FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	LON/00AT/LBC/2015/0006
Property	:	90 Chiswick Lane London W4 2LA
Applicant	:	Lashbrook Properties Ltd
Representative	:	Wallace LLP, solicitors
Appearances for Applicant:	:	(1) Mr Daniel Dovar, counsel (2) Mr Martin Greenfield (witness)
Respondent	:	Ms Alison De Castella
Representative	:	In Person
Appearances for Respondent	:	Ms Alison De Castella
Type of Application	:	Application for a determination that a breach of covenant of a lease has occurred

Tribunal Members	:	(1) Judge A Vance (2) Mr C P Gowman MCIEH MCMI
Date and venue of Hearing	:	13 January 2016 at 10 Alfred Place, London WC1E 7LR
Date of Decision	:	26 January 2016

DECISION

Decision of the Tribunal

1. The tribunal determines that the Respondent has not breached the covenant set out in clause 7 of Part 1 of the Fifth Schedule of her lease.

Introduction

2. The Applicant seeks a determination pursuant to s.168 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the Respondent has breached the covenant set out in clause 7 in Part 1 of the Fifth Schedule of her lease of the Ground Floor Flat, 90 Chiswick Lane London W4 2LA ("the Flat").

3. The Applicant is the freehold owner of 90 Chiswick Lane, London W4 2LA ("the Building"). Its title was registered at HM Land Registry on 10 December 1996. The Building is a house converted into two flats.

4. The Respondent's leasehold interest was registered at HM Land Registry under title number NGL561459 on 20 May 1993. Her lease is dated 1 September 1986 and was entered into by (1) Shipston Industrial Investments Limited and (2) Alistair Roxburgh Brown and Alisa Anne Will Brown ("the Lease").

5. In an earlier application made under s.168 of the 2002 Act a differently constituted Tribunal determined, in a decision dated 26 May 2015, that the Respondent had:

   (i) breached clause (1) in Part II of the Lease in that she had failed to keep certain areas of the Flat in good and substantial repair and condition. The breaches of covenant related to plaster, a fireplace, sash windows, the kitchen rear external door, sanitary fittings in the bathroom and the front and rear gardens;

   (ii) breached clause (2) in Part II of the Lease in that she had failed to paint areas of woodwork for longer than seven years; and

   (iii) breached clause (5) in Part II of the Lease in that she had allowed rubbish to accumulate at the Property which may grow to become a nuisance to the occupiers of neighbouring of adjacent property.

6. The Applicant states that on 8 July 2015 it served a notice on the Respondent under section 146 Law of Property Act 1925 requiring the Respondent to remedy the breaches of covenant identified in the Tribunal's decision of 26 May 2015 within a reasonable period of time.

7. In a letter dated 14 October 2015 Mr Martin Greenfield, a director of the Applicant company, wrote to the Respondent in the following terms:

> *"Re: 90 Chiswick Lane W4 2LA*
>
> *I refer to the Fifth Schedule part 1 sub section 7 of your Lease of the above premises which requires you as the Lessee to allow the Lessor to view the state of repair of the premises.*
>
> *I therefore require access to your flat on Thursday 29th October 2015 at 11.30 am or Sunday 1st November 2015 at 11.30am. Please inform me which date is suitable."*

8. Mr Greenfield's evidence to this Tribunal was that the letter of 14 October 2015 was sent to the address of the Flat and that a copy was sent to the Respondent's residential address at 143 Tyneham Road London SW11 5XG. The Applicant received no response from the Respondent to this letter and Mr Greenfield's evidence was that when he attended the Building on 29 October and 1 November the Respondent was not present and so his intended inspection of the Flat did not take place.

9. The Applicant's position is that the Respondent's failure to respond to his request for access contained in his letter of 14 October 2015 constitutes a breach of the covenant in clause 7 of Part 1 of the Fifth Schedule of her lease which provides as follows:

> *(7) To permit the Lessor and its duly authorised Surveyors or Agents with or without workmen at all reasonable times by prior appointment (except in case of emergency) to enter into and upon the Demised Premises or any part thereof for the purposes of viewing and examining the state of repair thereof.*

10. This application was made on 4 November 2015. Directions were issued by the Tribunal on 17 November 2015. The application was initially considered to be suitable for determination on the papers but by further directions dated 8 January 2016 was listed for hearing as it was considered that there were disputed facts that needed to be tested by cross-examination.

Inspection

11. Neither party requested that the tribunal inspect the Flat or Building and the tribunal did not consider this to be necessary or proportionate.

The Hearing

12. The Tribunal heard oral evidence from Mr Greenfield and the Respondent. Witness statements from both were included in the hearing bundle.

