FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/38UB/LBC/2015/0014**
Property	:	**Flat 3, 88 West Street, Banbury, Oxfordshire, OX16 3HD**
Applicant	:	**Varennes Developments Limited**
Representative	:	**Mr A Satterly**
Respondent	:	**Miss E E Barlow**
Representative	:	**Unrepresented**
Type of Application	:	**Determination of an alleged breach of covenant**
Tribunal	:	**Mrs H C Bowers MRICS** **Judge J Oxlade**
Date and venue of Determination	:	**Wednesday 13 January 2016** **Rye Hill Golf Course, Milcombe, Banbury, Oxfordshire, OX15 4RU**
Date of Reasons	:	**21 January 2016**

DECISION

The Tribunal finds that the Respondent has been in breach of the terms of her lease:

- by reason of the findings below the Respondent has been in breach of Schedule 8, paragraph 9;
- by reason of the findings below the Respondent has been in breach of Schedule 4, Part II, paragraph 6;
- by reason of the findings below the Respondent has been in breach of Clause 5;
- by reason of the findings below the Respondent has been in breach of

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Schedule 4, Part II, paragraph 7;

- by reason of the findings below the Respondent has been in breach of the Deed of Covenant dated 12th August 2013.

Background:

(1) The Applicant landlord seeks a determination, under subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act"), that the Respondent tenant is in breach of the lease dated 16th December 1988 under which Flat 3, 88, West Street, Banbury, OX16 3HD ("the subject property") is held.

(2) An application was dated 25 August 2015, requiring a determination of a breach of covenant. Amended Directions were issued on 7 September 2015.

(3) It is maintained that the Respondent is in breach of the subject lease in respect of the parking of a vehicle on a gravel driveway at the property ('the parking space") and in respect of a water leak from Flat 3 into Flat 2 and Flat 1. It is claimed that these issues caused nuisance and interference with the comfortable enjoyment of the tenant of flat 2. To provide some context it should be noted that this is the fourth application that has been made by the Applicant in respect of breaches of lease by the Respondent.

The Law:

(4) Section 168 of the 2002 Act provides 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 (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) .....
(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."

Terms of the Lease:

(5) The "subject lease" is dated 16th December 1988 and was originally between Varennes Developments Limited as Lessor; 88 West Street (Banbury) Management Company Limited as the Management Company and Susan Lynn Sargent as the Lessee. The bundle submitted to the Tribunal included a Deed of Covenant relating to the subject property and this indicated that the lease was assigned to the Respondent on 12th August 2013. Under this Deed Miss Barlow covenants to observe and perform the covenants and stipulations within the lease.

(6) The clauses that the Applicant claims that the Respondent has breached are set out below:

> Clause 5 states that "*The lessee covenants with the Lessor and as a separate covenant with the lessees from time to time of the other flats within the House and as a separate covenant with the Management Company that the Lessee will at all times hereafter observe and perform the restrictions stipulations and covenants set out in Part I and Part II of the Fourth Schedule hereto*".
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> The Fourth Schedule sets out the Lessee's covenants. In particular the Fourth Schedule, Part I (5) states "*Not to use or permit the use of the Flat or any part thereof for any illegal or immoral activity or in any manner that may be or become a nuisance or annoyance to the lessees owners or occupiers of any other flat in the house or neighbouring properties not to use any unsuppressed electrical appliances.*"
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> The Fourth Schedule, Part II sets out the Lessee's covenants with the Lessor, the Management Company and the Lessee of the other flats in the House. Paragraph 6 states "*Not to do or permit to be done upon or in connection with the Flat anything which shall be or taken to be a nuisance annoyance disturbance or cause damage to the Lessor or the Lessor's Tenants or to any neighbouring adjoining or adjacent property or the Owner or Occupiers thereof*".
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> The Fourth Schedule, Part II, (7) states "*To observe the Regulations specified in the Eighth Schedule hereto and such other reasonable regulations consistent with the terms of this Lease or which the Management Company may give notice in writing*".
>
> The Eighth Schedule sets out the Regulations. The Eighth Schedule (2) states "*Not to hinder or obstruct in any manner the passage of persons entitled to use the same over any common external paths leading to the entrance of the House nor to obstruct or otherwise interfere with the same except for the reason of immediate repair of any Conduit running under the same*".

