found that he is under an obligation to afford his landlords access to inspect his flat upon reasonable notice. The Applicants are now likely to make a lawful demand for access. If the Applicants seek to exercise this right and are refused, it is probable that they will seek a further application for a determination. If he is found to be in breach, the Respondent risks losing his home.

The Application

4. By an application dated 31 July 2024, the Applicants issued this application under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") seeking a determination that the Respondent tenant is in breach of his lease in respect of 38B Park Road, Hampton Wick, Surrey, KT1 4AS ("the Flat") in that he has: (1) refused access to inspect; and (ii) failed to keep the flat in good and substantial repair. Rose & Rose Solicitors LLP were acting for the Applicants. The Applicants had no email address for the Respondent. On 13 September 2024, the Tribunal sent a copy of the application to the Respondent.

5. On 17 September 2024, the Tribunal issued Directions. The Directions stated that the application would be heard at a face-to-face hearing on 9 January 2025. The Tribunal would inspect the property at 10.30 on the morning of the hearing. On 18 September, the Tribunal sent a copy of the Directions to the Respondent.

6. On 22 October 2024, the Applicants sent their evidence and legal submission to the Respondent (at B2-B100 of the Bundle). The legal submissions had been drafted by Counsel. The Applicants hand delivered one copy. There is no letter box, so a copy was left outside his flat in the communal hallway. The Applicants provided a photograph of the envelope that had been left. Rose & Rose sent a second copy. The Applicants also provided a copy of this delivery.

7. By 19 November 2024, the Respondent was directed to email the Applicants his statement in response, any witness statements and the documents on which he sought to rely. The Respondent failed to comply with this Direction. Indeed, the Respondent made no contact with the Tribunal.

8. On 12 December 2024, the Applicants emailed a hearing bundle to the tribunal. On 12 December 2024, Rose & Rose sent a copy of the bundle to the Respondent. The Tribunal was shown a copy of the accompanying letter. This referred to the hearing on 9 January 2025.

The Inspection

9. At 10.30 on the morning of the hearing, the Tribunal attended the property which is a substantial two storey house in Hampton Wick. The Applicants live on the ground floor and the Respondent is the tenant of the second floor flat. There had been a doorbell for the first floor flat, but we were told that Mr Nicholson had removed this. There is a small communal entrance hall with a door leading to the first floor flat. There had been a letter box to the flat. However, we were told that Mr Nicholson had sealed this. There was no response when we knocked on this door.

10. Mr Buckley provided the Tribunal with the mobile number of Mr Nicholson. Judge Latham telephoned Mr Nicholson. Mr Nicholson answered and stated that he was at work in Guildford. He stated that he worked for a government department, but was unable to give details on an unsecure line. He said that he had no knowledge of the proceedings. He was unable to leave work and come to the flat to admit us to inspect. Judge Latham advised Mr Nicholson to come to the hearing at 13.30. He added that the Tribunal would be willing to delay the start until 14.30, if this would assist him. Mr Nicholson stated that he would still be unable to attend. Judge Latham stated that the hearing would proceed at 13.30. The FTT would need to consider whether to proceed in his absence. However, it would be likely to do so, if satisfied that he was aware of the

hearing and had decided not to engage. Judge Latham gave him the strongest advice to attend, warning him that a determination that he had breached the terms of his lease, could lead to the County Court forfeiting his lease. He risked losing his home. Mr Nicholson provided an email address markn79@hotmail.com.

11. The Tribunal inspected the rear garden. The Applicants have sole use of this. New windows had been installed at the front of the property. Externally, the property was in an excellent state of repair, with a new roof. The Tribunal was unable to inspect the first floor flat. The Tribunal had a limited view of the first floor front room from the front of the property. It seemed to be in a poor state of decorative repair.

The Hearing

12. The hearing started at 13.30. Mr David Giles (Counsel) appeared for the Applicants instructed by Rose & Rose Solicitors LLP. Mr Mark Buckley and Ms Carol Dukes, attended. Mr Buckley confirmed the accuracy of his witness statement (at B2-91).

13. There was no appearance from Mr Mark Nicholson. The Tribunal was satisfied that he had received copies of (i) the application; (ii) the Directions; and (iii) the Applicants' bundle of evidence. The Tribunal was satisfied that Mr Nicholson had taken an informed decision not to engage with the proceedings. Having regard to the provisions of rule 34 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, we were satisfied that it was in the interests of justice to proceed.

14. The case was prepared and presented on the basis that Mr Nicholson occupied the first floor flat pursuant to a lease, dated 28 March 2013 (at B9-55). This grants a term of 125 years from the date of the lease.

15. The Landlord reserves the rights set out in Schedule 6 of the lease. Paragraph 3 of the Sixth Schedule, provides for the right of the Landlord, its servants or agents, at all reasonable times with or without workmen, as often as need require to have access to enter the Demised Premises for the purpose of inspection and executing repairs.

16. By Clause 3(a), the Tenant covenants to observe and perform the covenants contained in the Seventh Schedule:

(i) By Paragraph 6 of the Seventh Schedule, the Tenant covenants: "to permit the Landlord with or without workmen "at reasonable times and upon reasonable notice (except in emergency) to enter upon and view and examine the condition of the Demised Premises.

