



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case Reference** : **LON/00BK/LBC/2021/0057P**

**Property** : **Ground Floor Flat, 56 Clifton  
Gardens, London W9 1AU**

**Applicant** : **56 Clifton Gardens Limited**

**Representative** : **All Square Legal Limited, Solicitors**

**Respondent** : **Dorrington Residential Limited**

**Representative** : **Lin Mattsson of Counsel**

**Type of Application** : **Application for determination as to  
breach of covenant or condition in  
lease under section 168(4)  
Commonhold and Leasehold  
Reform Act 2002**

**Tribunal Member** : **Judge P Korn**

**Date of Decision** : **22<sup>nd</sup> November 2021**

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**DECISION**

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**Description of hearing**

This has been a remote hearing on the papers. The form of remote hearing was **Paper**. An oral hearing was not held because the Applicant confirmed that it would be content with a paper determination, the Respondents did not object and the tribunal agrees that it is appropriate to determine the issues on the papers alone. The documents to which we have been referred are in an electronic bundle, the contents of which we have noted. The decision made is described immediately below under the heading “Decision of the tribunal”.

## **Decisions of the tribunal**

- (1) A breach of covenant has occurred, namely a breach of the covenant contained in clause 2.8.1 of the Lease.
- (2) The Respondent's cost application is refused.

## **The application**

1. The Applicant seeks a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("**the 2002 Act**") that a breach of covenant has occurred under the lease of the Property ("**the Lease**").
2. The Applicant is the freehold owner of the building ("**the Building**") of which the Property forms part and the Respondent is the current leasehold owner of the Property. The Lease is dated 17<sup>th</sup> August 1987 and was originally made between the Applicant (1) and The Church Commissioners for England (2). The Property is a ground floor flat within a three-storey building with a basement.
3. In its application, the Applicant alleges that the Respondent is in breach of the covenant contained in clause 2.8.1 of the Lease by failing to allow the Applicant or its agents access to the Property. The relevant part of clause 2.8.1 of the Lease reads as follows:-

### **Clause 2.8.1**

*To permit the Landlord or its agents or workmen at all reasonable times (Requisite Notice having been given) to enter into and upon the Demised Premises for any other purpose connected with the interest of the Landlord in the Building or the Demised Premises or its disposal charge or demise and in particular to examine the state and condition thereof ... .*

## **Applicant's written submissions**

4. Ali Naini, a director of the Applicant company, has given a witness statement. He states that over the years the directors have received various reports of anti-social behaviour on the part of the residents of the Property.
5. In April 2021, Mr Naini heard certain noises from an area accessible only from the Property which led him to suspect a rodent infestation. After unsuccessful attempts to speak to the tenants and the Respondent's agents, the directors were advised by their legal advisers

to serve a section 196 notice on the Respondent requiring access for inspection.

6. Mr Naini posted a copy of the notice personally into the Property's post box. His understanding is that a copy was also sent to the Respondent by post and to its agent by email, in each case by the Applicant's company secretary. The notice was served just over a month before the date on which entry was required, namely 21<sup>st</sup> May 2021. Then on 21<sup>st</sup> May, at the time stated in the notice, Mr Naini arrived at the main door of the Building with a member of staff of the Applicant's managing agents, Peter Birch. They rang the bell to the Property and then tried again an hour later but there was no response. Mr Birch has given a witness statement confirming Mr Naini's account of the attempt to gain entry.

### **Respondent's written submissions and cost application**

7. The Respondent accepts that a copy of the notice seeking access to the Property was sent to the Respondent's registered office address on or about 20<sup>th</sup> April 2021 but denies that it was a valid notice pursuant to clause 2.8.1 of the Lease.
8. On the issue of validity, the Respondent refers to the case of *Siemens Hearing Instruments Ltd v Friends Life Ltd (2014) EWCA Civ 382* and states that the heading of the notice, namely the reference to section 196 of the Law of Property Act 1925, made no sense and was confusing as section 196 regulates deemed service of notices. The Respondent adds that the stated reason for the request for inspection was "Nuisance" and states that a reasonable recipient with knowledge of the factual background would have understood the reference to nuisance to relate to allegations that the tenants (Mr and Mrs Cohen) were guilty of anti-social behaviour, as these were the only allegations of which they were aware, and such allegations would not give the Applicant a right to enter. The Respondent also refers to the case of *Beaufort Park Residents Management v Mr Abdolreza Sabahipour (2011) UKUT 436* in stating that a landlord's right of entry is subject to fulfilment of the conditions stipulated in the lease, and here clause 2.8.1 of the Lease did not give a right to enter in connection with any alleged "nuisance".
9. The Respondent also denies that the interval between 20<sup>th</sup> April and 21<sup>st</sup> May was a reasonable time for the purposes of clause 2.8.1 as there was no urgent need to inspect the Property for the stated purpose. Also, at the relevant time England was in a national lockdown due to the pandemic, the Cohens were elderly and vulnerable, and entry by both Mr Naini and Mr Birch would have breached the rule of 2 households in force at the time in connection with the pandemic.
10. In addition, the Respondent submits that the failure of the Cohens to open the door on 21<sup>st</sup> May does not constitute a breach of covenant by

the Respondent. The Respondent was only obliged to “permit” access; it did not have to “ensure” access, and at most the Respondent only needed to take reasonable steps to facilitate access. The Respondent asserts that it has at all times sought to facilitate access.