The Eighth Schedule (9) states *"Not to suffer or permit any water or liquid to escape from the Flat or permeate the House and in event of such happening the Lessee will immediately at their own expense rectify and make good all damage and injury caused to any part or parts of the House providing that all rights otherwise to which the Lessor and the lessees of the other flats in the House may be entitled shall remain unaffected and capable of being enforced".*

The Eighth Schedule (12) states *"The Lessee shall not keep or place or permit or suffer to be kept or placed any bicycle perambulator or other articles of any description or any obstruction in the common access areas of or the grounds of the House nor do or permit to be done any act or thing whatsoever in or about the Flat or the House that may be or become dangerous or a nuisance or cause scandal or annoyance to the Lessor the Management Company or any of the occupiers of the other flats at least once in every two month during the Term".*

The Eighth Schedule (16) states *"Not to use the parking space included in the demise otherwise than for the parking of one private motor car or motor cycle and not to carry out any mechanical or other works to any such private motor car or motor cycle whilst parked in the said parking space".*

(7) The lease defines House as meaning "the whole building of which the Flat forms part". In the First Schedule the lease defines the Flat as including the parking space shown hatched red on the lease plan (the driveway). In the Third Schedule of the lease the exceptions and reservations are detailed. The lease gives rights of access over the parking space and along any common external paths leading to the House.

Inspection:

(8) The current Tribunal has made two previous decisions in respect of this property. Therefore the Tribunal considered that it was not necessary to make any further inspection and would consider this matter from the representations and evidence submitted at the hearing.

(9) As described in previous decisions, the building is an end terrace house on three floors that has been converted into three flats. To the side of the subject property is a gravel driveway ('the parking space") that provides access to the three flats. This driveway is demised to the top floor flat (Flat 3). The ground floor flat has a separate entrance door and access to the first and second floor flats is from a door on the ground floor and an internal staircase. The hallway and stairs are also included in the demise of the top floor flat. The

driveway area provides access to the entrance door serving Flats 2 and 3 and to the separate entrance door for Flat 1.

Hearing:

(10) Written representations were received from the Applicant, but no representations were received from the Respondent. A hearing was held on Wednesday 13 January 2016 at 11.00 am, at the Rye Hill Golf Course, Milcombe, Banbury, Oxfordshire, OX15 4RU. Mr Satterly attended on behalf of Varennes Development Limited. Also at the hearing was Mrs Heritage, the tenant of Flat 2. Miss Barlow did not attend the hearing and had not provided any representations in respect of this case. Mrs Heritage explained that Miss Barlow had informed her on the previous evening that she was unable to attend the hearing due to her work commitments. In coming to its decision the Tribunal had consideration of the written submissions and evidence, and the evidence and oral submissions made at the hearing.

Applicants' Case

(11) Mr Satterly set out the relevant terms of the lease that are claimed to have been breached. He then explained that from the evidence of Mrs Heritage and various documents, that there had been a number of breaches of the subject lease. It is claimed that these breaches occurred during a period from late May 2015 up to the date of the application, 25 August 2015.

