



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

Case Reference : **BIR/00CQ/LBC/2013/0008**

Property : **113 Rosemary Close, Tile Hill,
Coventry CV4 9NZ**

Applicant : **Whitefriars Housing Group
Limited**

Representative : **Alexander Bastin of Counsel**

Respondent : **Mr Mark Anthony Tew**

Representative : **Litigant in Person**

Type of Application : **Application for an Order that a
breach of covenant or a condition in
the lease has occurred (Section 168(4)
of the Commonhold and Leasehold
Reform Act 2002)**

Tribunal Members : **Judge Anthony Verduyn
Mr John Ravenhill
Mr Andrew Lavender**

**Date and venue of
Hearing** : **29th November 2013
Priory Court, Bull Street,
Birmingham**

Date of Decision : **30th January 2014**

DECISION

1. Pursuant to an application under Section 168(4) of the Commonhold and Leasehold Reform Act 2002, this Tribunal holds that the Applicant may serve a notice under Section 146(1) of the Law of Property Act 1925 (restriction on forfeiture) in respect of breaches by the Respondent of conditions or covenants in his lease, in particular of Clause 4(5) and paragraphs 1 and 8 of the Fourth Schedule to his lease, such breaches having been finally determined as having occurred, as appears below.

REASONS

2. The Applicant, Whitefriars Housing Group ("Whitefriars"), is a registered social landlord and freehold proprietor of a purpose built block of flats at Rosemary Close, which includes the flat of which the Respondent, Mr Mark Anthony Tew ("Mr Tew") is the tenant under a long lease. The application before the Tribunal is for an order under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 (the "2002 Act", a copy of Section 168 is appended.), that a breach of covenant or a condition in a lease has occurred. The application was made on 11th September 2013 and directions given on 1st October 2013. The background to the application is essentially uncontroversial:

- i) The lease is dated 6th June 1988 and made between the Council of the City of Coventry, Whitefriars' predecessor in title as Landlord, and Olwyn Eunice Tinson and Irene Chaytors, Mr Tew's predecessors in title. It is for a term of 125 years from 15th November 2004 at an annual rent of £10 ("the Lease"). The property, the subject of the Lease, is a one-bedroom second floor flat in a purpose built block ("the Property"). The lease is registered and the registered leasehold title (WM439711) shows Mr Tew paid £63,750 for the Property on 5th May 2006.

- ii) Clause 4 of the Lease contains covenants binding upon Mr Tew as successor in title to the original lessees which, at (5) requires him to: "Observe and perform the covenants and restrictions set out or specified in the Fourth Schedule hereto". The Fourth Schedule contains two restrictions relied upon by the Applicant in the following paragraphs:

- "1. Not to use or occupy the said Property nor permit the same to be used for any purpose whatsoever other than as a private residential flat in the occupation of one family only nor for any purpose from which a nuisance or annoyance can or might arise to the owners tenants and occupiers of any part of

the said Building or of any property in the neighbourhood nor for any illegal or immoral purpose"

"8. Not to permit any singing or instrumental music in the said Property nor use or permit or suffer to be used a wireless or television set or apparatus so as to be a nuisance or annoyance to the occupier or occupiers of any other part of the said Building nor place or keep any dustbin or other refuse container under or near any of the windows of the said Building"

3. The allegations against Mr Tew are controversial and have already been the subject of Court proceedings. The Applicant asserts that Mr Tew has broken the covenants contained in the paragraphs by causing nuisance and annoyance to the other tenants and occupiers of the building in which the property is situated. Two schedules of allegations are appended to Whitefriars' Statement of Case. The first schedule deals with a period between September 2008 and 27th February 2013, and the second between 28th June 2013 and 17th August 2013 ("the Schedules"). The application before the Tribunal was made on 11th September 2013. The allegations in the Schedules relate to a variety of matters including, importantly for the purposes of this application, the playing of music and the playing of a television and radio at loud volumes. Additionally, and again significantly, there are allegations of loud singing and drilling. The second schedule exclusively complains at loud sounds of banging, dragging sounds, slamming doors and the like, but these complaints also feature in the first schedule.
4. Between the periods of the two schedules, District Judge Ridgway on 28th May 2013 made a final injunction against Mr Tew prohibiting antisocial behaviour, primarily on the basis of noise. On the same occasion he found Mr Tew in breach of an interim injunction made by Her Honour Judge Fisher on 26th February 2013 and he was, therefore, in contempt of court. A transcript of the judgment has been provided, and the Tribunal notes that before District Judge Ridgway, both Whitefriars and Mr Tew were represented by Counsel (Mr Tew appeared before the Tribunal in person only). The detailed judgment repays some consideration: the District Judge was faced with 78 denied allegations (including verbal abuse and comments, as well as the matters identified above) and a number of others to which the response was them not being recalled by Mr Tew. Mr Tew was found to have "a profound dislike of his neighbours". The evidence of Ms Lynn Gillespie (an officer of Whitefriars), Ms Yvonne Robertson (a tenant living at No.107, directly below the Property) and Ms Lauren Dunn (a tenant living directly above the Property) was accepted. The District Judge dismissed a partial alibi defence and rejected the contention that the noise was substantially attributable to building works: "Therefore, on the balance of probability, I find that the allegations in the Scott Schedule [i.e. the earlier of the two schedules in this application] are in substance proven and that the defendant [Mr Tew] has for a long time, but especially from the middle of 2012 to date, regularly, and I find deliberately, been making noise and I find it was, on the balance of probability, deliberately done to annoy his