13. Two additional documents were provided by the Applicant at the hearing and the Respondent did not object to the Applicant relying upon them in evidence. These documents were a print out of a web-page entry for a company called DeCas Design Solutions printed on 3 November 2014 and a copy of an email from the Respondent to Mr Greenfield dated 6 August 2014.

The Applicants' Case

14. At paragraph 8 of his supplementary witness statement dated 4 January 2016 Mr Greenfield states that as well as positing the letter of 14 October 2015 to the Respondent he also emailed a copy to her. In oral evidence to us he stated that he sent two emails to the Respondent enclosing a copy of the letter of 14 October 2015. One was sent to the Yahoo email address that the Respondent used to send her email of 6 August 2014 to him. In addition, he sent an email to *mail@decas design.com*, the email address stated on the Decas Design Solutions web page. He did so following an internet search against the Respondent's name which resulted in a hit for this page in which the Respondent is identified as being the relevant contact address for the company.

15. No copy of either of the emails from Mr Greenfield to the Respondent enclosing a copy of the letter of 14 October 2015 was before the Tribunal.

16. In his supplementary witness statement and in oral evidence Mr Greenfield confirmed that he attended the Building on 29 October and 1 November but when there was no answer from the Flat he left the Building and waited in his car with his wife for approximately 30 minutes before knocking on the Flat door once again. He failed to gain access on either of those dates.

17. In his Mr Greenfield's view the Respondent simply chose to ignore his request for access. If the suggested dates were inconvenient then, he says, she could have informed him. If, as she suggests in her witness statement, she was travelling at the time of receipt, she could have notified him by email. In his view she was aware of his email address, having emailed him on numerous occasions in the past.

18. It was the Applicant's case that the Respondent's failure to respond to the 14 October 2015 constituted a breach of the covenant in clause 7 of Part 1 of the Fifth Schedule of the Lease.

The Respondent's Case

19. The Respondent's evidence was that Mr Greenfield's letter of 14 October 2015 was received by her at 143 Tyneham Road when she was out of London and that she did not see it until 21 October 2015 following her return. She explained in oral evidence that she works as an interior designer and that for most of the month of October she was in the north of England commuting between two work projects. She returned home on 20 October 2015 and read the letter the following day. She stated that she intended to contact Mr Greenfield to reschedule the appointment, as she could not meet him on either of the proposed dates, but acknowledges that she did not do so and that she let this slip due to other commitments.

20. She stated that she subsequently visited the Flat on 5 November 2015 and was told by her neighbour that Mr Greenfield had visited the Building the previous Sunday with a woman, leaving half an hour later. She believed that Mr Greenfield possessed a key for the Flat and therefore assumed that he had let himself into the Flat during this visit and carried out the inspection. She then received this application very shortly afterwards.

21. The Respondent stated that she did not receive either of the two emails that Mr Greenfield stated he sent to her. Her evidence was that the Yahoo email account he used had become corrupted in August 2014 and that she has been unable to access it since then. Nor, she said, does she have any longer access to emails sent to the *mail@decas design.com* email address.

22. She states in her witness statement that she has now almost completed the work required to the Flat despite a delay caused by a leak from the upstairs flat which meant that redecoration works had to be delayed whilst walls and the ceiling dried out..

23. In addition, she does not oppose an inspection and discussions as to an appropriate date for this to take place were underway as at the date of the hearing before us. A letter from her solicitors to the Applicant's solicitors dated 6 January 2016 proposed three dates for an inspection in January. These were unsuitable and the Applicant's solicitors suggested three alternative dates in a letter of 7 January 2016. She is not, therefore opposing an inspection and discussions as to an appropriate date were underway as at the date of the hearing before us.

24. The Respondent denies that she has breached the covenant in clause 7 of Part 1 of the Fifth Schedule of the Lease and suggests that the two Tribunal applications made by the Applicant were attempts to harass her into selling her lease or to obtain forfeiture.

The Law

25. The relevant parts of s.168 of the Commonhold and Leasehold Reform Act 2002 Act are annexed to this decision.

Decision and Reasons

26. The Tribunal is not satisfied that the Respondent has breached the covenant in clause 7 of Part 1 of the Fifth Schedule of the Lease.

27. The covenant in question obliges the lessee to allow the Lessor entry to the Flat in order to view its state of repair *"at all reasonable times by prior appointment (except in case of emergency)"*. The Applicant does not contend that access was required as a result of an emergency and the Respondent does not contend that the proposed times of the inspection were unreasonable. The question for the Tribunal to determine is therefore whether or not there was *prior appointment* for an inspection to take place.

28. Mr Dovar submitted that the requirement for a *prior appointment* is met simply by the lessor providing *notice* to the lessee as to the date and time it wishes to inspect the Flat. In his submission it would be wrong to construe the clause so that a breach of covenant would only be established if there was first agreement between the parties as to a date and time for an inspection which the lessee then failed to comply with. To do so would, he suggested, render the words *"at all reasonable times"* redundant. In his submission appropriate notice had been given by Mr Greenfield in his letter of 14 October and the Respondent's failure to respond to that letter amounted to a breach of the covenant in clause 7 of Part 1 of the Fifth Schedule of the Lease.

