

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE  
SOUTHERN RENT ASSESSMENT PANEL &  
LEASEHOLD VALUATION TRIBUNAL**

In the matter of an Application under Section 168(4) of the Commonhold and  
Leasehold Reform Act 2002 (Breach of Covenant/Forfeiture Application)

Case No. CHI/00MW/LBC/2007/0016

Property: Flat 2 Clarence Lodge, 7 Clarence Road, Shanklin, Isle of Wight, PO37 7BH

**Between:**

Clarence Lodge Management Limited  
("the Applicant")

and

John Paul Drakeford  
("the Respondent")

**DECISION  
OF THE LEASEHOLD VALUATION TRIBUNAL**

**1. The Applications**

- (1) Under Section 168 (4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") for a determination that a breach of covenant in the Lease has occurred. Section 168 of the 2002 Act was inserted to prevent a Landlord under a long Lease from serving a Notice under Section 146 of the Law of Property Act 1925 until a breach of covenant by a Tenant has been finally determined or admitted.
- (2) Under Clause 10 (1) of Schedule 12 of the 2002 Act for a determination that the Respondent shall pay the costs incurred by the Applicant in connection with the proceedings and under Clause 10 (2) (b) where he has, in the opinion of the Tribunal acted frivolously, vexatiously, abusively disruptively or otherwise unreasonably in connection with the proceedings.

**2. Preliminaries**

Directions were made by the Tribunal on 15<sup>th</sup> June 2007 proposing that the matter be dealt with on the fast track and without an oral Hearing. The parties were requested to submit written representations and unless either party objected, the matter would be dealt with as a paper determination without an oral Hearing. The Applicant requested that the matter be dealt with as a paper determination and the Respondent did not object. Accordingly the matter was determined by a single Lawyer/Chairman on written representations without an oral hearing.

**3. The alleged breach of covenant**

The Applicant alleged that the Respondent was in breach of covenants 3 (3) and 4(3) of the Lease. Those Clauses read as follows:

3. *The Tenant hereby covenants with the Lessors as follows:*

*(3) To permit the Lessors and their duly authorised Surveyors or Agents with or without workmen at all reasonable times by appointment (but at any time in case of emergency) to enter into and upon the demised premises or any part thereof for the purpose of viewing and examining the state of repair thereof*

4. *The Tenant hereby covenants with the Lessors and with and for the benefit of the Flat Owners that throughout the term the tenant will:*

*(3) permit the Lessors and each tenant of a flat in the Building with or without workmen and all persons authorised by any of them at all reasonable times by appointment (but at any time in case of emergency) during the said term to enter into and upon the Demised premises or any part thereof for the purpose of repairing or altering any part of the Building or executing repairs or alterations to any adjoining or contiguous premises or for the purpose of making repairing maintaining supporting rebuilding cleansing lighting or keeping in good order and condition the Common Parts and all roofs foundations damp courses tanks sewers drains pipes cables watercourses gutters wires party or other structures or other conveniences belonging to or serving or used for the Building or any part thereof and also for the purpose of laying down maintaining repairing and testing drainage gas and water pipes and electric wires and cables and for similar purposes and also for the purpose of cutting off water to the Demised Premises or any other premises in the Building in respect whereof the tenant or occupier shall have made default in paying his share of the water rate the Lessors or the tenant so entering and authorising entry (as the case may be) making good all damage occasioned to the Demised Premises*

4. **The Applicant's representations**

The Applicant, through its Solicitors, submitted a written statement by Mr Graham John Sitton, a Director of the Applicant Company, setting out the grounds in support of his Application including a number of copy documents. He gave various reasons why access to the Flat was required, all of them very important and legitimate ones. In particular access was required in connection with the fire alarm system and also some inspect infestation in the roof void. Both these reasons were important from a health and safety aspect for all the occupiers of the building.

5. The Applicant also produced copy correspondence from the Managing Agents and the Applicants Solicitors requesting access. No reply was made by the Respondent to these letters.

6. **The Respondent's Representations**

The Respondent had made no representations as provided for by the Tribunal's Directions dated 15<sup>th</sup> June 2007 and clearly did not intend to contest the Application.

7. **Consideration**

The Respondent has had every possible opportunity to contest these proceedings and his silence must be taken as his consent to the Application. There is no doubt that there has been a breach of covenant as alleged as the Respondent has failed to allow the Applicant to have access to the Flat for legitimate purposes. For these reasons the Applicant is clearly entitled to a determination that a Breach of Covenant has taken place.

8. **DECISION**

For the reasons given above the Tribunal HEREBY DETERMINES in accordance with its powers under Section 168 (4) of the Commonhold and Leasehold Reform Act 2002 that a breach of covenant has occurred in that the Respondent has failed to allow access to the Applicant in breach of Covenants 3 (3) and 4 (3) of the Lease dated 12<sup>th</sup> August 1988 made between Arrowcrown Limited (1) Sara Jane Warren (2)

9. **Application under Clause 10(1) of Schedule 12 of the 2002 Act**

The Applicant claims to have incurred various costs in connection with the proceedings and this application invited the Tribunal to exercise its discretion in making an Order that the Respondent shall repay to the Applicant such costs. The details of the costs incurred were not itemised. Various Invoices from C.L.Maintenance Co were included in the Applicant's Bundle, but there was no Invoice from the Applicant's Solicitors showing the costs that had been incurred in connection with these proceedings.

10. The Tribunal reviewed the wording of Clause 10(2)(b) which required the Tribunal to find that the Respondent had acted "frivolously, vexatiously, abusively, disruptively or otherwise unreasonable in connection with the proceedings." The Applicants had not supported their Application with any evidence that the Respondent had acted in this way. All he had done was to fail to respond to any of the requests for access to his Flat. The Tribunal finds that to persuade it to exercise its discretion to make such an Order, some clear evidence of some positive act by the Respondent of acting "frivolously, vexatiously, disruptively, or otherwise unreasonably" needs to be shown. Merely passive non-participation is insufficient to satisfy the requirement of this statutory provision. In any event the Applicant has failed to produce evidence that it has incurred the costs of these proceedings as no evidence of any Solicitors Bill of Costs or other conclusive evidence of any costs incurred by the Applicant has been produced. For these reasons the Tribunal declines to make such an Order.

Dated this 24<sup>th</sup> day of August 2007

*J.B.Tarling (Signed)*

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John B. Tarling (Lawyer/Chairman)  
A member of the Panel appointed by the Lord Chancellor