neighbours for whom he has developed a profound and deep-seated dislike." The injunction followed under the terms of Section 153A to C of the Housing Act 1996 (as amended). This Tribunal notes that the Housing Act 1996 relates to anti-social behaviour, rather than the enforcement of the covenants in the Lease. The resulting court Order referred to the allegations in the Schedule being "substantially proven", although the District Judge for sound practical reasons was not invited to and did not address in detail every allegation made. The finding of contempt of court did proceed upon the proof of specific allegations between 26th February 2013 and 10th March 2013, which related to making banging noises and other loud noises, including shouting.

5. The Tribunal is invited by Whitefriars to treat all allegations to 28th May 2013 as having "been the subject of determination by a Court" under Section 168(5)(b) of the 2002 Act. Allegations since then are the subject of evidence and the Applicant called Ms Lynn Gillespie to prove the content of a witness statement dated 14th October 2013 and Ms Yvonne Robertson to prove her witness statement dated 3 days earlier. No submissions or evidence was provided to the Tribunal by Mr Tew in advance of the hearing (save for submission in support of a rejected application for an adjournment), even though he was directed to supply to the Tribunal by 30th October 2013 a full statement in response to the application, any signed witness statement of fact, any legal submissions and "any other documents upon which the respondent wishes to rely at the hearing, not already provided by the applicant". The directions noted that the Tribunal may decline to hear evidence from any witness who has not provided a statement in accordance with the directions.
6. The Property was not inspected by the Tribunal because the allegations relate to personal conduct on the Property and the physical structure, state or condition of the Property is not relevant to the determination of the issues raised.
7. At the hearing, Counsel for Whitefriars contended that, in respect of findings of fact made by District Judge Ridgway, if Section 168(5)(b) did not apply there was an issue estoppel, because the findings were made in proceedings between the same parties on issues relevant to each set of proceedings. Further, it was an abuse of process now to challenge findings which were not appealed following the prior judgment. It was asserted that paragraph 1 of the Fourth Schedule was broken insofar as there was use of the Property "for any purpose" meaning from which a nuisance or annoyance arose. The first part of paragraph 8 was also obviously on point. Counsel also stated that Ms Dunn would not be called in support of the application because she had since moved, but the witnesses who had provided statements were available to give evidence.
8. Mr Tew made some opening submissions to the effect that he was in the process of selling the Property. He explained the banging and drilling noises as emanating from scaffolding that had been erected outside the Property. He denied all allegations of breach.

9. Ms Lynn Gillespie, tenancy enforcement officer, confirmed the content of her statement. She thereby confirmed the collection on 1st July 2013 of diary sheets filled in by Ms Yvonne Robertson and recording noise nuisance. She also listened to some recordings of noise which was very loud and audible over the sound from Ms Robertson's television. Further diary sheets were received in August 2013 and Ms Robertson, who complained to her of stress and lack of sleep, also stated she was staying away from her home due to the noise nuisance. On 11th October 2013, when visiting, Ms Gillespie directly witnessed banging noise at 3.10 pm made on the balcony railings of the Property. She also took the opportunity to listen to recordings made on 26th June 2013. Three diary sheets, detailing noise nuisance between 15th October and 23rd November 2013 were added to the application bundle.
10. This evidence was unchallenged by Mr Tew who, instead, asserted that he had given up work because of the proceedings. Ms Gillespie responded by saying she had seen him at Coventry County Court the previous week, when dealing with an injunction to obtain access for a gas inspection, and had understood that he was leaving there to return to work.
11. Ms Yvonne Robertson, then gave evidence, confirming her witness statement and the diary sheets recording her complaints at noise nuisance. This included a large number of allegations concerning loud hammering, banging and thudding, but also loud television on 28th June 2013 between 10 pm and 11.10 pm. Although clearly upset, Ms Robertson was able to deal with questions from Mr Tew mediated through the Chairman of the Tribunal to minimise distress and ensure that questions were properly formulated. She insisted her diary sheets were accurate and that noise, including drilling noise, came from the Property and not outside.
12. Whilst Mr Tew had not provided a statement to the Tribunal, given the significance of the proceedings to the retention of his home, the Tribunal permitted him to give evidence. The Tribunal did not permit him to adduce documents which he stated related to an alibi, because these had not been disclosed (despite the direction) and amounted to an ambush of Whitefriars. Further, if adduced, they would have denied Whitefriars the opportunity to produce any evidence challenging them. It should be noted that, although not represented at the hearing, Mr Tew had solicitors write on his behalf to the Tribunal and could, therefore, have taken advice on disclosure of documents, had he so chosen. Argument from Mr Tew that he had focused on selling the Property was not considered a good excuse for failing to provide documents before the hearing itself.
13. In evidence Mr Tew denied the allegations asserting that he had a 19-inch television in his kitchen, but only played it at low volume. He accepted he was up early in the morning, but asserted that the allegations against him at all times of day were ludicrous. Mr Tew was cross-examined on his assertions that he was at work when noise was