(ii) By Paragraph 4 of the Seventh Schedule, the Tenant covenants to keep the Demised Premises in good and substantial repair and condition and properly cleansed throughout.

17. The hearing took a surprising turn when the Tribunal asked for an explanation of two letters which the Applicants sent to Mr Nicholson, dated 7 February 2023 (at B71) and 14 February 2023 (B72):

(i) The letter of 7 February stated: "As freeholder of the building, we have a legal responsibility to ensure that services are provided in a safe manner to your flat, when you revert to being a tenant on 29th March";

(i) The letter of 14 February stated: "Please can we remind you that we need access as soon as possible for mandatory safety checks to ready the flat for the start of your tenancy on 29th March 2023".

18. It became apparent that the lease did reflect the substance and reality of the terms of Mr Nicholson's occupation (see *A.G.Security v Vaughan* [1990] 1 AC 417). Mr Nicholson did not pay a service charge reflecting the landlord's costs of maintaining the property. He rather paid a rent. In April 2023, the rent was £819.67 per month. In April 2024, this increased to £900.82. Mr Buckley stated that the rent was increased by RPI + 1% each year in line with the guidance issued by the Regulator of Social Housing for social tenants.

The Background

19. The property at 38B Park Road is a substantial two storey house in Hampton Wick. It was owned by the London Borough of Richmond upon Thames ("Richmond"). There are two flats on the ground and first floors. There is a substantial garden at the rear of the property. In the distant past there were two secure tenants:

(i) In 1977, Richmond granted a secure tenancy of the first floor flat (Flat B) to Mrs Nicholson, the Respondent's mother. This is a two bedroom flat.

(ii) The secure tenant of the ground floor flat (Flat A) acquired a 125 year lease pursuant to the statutory Right to Buy. In 1999, Mr Buckley acquired this lease.

20. In 1999, Richmond transferred the freehold in the property to Richmond Housing Partnership ("RHPL") a social landlord regulated by the Regulator of Social Housing. It is understood that Mrs Nicholson remained in occupation as a secure tenant protected by Part IV of the Housing Act 1985, retaining a preserved Right to Buy.

21. In 2002, Mrs Richardson died. Upon her death, the Respondent succeeded to his mother's secure tenancy and retained the preserve Right to Buy.

22. The Applicants stated that the property was in a substantial state of disrepair. Carol Dukes was now living in Flat A as Mr Buckley's partner. The Applicants saw no prospect that RHPL would put the property in a proper state of repair. They therefore instigated the following:

> (i) On 4 July 2011, Mr Nicholson submitted his "RTB1" to initiate his statutory Right to Buy. The property was valued at £245k and with the statutory discount of £100k, the purchase price was £145k.
>
> (ii) The Applicants negotiated the purchase of the freehold interest from RHPL. A price of £5,250 was agreed.

23. On 28 March 2013, RHPL granted the Respondent a 125 year lease of Flat B from 28 March 2013. The demise included a garage at the rear of the property and a right of access at the front of the building. There were no rights in respect of the rear or front gardens. The lease is at B9-55. The title was registered on 10 April 2013 (C4).

24. On 8 April 2014, the Respondents were registered as the freehold owners of the property (C10-16). This records that consideration of £5,250 was paid on 27 March 2014.

25. On 22 July 2014 (at B58—64), there was a deed of variation between the Applicants and the Respondent. The Respondent agreed to a number of covenants restricting his rights to sublet or assign the Flat. This included a covenant not to permit another person to occupy the whole or part of the Flat. It is unclear what, if any, consideration was paid in respect of these variations. The tenant seems to be condemning himself to live on his own in the Flat.

26. At first sight, the legal position would seem clear. Upon the Respondents acquiring the freehold, they would have become the Respondent's landlord pursuant to his lease dated 28 March 2013. The Applicant covenanted to keep the structure and exterior of the building in a good state of repair; whilst the tenant covenanted to pay a service charge and a ground rent of £10 pa.

27. However, when the Tribunal probed the situation, it became apparent that this was not the substance and reality of the agreement between the parties. There was a side agreement which was not provided to the tribunal. Mr Nicholson had not provided the purchase price of £145k. This had been funded by the Respondents. They also paid his legal expenses. The intention rather seems to have been to put the Respondent

in a similar position as he was under his secure tenancy. He was not required to pay any service charge or to repay the capital that had been advanced. His monthly payments rather reflected the rent that he would have paid under his secure tenancy, the rent increasing by RPI + 1% each year in line with the guidance issued by the Regulator of Social Housing.

28. The Applicants told the Tribunal that after a period of 10 years, the Respondent had agreed to surrender his lease. In return, the Applicants would grant the Respondent a tenancy for life. The terms of this were far from clear. In so far as it had been contemplated that the Applicants would grant a secure tenancy on the terms that the Respondent had previously enjoyed, this would not have been possible as the Applicants would not have satisfied the "landlord" condition in section 80 of the Housing Act 1985.

