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

| | | |
|---|---|---|
| **Case Reference** | : | MAN/00EQ/LBC/2021/0011 |
| **Property** | : | 8 Beechwood Knutsford Cheshire WA16 8AR |
| **Applicant** | : | Southern Estates Limited |
| **Representative** | : | Stephenson Solicitors |
| **Respondent** | : | Stephen Robert Buckley |
| **Representative** | : | Jolliffe & Co LLP |
| **Type of Application** | : | Application for a Determination that a Breach of Covenant has occurred Section 168(4) Commonhold and Leasehold Reform Act 2002 |
| **Tribunal Members** | : | Judge R Watkin<br>Mr S Wanderer MRICS |
| **Date and Venue of Hearing** | : | 30 November 2022 – By Video |
| **Date of Decision** | : | 30 November 2022 |

---

**DECISION**

---

## Decision

The Tribunal determines that the Respondent has breached the terms of clause 2(3) of the lease dated 20 May 1966 between The Whelmar Property Company Limited and James Gresham.

## The Application

1. The Applicant, Southern Estates Limited, has been the registered proprietor of the freehold property known as 8 Beechwood Knutsford Cheshire WA16 8AR(the "Property") registered under title number Ch 386146 at HM Land Registry since 4 April 2000. The Respondent to the application is Stephen Robert Buckley, the registered proprietor of the leasehold of the Property registered under title number CH 17614 at HM Land Registry since 6 May 1997.

2. The Applicant holds the leasehold intertest in the Property pursuant to a lease dated 20 May 1966 between The Whelmar Property Company Limited and James Gresham (the "Lease"), on the following terms:

| | |
|---|---|
| Term | 999 years from 25 March 1963 |
| Annual rent | £15 per annum(initial) |

3. By application dated 18 November 2021, the Applicant seeks an order under section 168(4) of the Commonhold and Leasehold Reform Act 2002 (the "Act"). The Applicant contends that the Respondent has breached clauses 2(3) and 2(13) of the lease.

4. Clause 2(3) states:

"*that the lessee will throughout the said term at the expense of the lessee and without being thereunto required well and substantially repair cleanse maintain amend and keep the said demise premises and all fixtures and additions thereto and all sewers drains water courses and other appurtenances thereto including the fence on the side or sides of the demised premises as may be indicated by "T" within the boundary of the land shown edged red on the said plan in good and substantial repair and condition.*"

5. Clause 2(13) states:

*"not without the previous licence in writing of the lessors to permit any parts of the said demise premises or any dwellinghouse or building erected or to be erected thereon to be used otherwise than as a private residence only and not to erect or permit to be erected upon the demised premises or any part thereof any machinery or do or permit to be done thereon any wilful damage waste spoil or destruction or anything which shall be or may grow to be a nuisance or annoyance to the lessors the public or the neighbourhood"*

6. The following documents are attached to the application:

   a. Interim Schedule of Dilapidation and Wants of Repair by Carter Jonas LLP dated 5 November 2021

   b. The Lease.

**The Law**

7. Section 168 commonhold and leasehold Reform Act 2002 states:

> (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) tha the breach has occurred,
>
> (b) the tenant has admitted the breach, or
>
> (c) a court in any proceedings, or an arbitral tribunal in proceedings pursuar 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.

8. The tribunal's Jurisdiction under section 168(4) is 2 determine whether a breach of covenant or condition has occurred. The tribunal does not have jurisdiction under this section to determine whether there has been a waiver of any right to forfeit the Lease by the Applicant or whether any remedy that the Applicant may claim in the future is available to it.

9. However, the Tribunal notes that there is a distinction between a waiver of the right to forfeit the Lease and a waiver of any covenant itself. In respect of the former, this is not a matter that the tribunal is able to determine. However, the latter is key to a determination of whether there has been a breach of the covenant as if the covenant itself has been waived, it cannot have been breached.