caused, but maintained that his employers checked his whereabouts by telephone and he could not return home without a lift. Mr Tew insisted that he had given up work on 11th November 2013. He accepted he was at Coventry County Court, but denied that he had said he left there to return to work. He insisted that noise allegations were fabrications, noise came from outside and that there was a conspiracy against him as a long leaseholder.

14. In closing, Whitefriars invited the Tribunal to accept the evidence adduced of breach of covenant and rejection of the allegation of fabrication. Mr Tew continued to describe his current circumstances as a "living hell", and expressed his desire to move on.
15. The Tribunal having considered all the material before it, finds as follows:
16. The judgment and orders of District Judge Ridgway of 28th May 2013 did not finally determine that a breach of covenant or condition in the Lease had occurred within the meaning of Clause 168(2)(c) of the 2002 Act because the District Judge was making findings of fact relating to the Housing Act 1996 application and did not address or make findings in terms in relation to the Lease itself. Any bar to application by reason of prior determination by the Court under Section 168(5)(b) does not apply accordingly (and would not apply to matters after 28th May 2013 in any event). The matter of breach was simply not before the District Judge. The matter is, however, before this Tribunal pursuant to a proper application made under Section 168(4) of the 2002 Act.
17. District Judge Ridgway dealt with all matters of fact that were before this Tribunal to 28th May 2013. Given these facts were determined in favour of Whitefriars by that Judge and are not the subject of appeal, there is an issue estoppel arising in relation to them and Mr Tew cannot now simply gainsay those findings. Even if this Tribunal were wrong in finding such an estoppel, on the balance of probabilities the facts complained of to 28th May 2013 were made out in any event insofar as the Tribunal has no hesitation in accepting the evidence of Ms Gillespie and Ms Robertson. Each of them gave evidence in a straight-forward and compelling manner, supported by the content of the records made at the time of the incidents concerned. The Tribunal considers that there is no evidence that Whitefriars, or Ms Gillespie, has any bias against long leaseholders in general. Ms Gillespie's evidence significantly includes her own direct experience of an example of the noise complained of by Ms Robertson. The Tribunal is satisfied that the distress suffered by Ms Robertson in particular was also genuine and caused by the behaviour of Mr Tew which constituted noise nuisance and was an annoyance. This includes the complaints at loud music, television and radio. Mr Tew's evidence, by contrast, was sweeping in its denials but did not have the appearance of being truthful. Whilst allowance has to be made for his position as a litigant in person, the reality was that he had no real challenge to the contentions made against him. His assertion that complaints were made at times that he was at work did not address

many of the incidents complained of, is uncorroborated or otherwise evidence and is not accepted by the Tribunal (as it was also not accepted by the District Judge). It follows that the complaints made for the period before and after 28th May 2013 are made out on the balance of probabilities.

18. Whilst paragraph 1 of the Fourth Schedule is somewhat clumsily drafted, the Tribunal finds that it was nevertheless broken in that Mr Tew was using the Property for a "purpose from which a nuisance or annoyance can or might arise to the owners tenants and occupiers of any part of the said Building", in that he was using the Property deliberately to antagonise immediate neighbours. If that were not sufficient in itself and at those neighbours' complaint, it is certainly a purpose from which nuisance or annoyance might arise to others protected by the paragraph. Paragraph 8 is clearly broken by the repeated loud playing of the radio (wireless) and television. An incident of singing is also proven so as to constitute a breach. The use of a drill to make noise may also in this context constitute use of apparatus.
19. This being a final determination that the breaches have occurred, in accordance with Section 168(2)(a), Whitefriars, may now serve a notice under Section 146(1) of the Law of Property Act 1925 in respect of the breaches by Mr Tew after the end of the period of 14 days after the day on which this final determination is made, that is the date given below.
20. If any party is dissatisfied with this decision application may be made for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be made within 28 days of this decision (Rule 52 (2)) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Judge Anthony Verduyn

Dated 30th January 2014

Appendix

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 (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 the appropriate 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.

(6) For the purposes of subsection (4), “appropriate tribunal” means—

(a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) in relation to a dwelling in Wales, a leasehold valuation tribunal.

[End]