11. The Respondent notes the Applicant’s assertion that the Cohens did not open the door on 21<sup>st</sup> May but also notes that the Applicant did not contact the Respondent direct to seek its assistance to gain access or to re-arrange the visit.
12. The determination bundle includes a witness statement from the director of the Respondent company, Peter Yeates. In his statement he sets out what he considers to be the relevant background information, including various complaints made by the Cohens over the years which he states have not been dealt with by the Applicant. The various problems have led to poor relations between the Cohens and the lessees of other flats and particular animosity between the Cohens and Mr Naini. He also states that the notice does not refer to any rodent infestation.
13. The Respondent further states that an earlier request for access was received in February 2021 and in response to this first request the Respondent’s agent told Mr Naini that access would be given if full PPE was worn.

### **Applicant’s response**

14. The Applicant states that notice was served by post to the Respondent’s registered premises, by post to their former agents’ premises and by personal delivery at the Property.
15. The notice was served to facilitate an inspection in circumstances where it was believed there might be an infestation of rodents which in turn could have a detrimental effect on the health and quiet enjoyment of other occupiers and leaseholders. A month’s notice was given during which time none of the arguments now being advanced by the Respondent was raised.
16. There had been previous correspondence between the parties regarding rodent infestation and therefore the Respondent was well aware of the issue. As regards the rule of 2 households, this only applied to indoor social gatherings.

### **The statutory provisions**

17. The relevant parts of section 168 of the 2002 Act provide as follows:-

*“(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 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.*

*(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.”*

### **Tribunal’s analysis**

18. The Respondent seems to accept, and in any event I find as a matter of fact, that the notice was served on the Respondent.
19. As regards the validity of the notice, the Respondent claims that the notice made no sense and was confusing but I do not accept this. As regards the reference to section 196 of the Law of Property Act 1925, even if the Respondent did think about the question of why section 196 was being referred to, and there is no real evidence that it did so on receipt of the notice, I do not consider it credible that this reference would – or could reasonably – have confused the Respondent as to the purpose of the notice in the light of the rest of the contents of the notice.
20. As regards the suggestion that the Respondent was confused by the reference to “nuisance”, again I do not accept that it was – or could reasonably have been – confused by this. If the Respondent wanted more information as to the details of what had prompted the request for access it could simply have requested that information rather than simply ignoring the notice, and the reliance on the word “nuisance” as justifying any failure to permit access is unpersuasive. In any event, it is the Respondent’s position that it is Mr and Mrs Cohen who were confused, but it was the Respondent’s own responsibility to comply with the covenant under the Lease.
21. As regards whether there is a right to enter in connection with a complaint of nuisance, in my view this is not the right question to ask. The right of entry is widely drafted and includes any purpose connected with the landlord’s interest in the Building or the Property, and this clearly covers the issue of rodent infestation. What the Respondent has done is to take the word “nuisance”, give it a particular spin by

reference to past arguments and then simply assumed (or asserted) that the request for entry relates to a particular historic argument which falls outside the ambit of those matters for which access can be sought, based on no real evidence.

22. As regards the period between the notice and attempted access, the Respondent submits that a period of a month was not reasonable but I disagree. It is true that the pandemic led to restrictions and understandable health concerns regarding social distancing, particularly amongst the elderly and the vulnerable, but it does not follow that a whole month's notice in these circumstances was unreasonable. It is true that this was not an emergency situation, but in emergencies generally no notice at all is needed. The Respondent has provided no evidence to show that the concern about rodent infestation was unwarranted, and in relation to an issue like rodent infestation, where obviously the problem can spread to other parts of the Building, the Applicant has responsibilities as landlord to other leaseholders. In the circumstances, even taking the pandemic into account, I consider 21<sup>st</sup> May 2021 to constitute a "reasonable time" for the purposes of clause 2.8.1 of the Lease when notice was served on or about 20<sup>th</sup> April 2021.
23. As regards the rule of 2 households, as noted by the Applicant this applied to social occasions, not to business interaction.
24. There is then the question of whether the failure of the Cohens to open the door on 21<sup>st</sup> May itself constituted a breach of covenant by the Respondent. Again, I think that this is slightly the wrong question. Whilst it is true that the Respondent's obligation was to "permit" entry, I am satisfied based on the evidence before me that it did not permit entry. It had notice of the date of proposed entry for a whole month but there is no evidence that it took any meaningful steps to facilitate such entry or even to try to do so. It was on notice, for a whole month, that the Applicant planned to attend the Property at noon on Friday 21<sup>st</sup> May 2021 and yet – despite this – it seems to be arguing that the onus was somehow on the Applicant to contact the Respondent direct to seek its assistance to gain access (presumably on the day, whilst waiting outside the door) or to re-arrange the visit.
25. The reference to an earlier request for entry on 21<sup>st</sup> February 2021 is noted. Whilst it is arguable that it provides some context, the exchange referred to by the Respondent is not relevant to the later request for entry on the basis of the evidence before me.
26. As regards the alleged history of poor relations between the Cohens and Mr Naini and other lessees, it may well be true that there have been past problems, but again on the evidence before me that history does not render the Applicant's notice invalid and nor does it mean that a breach of covenant has not occurred.

27. In conclusion, therefore, I am satisfied that a breach of covenant has occurred. It is not part of the tribunal's jurisdiction to evaluate the seriousness or otherwise of the breach and therefore I will not comment on this point.

### **Cost application**

28. The Respondent has applied for a cost order against the Applicant under paragraph 13(1) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 on the basis that the Applicant has acted unreasonably in bringing and/or conducting these proceedings.
29. As the Applicant has been successful in these proceedings there is no question of it being appropriate to make a Rule 13(1) cost order against the Applicant, and accordingly the Respondent's cost application is dismissed.

**Name:** Judge P Korn

**Date:** 22<sup>nd</sup> November 2021

### **RIGHTS OF APPEAL**

- A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.
- B. 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.
- C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- D. 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.