10. The position was considered in detail by Martin Roger KC, Deputy Chamber President, in Bedford v Paragon Asra Housing Limited (2021) UKUT 266 in which he reviewed the differences between a waiver of the right to forfeit and a waiver of the covenant itself at paragraphs 24 to 32. He stated:

> *"26. It is necessary to bear in mind an important distinction when considering the issue of waiver in the context of a breach of covenant. The distinction is explained in Woodfall: Landlord and Tenant , at 17.092, as follows:*
>
> *"Waiver of the right to forfeit is not the same as waiver of a breach of covenant. The former depends on the principle of election and only bars one remedy, leaving the landlord's right to damages intact. The*

*latter depends on the inference of consent, and bars all the landlord's remedies in respect of the breach in question. Neither of these kinds of waiver will prevent the landlord from relying on the covenant in respect of subsequent breaches."*

11. The Deputy President then referred to the case of ***Swanston Grange (Luton) Management Ltd v Langley-Essen [2008] L & TR 20*** in which the Lands Tribunal (HHJ Huskinson) explained that:

> "in order to determine whether a breach of covenant has occurred, it may sometimes be necessary for a tribunal to determine whether the landlord has waived the right to rely on the covenant at all. If the covenant does not bind the tenant, because the landlord has waived its right to rely on it, there can be no question of the tenant having breached the covenant."

**DIRECTIONS**

12. On 13 May 2022, the application was considered by the Tribunal and a directions order made by Judge Bennett indicating that the Tribunal does not consider that an inspection of the Property will be necessary, that it considers the matter appropriate for a determination in the absence of the parties, allowing the parties an opportunity to indicate whether they wish to make oral representations and setting out a timetable for the exchange of documents and providing directions in relation to expert evidence.

13. In compliance with the directions order, the Tribunal received the following documents:

    a. Applicant's Bundle;

    b. Expert witness report of the Respondents valuer; and

    c. A witness statement from the Respondent, Mr Buckley.

14. A Supplementary bundle was received From the Applicant solicitors on 23 September 2022.

15. Subsequently, the Respondent requested an attended hearing the matter was listed for hearing today.

16. At today's hearing the Applicant was been represented by Mr Glenn Stevenson, solicitor, and the Respondent was represented by Karina Champion of Counsel.

**Procedural Matters**

17. By application dated 9 November 2022, the Applicants applied to the tribunal for permission adduce expert witness report. Whilst the report was included within the Applicants bundle of 30 May 2022, no application for permission to rely on the report had been made previously.

18. Paragraph 19 of the Tribunal Procedure (First Tier Tribunal)(Property Chamber) Rules 2013 states:

**Expert evidence**

**19.**—(1) It is the duty of an expert to help the Tribunal on matters within the expert's expertise and this duty overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid.

(2) No party may adduce expert evidence without the permission of the Tribunal.

(3) Expert evidence is to be given in a written report unless the Tribunal directs otherwise.

(4) Subject to paragraph (6), each party must provide a copy of the written report of any expert witness to the Tribunal and each other party at least 7 days before—

(a) the date of the hearing; or

(b) the date notified upon which the issue to which the expert evidence relates will be determined without a hearing.

(5) A written report of an expert must—

(a) contain a statement that the expert understands the duty in paragraph (1) and has complied with it;

(b) contain the words "I believe that the facts stated in this report are true and that the opinions expressed are correct";

(c) be addressed to the Tribunal;

(d) include details of the expert's qualifications and relevant experience;

(e) contain a summary of the instructions the expert has received for the making of the report; and

(f) be signed by the expert.

(6) The Tribunal may direct that—

(a) the expert's evidence must be limited to such matters as the Tribunal directs;

(b) the expert must attend a hearing to give oral evidence; or

(c) the parties must jointly instruct the expert.

19. Whilst it is disappointing that the application to rely on witness evidence was not made earlier, it is noted that the experts report is dated 5 November 2021 and was included within the Applicant's Bundle dated 30 May 2022. Furthermore, the Respondent did not raise any objection to the Applicant relying upon the Expert's Report.

20. Therefore, whilst there may not have been an application at the earliest stage and permission was not sought when this matter was previously dealt with by the tribunal, permission was granted at the hearing for the Applicant to rely upon the report.

**Evidence**

21. Thus, prior to the hearing today, the Tribunal had the opportunity to consider all the documentation that had been provided in advance.

