



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

Case Reference : **CHI/00ML/LBC/2022/0006**

Property : **137, Bear Road Brighton East Sussex
BN2 4BD**

Applicant : **Sara Castelletto (Landlord)**

Representative : **Griffin Smith**

Respondent : **Kay Baker (Tenant)**

Representative : **Not represented**

Type of Application : **Breach of covenant**

Tribunal Members : **Judge F J Silverman Dip Fr LLM
Mr R Brown FRICS**

**Date and venue of
Hearing** : **Paper remote
12 July 2022**

Date of Decision : **12 July 2022**

DECISION

This has been a remote consideration on the papers which has been consented to by the parties. The form of remote hearing was P:REMOTE. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents to which the Tribunal was referred are contained in an electronic bundle the contents of which are referred to below. The orders made in these proceedings are described below.

Decision of the Tribunal

The Tribunal determines that the Respondent Tenant is not in breach of covenant under the terms of her lease.

Reasons

1 The Applicant landlord sought a declaration from the Tribunal that the Respondent tenant was and remained in breach of the covenants of her lease. Directions were issued by the Tribunal on 3 May 2022.

2 The hearing took place as a paper consideration to which the parties had previously consented. In accordance with current Practice Directions relating to Covid 19 the Tribunal did not make a physical inspection of the property. The issues in the case were capable of resolution without a physical inspection of the property.

3 The Applicant landlord is the freeholder of the building known as 137/139 Bear Road Brighton East Sussex BN2 4BD (the building) which comprises two self-contained flats. The ground floor Flat (no 137) (the property) is occupied by the Respondent. The Applicant lives in the flat which forms the upper part of the building (no 139).

4 The Respondent is the tenant of the property.

5 The lease under which the Respondent holds the property is dated 31 March y 1977 (the lease) (page 19) and was made between O E F E Barry and W Tarling (1) and M A Pinkney and E R Pinkney (2).

6 The Applicant said that she needed to gain access to the property to check that it was compliant with current fire regulations and if found to be defective, to carry out improvements to bring the property up to the required standard. The Tribunal acknowledges the need for a landlord to inspect and carry out works for this purpose.

7 The Respondent's lease contains a covenant requiring the tenant to allow access on reasonable notice (covenant 3(6) page 23).

8 The Applicant said that she had asked for access on 14 January 2022 and again on 15 February 2022 but that on both occasions access had been denied. There is no evidence in the hearing bundle to support these statements.

9 Prior to that her managing agents had requested access on 25 November 2021 which had similarly been refused (page 62).

10 Page 56 of the hearing bundle contains an undated and unsigned letter addressed by the Applicant's managing agents to the Respondent the contents of which suggest it was intended as a letter before action giving details of the

Respondent's failure to pay rent and service charges as well as an allegation that she had unlawfully refused entry to the property contrary to clause 3(6) of her lease.

11 The above letter is marked as a draft. It is undated and unsigned. There is no evidence it was ever sent to the Respondent and the Tribunal is unable to accept it as evidence of the facts it purports to establish.

12 The Applicant's evidence also contains a string of undated electronic messages or What's App communications which do not identify the persons sending/receiving the messages or the dates on which they were created. The contents of the messages suggest a difficult relationship between the two people involved but does not contain any evidential proof that the Applicant, as landlord, was denied entry to the property by the Respondent, as tenant, on any specific day or time after having been given appropriate notice of the intended visit.

13 The only possible evidence of breach produced to the Tribunal is one letter sent by the Applicant's agent to the Respondent (page 62). A finding of breach of covenant against the Respondent has potentially serious consequences in that it would then be possible for the Applicant to commence possession proceedings against the Respondent. In view of these consequences a decision which determines that a tenant has been in breach of covenant would need to be supported by credible evidence of the breach. The Tribunal is not prepared to make a finding of breach of covenant on the tenuous evidence of one refusal of entry by the Respondent to the Applicant's agent.

14 Although it is noted that the Respondent has not engaged with these proceedings, the burden of proof lies with the Applicant to establish her case. This she has failed to do. She has produced no verifiable evidence that on specific days and times she asked for and was refused permission to inspect the property after having given the tenant reasonable notice of the intention to enter. For that reason her application cannot succeed.

15 The Law

Commonhold and Leasehold Reform Act 2002 s 168

No forfeiture notice before determination of breach

(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.

Section 20C Landlord and Tenant Act 1985

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Name: Judge F J Silverman as Chairman **Date:** 12 July 2022

Note:

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.