(12) Mrs Heritage had provided two written witness statements. One dated 17 August 2015 dealt with the issue of the parking of the vehicle on the gravel area. The second witness statement is dated 30 August 2015 and dealt with the problem of water ingress to her flat. In oral evidence Mrs Heritage explained that the vehicle, a campervan had been parked continuously on the gravel driveway from late May/early June 2015 until 22 July 2015. There was a photograph in the bundle that showed the camper van parked in situ throughout the period and although Mrs Heritage had not taken the photograph, she was able to talk about it. She described that the van was parked approximately one foot to the left hand side of the door and that it was not parked directly in front. In describing her efforts to get access through the door she explained that the lock was on the left hand side, adjacent to the van. To gain access she had to manoeuvre to the side at an angle and her arm brushed the side of the campervan. When the Tribunal suggested that the door width would be approximately 2.5 – 3 feet and the extra width of one foot that she described would suggest an access width of approximately 3.5 to 4 feet, she seemed to accept that would be the width of the access. She stated that her daughter came to visit with her two children, her grandson, then approximately 6 months old, transported in a large, single buggy. Whilst her daughter struggled, she was able to get the buggy passed the campervan, along

the side of the house, up to and through the front door. She was then able to leave the buggy in the ground floor hallway.

(13) When asked about the nuisance and annoyance, Mrs Heritage described that as the camper van was parked directly in front of the hallway window, the light was obscured. Therefore she had to use the electrical light in the hallway/stairwell and this extended to when she undertook the cleaning of these areas.

(14.) Mrs Heritage explained that she had to walk around the campervan to gain access to the communal shed. She used the communal shed for old items to be taken to the refuse and large cardboard boxes. However, it was not used for normal household rubbish.

(15.) In respect of the escape of water issue, Mrs Heritage confirmed that she noticed the damp patch on 19 June 2015. It was only on 25 June 2016 that she observed water on the light fitting and that water falling onto the floor and furniture. Subsequently she did notice that there was damp in the airing cupboard and had to use a bowl to collect the water. It was suggested that the damp ingress was related to the use of the washing machine, but Mrs Heritage stated that she had not particularly noticed any relationship between the washing machine being used and the water ingress. However, at one stage, whilst Miss Barlow was away a friend was house sitting for her. During this time the house sitter used the washing machine and water started to ingress to Flat 2 again. Miss Barlow had told Mrs Heritage that she would arrange for a plumber to address problems with the washing machine. Mrs Heritage has not observed anyone in attendance, although she acknowledged that she is often out of the property and at work. It was confirmed that Miss Barlow had not carried out any works to Flat 2 to remedy the damage that had been caused.

(16) Mr Satterly had not provided a witness statement but he did make some statements of fact. He explained that there had been two sources of water leakage from Miss Barlow's flat. The first was due to a defective water tank and ballcock. The second cause resulted from a poorly fitted washing machine where the water supply pipe had a missing seal.

(17.) In addition to the witness statements, there was email correspondence from Charlotte Foulds, the owner of the campervan; Mr Burr who provided photographs of the water damage to the interior of Flat 2; an email exchange between Miss Barlow and Mrs Heritage; various letters from the landlord to Miss Barlow and an email exchange between Mr Satterly and Mrs Horth an Environmental Health Officer with Cherwell District Council and an undated and un-ascribed photograph of a camper van parked on the gravel parking area. The photographs of the interior of Flat 2 showed signs of damp penetration to the walls and ceiling and around a light switch of the flat. The

photograph of a small camper van showed it parked on the gravel area with some space to the right hand side, giving access to the main doors of Flat 1 and the communal door serving Flats 2 and 3. It also showed the van parked directly outside the ground floor window, but the door to the communal shed was not blocked. The Applicant wished to submit more recent correspondence from Mrs Horth of Cherwell District Council that further explained the problem and the repairs that were carried out. This letter was dated 24 November 2015. The Tribunal declined to see this correspondence as it had not been submitted prior to the hearing, when it was clearly available and that if admitted it was a document that Miss Barlow would not have had an opportunity to see and to comment upon.