29. We do not agree with Mr Dovar's submission. In the absence of any definition in the Lease as to the meaning to be attributed to the words *"by prior appointment"* and in the absence of any evidence as to the intention of the contracting parties to the Lease we consider the words should be given their ordinary and natural meaning. This, in our view, is that *prior appointment* in this context refers to an agreed arrangement between the parties as to when an inspection is to take place. In our view mere notice is not enough to constitute an appointment. It is only if an arrangement is made and the lessee then reneges on that agreement that a breach of this covenant can arguably be established.

30. We do not agree that this construction renders the words *"at all reasonable times"* (which immediately precede the words *"by prior appointment"*) redundant. In our view the wording of the clause indicates to both parties that when considering proposals for the date and time of an inspection it is intended that the inspection is

to take place at all reasonable times. Both parties should, therefore, have regard to that position when arranging the appointment.

31. If Mr Dovar's suggested construction is correct then a lessee's failure to respond to a lessor's notice of an intended inspection because he or she was on holiday when the notice was sent would automatically, through no fault of the lessee, amount to a breach of covenant. We do not consider that the contracting parties to the Lease would have intended such a stark outcome.

32. Even if Mr Dovar's submission were correct Mr Greenfield's letter of 14 October 2015 cannot be regarded as evidencing notice of an appointment given that he suggests two alternative dates for an inspection. We cannot see how this can realistically be construed as amounting to notice of a prior appointment for the purposes of the clause in question when the Respondent has no way of knowing on which of the two dates the inspection will take place. It is also clear in our view that the wording of his letter amounts to an enquiry rather than a giving of notice. If it was the latter there would have been no need for Mr Greenfield to end the letter by asking *"Please inform me which date is suitable".*

33. We derive support for our conclusion from the fact that there are two clauses in the Lease in which the lessor is granted a specific right of entry into the Flat both of which make the right contingent upon reasonable prior *notice* as opposed to prior *appointment.*

34. Clause 2 of the Fourth Schedule confers a right for the lessor to enter the Flat in order to carry out its obligations under the Sixth Schedule to the Lease (which includes the repair and renewal of the structure of the Building). The right is exercisable *"upon reasonable prior notice (except in emergency)".*

35. Clause 10 of the Fifth Schedule permits the lessor to enter the Flat in order to carry out repairs to any part of the Building *at all reasonable times upon prior notice in writing (except in case of emergency)"*

36. In both of these clauses the contracting parties to the Lease agreed to the lessor's right to enter the Flat upon the giving of reasonable prior notice to the lessor but without the need for there to be a prior appointment. If they had intended mere notice to be sufficient for the purposes of clause 7 of Part 1 of the Fifth Schedule of the Lease then, in our view, they would have said so. The inclusion of the words *"by prior appointment" as opposed to "upon reasonable prior notice"* in clause 7 indicate to us that this was not their intention and that what the clause requires is an agreed arrangement between the parties as to when an inspection is to take place.

37. This is entirely appropriate given that Clause 2 of the Fourth Schedule and Clause 10 of the Fifth Schedule concern the lessor's right to *enter* the Flat whereas clause 7 of Part 1 of the Fifth Schedule is a lessees covenant allowing the lessee to *inspect.* One can well understand why in the case of the former the contracting parties would have agreed to unilateral notice being sufficient for the lessor to exercise its right to

enter whereas the right to inspect requires consensus between the parties as to the date of inspection.

38. We considered the Respondent to be a reliable witness and accept her evidence that she received Mr Greenfield's letter of 14 October 2015 on her return from travelling on 21 October 2015. She has been frank in conceding that whilst she should have contacted Mr Greenfield upon reading his letter to arrange a more convenient date for his inspection that she failed to do so. It is important that she recognises the seriousness of being found in breach of covenant by the previous Tribunal and also that the service of a s.146 notice by the Applicant is a step towards potential forfeiture of her lease. As such, we are pleased to note that she has now taken steps to facilitate the requested inspection.

39. Nevertheless, despite her acknowledged failure to respond to the request contained in the letter of 14 October 2015 we do not accept, for the reasons stated above, that this amounted to a breach of the covenant at clause 7 of Part 1 of the Fifth Schedule of the Lease

Name: Amran Vance **Date:** 26 January 2016

ANNEX 1 - 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 which 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.

ANNEX 2

APPENDIX OF RELEVANT LEGISLATION

Commonhold and Leasehold Reform Act 2002

The relevant parts of s.168 Commonhold and Leasehold Reform Act 2002 ("the 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 (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.