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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AW/LBC/2018/0031**
Property	:	**Flat 5, 24 Pembridge Crescent, London W11 3DS**
Applicant	:	**Justmill Limited**
Respondent	:	**Ms Gillian Barnes**
Type of Application	:	**Application for determination under section 168(4) Commonhold and Leasehold Reform Act 2002 (breach of covenant in lease)**
Tribunal Members	:	**Judge P Korn** **Ms S Coughlin MCIEH**
Date of Decision	:	**18th June 2018**

DECISION

Decision of the Tribunal

The Tribunal determines that, on the basis of the evidence provided, no breach of covenant under the Respondent's lease has occurred.

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 Respondent's lease.

2. The Respondent is the leaseholder of the Property and the Applicant is her landlord. The Respondent's lease ("**the Current Lease**") is dated 22nd January 2008 and the Applicant and the Respondent are the original parties to the Lease. The Lease incorporates by reference the terms of the previous lease ("**the Original Lease**") subject to some modifications.

3. The Property is one of seven flats in a converted house.

4. In its application the Applicant stated that it would be content with a paper determination, and in its directions the Tribunal stated that it considered the case to be suitable for a paper determination but that both parties had the right to request a hearing. No such request has been received and the case is therefore being dealt with on the papers alone without a hearing.

Applicant's case

5. The Applicant states that, despite repeated requests, the Respondent has failed to allow access to the Property in breach of the covenant contained in paragraph 6 of the Fourth Schedule to the Original Lease which now forms part of the Current Lease.

6. The Applicant has been attempting to gain access to the Property for some time in order to check its condition. The Respondent failed to reply to the request for access made by the Applicant's managing agents in a letter dated 2nd May 2017 and also failed to reply to further requests made by the Applicant's solicitors in letters dated 14th July 2017 and 7th March 2018.

7. The Applicant's written submissions include a witness statement from a David Fleming. He does not state the capacity in which he is providing the witness statement, although it appears from certain copy correspondence included with the Applicant's written submissions that Mr Fleming is the Applicant's solicitor. Mr Fleming states that in May 2017 he was instructed that the Respondent had failed to reply to the abovementioned letter dated 2nd May 2017. He then wrote to the Respondent on 14th July 2017 to arrange access but received no reply. On 20th December 2017 he then wrote to the Respondent regarding non-payment of service charge but also reminding her about the

access issue. He then wrote to her again about the access issue on 7th March 2018 but no reply was received.

8. In its application the Applicant states that the Respondent has not admitted the alleged breach.

Respondent's case

9. The Respondent has not made any submissions.

The statutory provisions

10. 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 tribunal for a determination that a breach of a covenant or condition in the lease has occurred."

Tribunal's analysis

11. The wording relied on by the Applicant is in paragraph 6 of the Fourth Schedule to the Original Lease which now forms part of the Current Lease and which reads as follows:-

"The Tenant shall permit the Landlords with or without servants agents or workmen at any time and after such notice as may be reasonable in the circumstances to enter on and examine the condition of the Flat ...".

12. Clause 2 of the Original Lease contains a covenant on the part of the tenant to observe and perform the obligations set out in the Fourth Schedule, and clause 5 of the Current Lease contains a covenant on the part of the tenant to observe and perform the covenants contained in the Original Lease subject to the modifications effected by the Current Lease. None of those modifications in any

way varies the terms of paragraph 6 of the Fourth Schedule of the Original Lease.

13. Neither party has brought any case law or other legal authority on the question of what precisely is meant by the words *"The Tenant shall permit the Landlords ... to enter"*.

14. The letter dated 2nd May 2017 from the managing agents (HPML) to the Respondent purports to quote a section of the Respondent's lease by way of justification for its subsequent comments regarding access to the Property. In doing so they refer to paragraph 3(6), but neither the Original Lease nor the Current Lease contains a paragraph 3(6). Furthermore, the wording quoted is not to be found in either the Original Lease or the Current Lease.

15. After stating that they are arranging access for all the flats in the building and after purporting to quote from the Respondent's lease HPML then state *"We will give you 7 days, from the date of this letter to give you time to make arrangements for somebody to let us in. We will be there at 11am on Friday 24th July 2017. If you could provide me with a name of a person I will be meeting, who can provide access I will be most grateful"*.