Submissions:

(15) In respect of the camper van, Mr Satterly stated that this was not a 'private motor car' and accordingly, the parking of the vehicle on the parking area was a breach of Eighth Schedule, paragraph 16. The Tribunal drew his attention to the wording of the Second Schedule, paragraph 5, which stated that the leaseholder had the right "*to park one motor vehicle in the car parking space hatched red*". Mr Satterly suggested that the provisions in the Eighth Schedule, paragraph 16, qualified this wording. In the alternative he suggested that the parking of the camper van in this area obstructed the access for the occupiers of Flats 1 and 2. It was a large vehicle and how it was parked caused an obstruction. Mr Satterly stated that there were no specific defined footpaths or common areas. The Third Schedule, paragraph 5 sets out the reservations to allow occupiers to have access over the driveway and "any common external paths". As there are no external common parts then the rights of access are over the driveway. He then suggested that the vehicle caused an obstruction and therefore was a breach of Eighth Schedule paragraph 2. Whether or not the vehicle was a private car, he contended that the presence of the vehicle caused a nuisance and annoyance and there was a breach of Fourth Schedule, Part I, paragraph 5 and the similar clause in the Fourth Schedule, Part II, paragraph 6. As a consequence of these specific breaches, the Respondent was also in breach of clause 5; Fourth Schedule, Part II, paragraph 7 and the Deed of Covenant.

(16) The Applicant's submissions about the water leak were that Miss Barlow had allowed the water to escape from her Flat and into Flats 2 and 3. Mr Satterly referred to the evidence from Mrs Heritage and to other documentation in the Tribunal's bundle. He also referred to a 'facebook' exchanged that was copied into the bundle, which he asserted was an admission of the breach.

(17) It was argued that there were two obligations on the Respondent. The first was not to allow water to escape from her Flat and to permeate into the

House. From the evidence presented it is alleged that this clause had been breached. There had been numerous requests from the landlord on 22 June, 25 July and 28 July 2015 and copied into the bundle that requested that Miss Barlow undertook the work. However, no work was carried out by Miss Barlow. The second obligation was that if such an escape occurred, that the Respondent should rectify the damage. These obligations were set out in the Eighth Schedule, paragraph 9. It was further submitted that the water ingress into Flat 2 had caused a nuisance and annoyance to the other tenants. Accordingly there was a breach of the Fourth Schedule, Part I, paragraph 5. In response to questions from the Tribunal, Mr Satterly did not think that this clause was limited by the wording at the end of the clause, "*not to use any unsuppressed electrical appliances*". He suggested that the Fourth Schedule, Part II, paragraph 6 was a wider provision and that the actions of Miss Barlow had caused a breach of this provision of the lease. Finally, if the breach of those clauses were found to have occurred, there would be the consequential breaches of clause 5; Fourth Schedule, Part II, paragraph 7 and the Deed of Covenant.

Respondent's Case

(18) Miss Barlow did not attend the hearing, and has not provided any written representations.

Tribunal's Findings of Fact:

(19) The Tribunal finds that during the period of late May/early June 2015 to 22 July 2015 a camper van was parked on the drive outside of 88 West Street.

(20) The Tribunal finds that at least on 19 June and 25 June 2015 there was water entering Flat 2 from Flat 3. The Tribunal also finds that Miss Barlow did not rectify the damage caused by the date of the application, namely 25 August 2015. It was explained at the hearing that we would not consider any evidence of any continuing breach subsequent to the date of the application and so have made no findings of facts in respect of any event after 25 August 2015. The application form made reference to water ingress into Flat 1. However, no specific evidence was adduced on that point and therefore the Tribunal make no finding that there was any ingress of water into Flat 1.

Findings of Breach

(21) The next stage is for the Tribunal to consider those facts in the context of the lease clauses in order to determine whether there have been any breaches of covenant.

(22) The Tribunal disagree with Mr Satterly in his interpretation of the lease that the wording of the Eighth Schedule, paragraph 16 qualified the wording of the Second Schedule, paragraph 6. The Second Schedule sets out the rights given to the leaseholder and gives the right to park "a motor **vehicle**". The provisions in the Eighth Schedule are the regulations for the property. If the wording of the Eighth Schedule was to be read as to qualify the wording of the Second Schedule, - as argued by Mr Satterly - this would have the effect of derogating from grant. There is a contradiction in these clauses and in such circumstances it should be read as 'contra proferentum', namely construed least favourably to the person putting forward the document, in this case the Applicant. Accordingly, the Tribunal find that there is no breach of Eighth Schedule, paragraph 16.