22. The Applicants state within the Expert's Report that, on 13 September 2021, they received an e-mail from Mr. Alan Salt, Assistant Housing Standards Officer at Cheshire East Council. The e-mail was a request for assistance in bringing the Property back into use or to improve the external appearance of the property. Mr Salt advised that "*the property has now been empty for 15 years and the owner has submitted various planning applications to extend and refurbish the property, although no action has been taken and the property is continuing to deteriorate. The property has been in its current state of repair with no roof slates for the past three years at least*".

23. The schedule provided by the Expert records the works that they suggest are required to be done to the premises in order for there to be compliance with the lease. In the interests of brevity, the contents of the schedule of dilapidations set out within the Expert Report are not repeated here.

24. The Respondent's evidence is set out in his witness statement dated 16 September 2021 in which he sets out the very sad background of how the Property previously belonged to his mother and that his parents had both been killed in a road traffic accident in 1997. At that time, he lived in the USA and was the only surviving member of the family.

25. He explains how difficult his life had been at that time due to his sudden loss and how the Property had been "in the hands of" his uncle, his mother's brother, who he had understood arranged for the Property to be rented out.

26. He also states that when the Property was first registered in his name, the incorrect address of 34 Wellington Street was included when the correct address is 22 Wellington Street and, therefore, that he has not been received correspondence in relation to the Property. As such, he's not been able to respond to the Applicant solicitors in a timely manner and attempt to rectify any alleged breaches of the lease.

27. Mr Buckley explains how, upon his return to the UK, he began the process of attempting to renovate the property. He does not provide details of any events between 2005 and 2018 but states that in around 2018 he began work on the Property which included stripping the roof tiles. However, he then decided to revise the Property and paused the works whilst he made a further application for planning permission. It seems that this application failed, was appealed but that the appeal was and subsequently rejected. He states that it is these protracted proceedings that are the cause of the breaches of clause 2(3) of the lease but that he does still have the first planning permission.

28. The Respondent indicates that if the tribunal orders that there has been a breach of the lease that he would be willing to rectify any breach.

29. At the hearing, Ms Champion for the Respondent confirmed that the Respondent did not dispute that the Property had fallen into disrepair and accepted that there had been breaches of the Lease but indicated that he does not accept that those breaches arose from any wilful neglect.

30. The Respondent initially indicated that he was content not to give evidence but following the submission of Mr Stephenson on behalf of the Applicant, he decided that he would like to give further evidence to the Tribunal. No objection was raised by the Applicant and the Respondent was permitted to give evidence to elaborate on the contents of his witness statement.

31. The Respondent's initial evidence was that he did not accept that he had not done any works to the Property as he had been very much involved with the Property through his application for planning permission. Subsequently, in cross-examination, he confirmed that whilst some works had been done to the Property, very little had been done in terms of repairs and he accepted that the Property is in the condition shown on the photographs at page 50 of the Applicant's Bundle. This shows the Property to have had all the roof titles removed from a large section of the Property.

32. During his evidence, the Respondent also acknowledged that he had not obtained the Applicant's permission to carry out the works to the Property either for which he has the benefit of planning permission or for which he is now seeking planning permission.

**DECISION**

33. Following a detailed consideration of the evidence and the submissions of the parties, and in the absence of any challenge to the enforceability of the covenants, the Tribunal has determined as follows:

**Clause 2(3)**

34. The Respondent accepts by his acceptance of the lack of roof tiles on the Property and his admission that there is a broken window and that a fascia board and gutter has been removed, that he has not repaired, cleansed, maintained the Property for a significant period of time.

35. As such, the Tribunal finds that there has been a breach of Clause 2(3) of the Lease.

**Clause 2(13)**

36. In relation to Clause 2(13), no evidence has been provided by the Applicant to suggest that the Property has been used otherwise than as a private residence, that any machinery has been erected on the property. However, the final part of the clause is a prohibition against doing or permitting to be done:

> *"any wilful damage waste spoil or destruction or anything which*

*shall be or may grow to be a nuisance or annoyance to the Lessors the public or the neighbourhood"*

37. The question of whether the Property has become a nuisance or annoyance to the "Lessors the public or the neighbourhood" is not straight forward. The newspaper articles provided on pages 5 and 6 of the supplementary bundle refer to "residents on Beechwood in Knutsford saying they are "*at the end of their tether*" and refer to the Property as "an eye sore"". Reference is also made to "countless complaints".