16. The next copy letter produced in evidence is a letter dated 14th July 2017 from the Applicant's solicitors to the Respondent. In it the Applicant's solicitors refer correctly to paragraph 6 of the Fourth Schedule to the Original Lease and state that by not having responded to HPML's letter of 2nd May 2017 the Respondent is in breach of covenant. They then go on to state that they are prepared to allow the Respondent a further 7 days to contact HPML to arrange a mutually convenient appointment and that unless she does so they will apply to the First-tier Tribunal for a determination that she is in breach of her lease.

17. On 20th December 2017 the Applicant's solicitors then wrote again to the Respondent stating, among other things, that she remained in breach of her lease by failing to allow access. Then on 7th March 2018 they wrote once again to the Respondent stating, among other things: *"My clients still require access to your flat. I must ask that you contact me within the next 7 days to confirm that you will allow access to my Clients' surveyor at any time within the following 14 days. I will then ask the surveyor to contact you direct."*

18. Taking HPML's letter of 2nd May 2017, whilst they failed to quote the Respondent's lease correctly they nevertheless made it clear that they were seeking access under the terms of her lease, and it is the case that her lease contains provisions allowing such access. The provisions wrongly quoted by HPML are fairly similar to the actual wording and therefore we do not consider that the Respondent should or would have been misled by the HPML's incorrect lease references. Of more significance is that HPML stated that they would be at the Property at 11am on Friday 24th July 2017 but then, seemingly, did not actually attend the Property. Presumably this was because they were awaiting the Respondent's confirmation that the time and date were convenient.

19. As regards the Applicant's solicitors' letter of 14th July 2017, that letter states as a fact that the Respondent's failure to respond to HPML's earlier letter was a breach of covenant. The letter then goes on to set a deadline of a further 7 days for the Respondent to take the initiative to arrange a mutually convenient appointment. As for their further letter of 20th December 2017, specifically in relation to the access issue this letter simply asserts that the Respondent remains in breach of her lease by failing to allow access. As for their further letter of 7th March 2018, the relevant section of this letter has been quoted above and amounts to a further request for the Respondent to make contact to arrange access.

20. The issue at the heart of this case is whether the Respondent's inaction in response to HPML's and the Applicant's solicitors' letters regarding access amounts to a breach of the covenant to *"permit the Landlords ... to enter"*. The evidence does not show that the Respondent has at any point actively refused access, whether in person, by telephone or in writing. Furthermore, there is no evidence that, having given reasonable notice, the Applicant then tried to gain access at the stipulated time but was unable to gain entry or was actively prevented from entering.

21. It is notable that HPML specified a particular date and time in their letter of 2nd May 2017 but then, seemingly, neither attempted to gain access nor tried to follow up in any other way. The Applicant then allowed the matter to drift until mid July 2017 when its solicitors wrote to the Respondent to raise the issue of access again but then did nothing further until December 2017. Again they raised the issue of access, but again they did nothing further until March 2018. The solicitors' letters themselves, aside from asserting that the Respondent was in breach of her lease, then placed the onus on the Respondent to do something proactive to make arrangements for access.

22. We are not satisfied that the Applicant has discharged its burden of proof to show that the Respondent is, or has been, in breach of covenant. The Applicant gave notice requiring access. The amount of notice has to be "reasonable in the circumstances" and on the basis of the evidence before us the date and time specified were reasonable in the circumstances. In a good landlord and tenant relationship it is to be expected that there will be communication between the parties to ensure that the date and time chosen are convenient, but clearly this is not such a relationship. Having specified a reasonable date and time and having not received a response the Applicant was then entitled to exercise its right of access. If the Respondent had either refused access at that point or not been available to permit entry then she would have been in breach of covenant. However, there was no refusal of access in correspondence and no attempt on the Applicant's part to gain entry at the reasonable time which it had already specified.

23. The Applicant's solicitors' letters do not assist the Applicant. First of all there are long gaps between letters, which indicate a somewhat relaxed approach to the issue of access. However, more fundamentally, at no point is access attempted and at no point is access refused, and the attempt to suggest to the

Respondent that she had an obligation to take active steps to arrange access was in our view misconceived.

24. Therefore, in conclusion, no breach has occurred of the covenant contained in paragraph 6 of the Fourth Schedule to the Original Lease (which now forms part of the Current Lease).

Cost applications

25. No cost applications have been made.

Name: Judge P Korn **Date:** 18th June 2018

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.