29. Mr Buckley stated that the Applicants had sought to serve Mr Nicholson with court papers to enforce this side agreement. However, service had not been affected.

30. In 2014, the Applicants took a number of photographs of Flat B (at B.79-91). This shows the flat to be cluttered. The decorative repair was poor. However, this was partly due to water penetration from a roof leak.

31. Having acquired the freehold, the Applicants spend substantial sums on putting the property in a good state of repair. A new roof was installed and the windows were replaced at the front of the property. None of these costs were passed on to the Respondent through the service charge.

32. It seems that the relationship between the parties broke down in about 2015. Mr Buckley suggested that it was a minor incident which proved the straw that broke the camel's back. A builder had used Mr Nicholson's ladder without permission. Since that date, there has been no communication between the parties. Mr Nicholson has removed his front bell and sealed the letter box in the door to his flat. The Applicants showed a Statement of Account (B77) which recorded rent arrears of £1,196.20. The payments are described as "interest due".

Requests for Access

33. In the absence of all the relevant documents to enable the Tribunal to determine the substance and reality of the legal relationship between the parties, the Tribunal is not willing to make any determination that there has been a breach of covenant. The Tribunal might have been willing to adjourn the case for this evidence to be provided, but for the fact that we were satisfied that even had the Applicants been able to rely on the terms of the lease, their claim that the Respondent had refused access was hopeless.

34. The Applicants rely on a number of requests for access at B86-76 made between 24 September 2019 and 12 February 2024. The first request (B66) was made by R G Cruickshank, a local estate agent. The final request (B74), the request was made by the Applicants. The letter reads:

> "As mentioned on multiple occasions, we do need access to the flat to carry out inspections. Please let us know when would be convenient to you"

35. The previous letters were written in similar terms, as was a letter dated 12 February 2024 (at B75) which was sent after the application was issued. On each occasion, the Respondent was asked to make contact to arrange an appointment. At no time did the Applicants sate that they required access at a particular time and day. Neither did they attend to seek to exercise that right.

36. The decision of HHJ Behrens in *New Crane Wharf Freehold Limited v Dovener* [2019] UKUT 98 (LC) applies to this case. The lease required the tenant to permit the landlord access at all reasonable times on not less than 48 hours' notice (at [2]). The critical letter required the tenant to confirm that he would afford access at a particular time ([5]). The tenant did not respond. There was no evidence that the landlord attempted to gain access ([6]). The landlord argued that the failure to respond to two letters amounted to a breach of covenant. The FTT found that there had been no breach ([6]). HHJ Behrens dismissed the appeal. The letter was no more than an invitation to the Tenant to propose a time (at [23]). The Judge went on to consider whether the landlord needed to attend if the tenant had refused access in advance. The Judge suggested that this all depended on the circumstances (at [24]). That situation does not arise in this case.

37. Mr Giles sought to distinguish this case on a number of grounds. By paragraph 3 of the Sixth Schedule, the landlord reserved the right to enter the Flat at all reasonable times to inspect and carry out repairs. He suggested that this imposed a reciprocal obligation on the tenant to enable the landlord to exercise that right. By not responding to the landlord's request to be afforded access, he was in breach of this obligation. The Tribunal cannot accept this argument. The tenant's obligation to afford access is clearly specified in paragraph 6 of the Seventh Schedule. The landlord must specify a time and date and then seek to exercise that right.

38. Mr Giles also argued that by refusing access to the Tribunal, the Respondent was refusing access to the landlord. We cannot accept that argument. The sole purpose of the Tribunal's inspection was to enable us to better understand the evidence that was to be adduced before us. It is not open to a landlord to rely upon such an inspection for any extraneous purpose. The landlord is only present to ensure that such an inspection is conducted fairly.

39. In the light of our findings. The Tribunal does not make any order for the repayment of the tribunal fees which have been paid by the Applicants.

The Next Steps

40. The Tribunal has dismissed this application as the landlord has not provided the relevant evidence to enable the Tribunal to establish the substance of Mr Nicholson's rights of occupation. The lease only provides part of the picture. We have not seen the side agreement. In any event, the Applicants have failed to establish that the Respondent is in breach of any covenant to afford access. In the light of our first finding, it is not necessary for the Tribunal to make any finding on whether the tenant has failed to keep his flat in good and substantial repair.

41. However, we would urge Mr Nicholson to afford his landlord access to inspect his flat. He must also recognise his responsibility to decorate his flat. It is probably that he would be obliged to afford access and to decorate his flat regardless of whether he is a lessee under the lease, dated 28 March 2013, or under a periodic tenancy.

42. The Applicants have spent substantial sums in putting this fine period house in a good state of repair. The Respondent has not been required to contribute to these costs.

43. If Mr Nicholson does not cooperate with his landlord, it is probable that the Applicants will issue a further application to this Tribunal. The current application has only been dismissed because the Applicants have failed to adduce sufficient evidence to establish a breach. If a breach is established, the next step will be for the landlord to apply to the County Court to forfeit his lease or determine his tenancy. He risks losing his home. We would urge him to seek legal advice so that he is able to protect his position.

Judge Robert Latham
6 February 2025

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).