38. In the case of ***Davies v Dennis and others [2009] EWCA Civ 1081***, Lord Justice Rimmer considered the interpretation of the words "*nuisance or annoyance*" in the context of the development of a Property. Whilst the question in that case related to the erection of a building that blocked the view, the same reasoning can be adopted in relation to a building that is unsightly. Either way, the question is whether the appearance of a building can amount to a "nuisance or annoyance"; whether as a result of the appearance of the building itself (as in this case) or by it obstructing another view.

39. Within the case of Davies, reference was made to the case of ***Tod-Heatley v Benham (1888 ) 40 Ch D 80***. That case related to the establishment of a hospital for the treating of diseases and whether the carrying on of such a trade would amount to the breach of a covenant not to do *"… any act, matter or thing which shall or maybe or grow to the annoyance, nuisance, grievance or damage of the lesser, assigns or the inhabitants of the neighbouring or adjoining houses*".

40. At paragraph 93, Cotton LJ stated:

> *"Now 'annoyance or grievance' are words which have no definite legal meaning. It has been pressed upon us that we cannot say that it was that which was an annoyance or grievance to reasonable people, because the Judges, in speaking of what would be an annoyance to reasonable people, are only speaking of what they themselves really think would be in annoyance or grievance. That is*

*the difficulty that Judges very often have to deal with; they must not take that to be an annoyance or grievance which would only be so to some sensitive person. They must decide not upon what their own individual thoughts are, but on what, in their opinions, and upon the evidence before them, would be an annoyance or grievance to the reasonable, sensible people; and, in my opinion, an act which is an interference with the pleasurable enjoyment of a house is an annoyance or grievance, and within the definition given by V-C Knights-Bruce in Walter v Selfe 4 De G & Sm 322. It is not sufficient in order to bring the case within the words of the covenant, for the Plaintiffs to show that a particular man objects to what is done, but we must be satisfied by argument and by evidence, that reasonable people, having regard to the ordinary use of a house for pleasurable enjoyment, would be annoyed or aggrieved by what is being done."*

41. Lindley LJ made similar points. He stated at 95-96:

> *"...Now what is the meaning of annoyance? The meaning is that which annoys, that which raises objections and unpleasant feelings. Anything which raises an objection in the minds of reasonable men may be an annoyance within the meaning of the covenant."*

42. Based on the above, Lord Justice Rimmer concluded that the erection of a house that interferes with a view could amount to a nuisance. In a similar way, this Tribunal finds that the unsightly nature of a Property could also be a nuisance.

43. Reflecting upon that analysis and considering the contents of the newspaper articles within these proceedings, there is evidence to show that there are a number of local neighbours who find the Property to be an eyesore and who have raised complaints about it. On the balance of probabilities, the Tribunal finds that that the present condition of the Property is a "nuisance or annoyance".

44. However, this tribunal also needs to consider whether the Respondent's failure to carry out works of repair and maintenance to the Property are

sufficient to amount to the Respondent doing or permitting the following:

> *"any wilful damage waste spoil or destruction or anything which shall be or may grow to be a nuisance or annoyance to the Lessors the public or the neighbourhood"*

45. Whilst Ms Champion on behalf of the Respondent submitted that the Respondent did not wilfully breach the covenants, the Respondent's own evidence confirmed that he had carried out works to commence the removal of part of the Property prior to stopping work and leaving the Property in that condition with the inevitable result that it became a nuisance and an annoyance to the neighbours.

46. Even if he had not carried out the works that resulted in the Property becoming an eyesore himself, he plainly permitted the Property to fall into a dilapidated state in circumstances where he had the power to prevent that from happening.

47. On balance, therefore, the Tribunal also finds that the Respondent is in breach of Clause 2(13) of the Lease.

**Costs**

48. Neither party made any application to the Tribunal in respect of costs.

**Appeal**

49. If either party is dissatisfied with this decision an application may be made to this Tribunal for permission to appeal to the Upper Tribunal, Property Chamber (Residential Property) on a point of law only. Any such application must be received within 28 days after these reasons have been sent to the parties under Rule 52 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.

Judge R Watkin
30 November 2022