(22) Mr Satterly's second point was that even if the campervan was a vehicle and so permitted under the terms of the lease, given the size and the position of the vehicle it was a nuisance and annoyance. However, from the evidence given by Mrs Heritage the vehicle did not block the access to the main door serving Flats 2 and 3. She explained that her daughter was able to access the main door with a large single buggy, but stated that it was a struggle. It was also observed from the photograph that the door to the storage shed was not blocked. It appears that there was a gap of around four feet that gave access to that door. Whilst it was noted that Mrs Heritage's shoulder brushed the vehicle as she was opening the door and that she had to walk around the vehicle to gain access to the storage shed, these are not issues that would reasonably amount to a nuisance and an annoyance. From her evidence the storage shed is not used on a regular basis. Miss Barlow has the right to park a vehicle on the drive that is demised to her and the other occupiers of the House could continue their normal activities. As to the lack of light from the window serving the communal hallway and stairs, Mrs Heritage stated that she used the electrical light when she needed to use the stairs or to undertake any cleaning of these communal areas. Whilst these matters may be seen as a slight irritation, the Tribunal does not find that these could reasonably give rise to a finding of nuisance and an annoyance in the light of a reasonably minded individual. Accordingly, the Tribunal determines that there is no nuisance and annoyance and that the covenants in the Fourth Schedule, Part I, paragraph 5 and Fourth Schedule, Part II, paragraph 6 are not breached. Consequentially, the Tribunal finds that there is no breach of clause 5; the Fourth Schedule, Part II, paragraph 7 and the Deed of Covenant.

(23) In paragraph 20, above, The Tribunal made a finding of fact that water had escaped from Flat 3 on at least two occasions and that up to the date of the application, the Respondent had taken no steps to rectify any damage that occurred as a result of the water leak. Accordingly, the Tribunal find that the Respondent is in breach of Eighth Schedule, paragraph 9. The Tribunal

considered the wording of the provision in the Fourth Schedule, Part I, paragraph 5, namely "not to use any unsuppressed electrical appliances". The Tribunal finds that this additional wording renders the provision to be ambiguous and does not relate to the escape of water from any Flat. Given that view, the Tribunal makes the determination that the Respondent is not in breach of that clause of the lease. However, the wording of the Fourth Schedule, Part II, paragraph 5, is far wider and the Tribunal accepts that the leak from Flat 3 has caused a nuisance, annoyance and a disturbance to the occupier of Flat 2 and hence, Miss Barlow is in breach of this provision. As a consequence of these findings, the Tribunal also finds that there are breaches of clause 5; the Fourth Schedule, Part 2, paragraph 7 and the Deed of Covenant.

(24.) In the application form, the Applicant makes reference to an "admission of breach" as to both factual scenarios. The email/text correspondence between Miss Barlow and Mrs Heritage would appear to amount to an admission that the factual events occurred. However, a distinction needs to be made between an admission as to the facts in this case and any admission that these circumstances amounted to a breach. The Tribunal finds that there was no admission from Miss Barlow as to the activities giving rise to a breach of the lease.

(25) In summary the Tribunal makes the following findings in respect of the terms of the lease:

- by reason of the findings in paragraph 23 above the Respondent has been in breach of Schedule 8, paragraph 9;
- by reason of the findings in paragraph 23 above, the Respondent has been in breach of Schedule 4, Part II, paragraph 6;
- by reason of the findings made in paragraph 23 above, the Respondent has been in breach of Clause 5;
- by reason of the findings in paragraph 23 above, the Respondent has been in breach of Schedule 4, Part II, paragraph 7;
- by reason of the findings in paragraph 23 above, the Respondent has been in breach of the Deed of Covenant dated 12th August 2013.

Name: H C Bowers **Date:** 21 January 2016

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office that has been dealing with the case.

2. 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.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. 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.