FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/00ML/LBC/2019/0008**
Property	**:**	**Top Flat 48 Harrington Road, Brighton BN1 6RF**
Applicant	**:**	**Rachel Espinosa (Landlord)**
Representative	**:**	**In person**
Respondent	**:**	**Mr & Mrs Choudhry (Tenants)**
Representative	**:**	**Mr Choudhry**
Type of Application	**:**	**Breach of covenant**
Tribunal Members	**:**	**Judge F J Silverman Dip Fr LLM** **Mr N Robinson FRICS**
Date and venue of Hearing	**:**	**Brighton** **12 September 2019**
Date of Decision	**:**	**16 September 2019**

DECISION AND ORDER

Decision of the Tribunal

The Tribunal determines that the Respondent Tenants are in breach of covenant in relation to Clause 3 sub-clauses (6), (7), (14), (22) and (25) of the lease.

The Respondents are ordered to pay to the Applicant the sum of £100 representing reimbursement of the Tribunal application fee.

Reasons

1 The Applicant landlord sought a declaration from the Tribunal that the Respondent tenants were and remain in breach of covenants of their lease. Directions were issued by the Tribunal on 23 March and 17 June 2019.

2 The matter was heard by a Tribunal sitting in Brighton on 12 September 2019 at which the Applicant represented herself and the Respondents were represented by Mr Choudhry.

3 The Applicant landlord is the freeholder of the building known as 48 Harrington Road, Brighton BN1 6RF (the building) of which the First Floor Flat (the property) occupies the upper floor and roof space. A portion of the rear garden of the property is included in the demise. The Applicant lives in the remainder of the building consisting of the ground and lower ground floors.

4 The Respondents are the tenants of the property.

5 The lease under which the Respondents hold the property is dated 27 June 1989 (the lease) (page 45) as corrected by a deed of variation (page 32) and extended by a lease dated 30 May 2014 (page 78). The extended lease encompasses the covenants set out in the 1989 lease.

6 The Tribunal inspected the property on the morning of and immediately before the oral hearing. The property comprises a self-contained flat on the upper floor of a converted two storey semi-detached house in a quiet residential area on the edge of the city centre. The exterior of the building is in a poor condition and the front garden is untidy and neglected. Access to the property is through the main front door of the building (shared with the Applicant) and up a carpeted staircase. The main living accommodation of the property is found on the upper floor and comprises a kitchen, two bedrooms, a large living/dining room and bathroom. A further staircase leads to two bedrooms and a bathroom in the roof space. Three velux windows have been set in to the rear of the roof and two to the front. At the side of the front of the property there is a locked gate (operated by PIN code) giving access to the side passage leading to the back garden. The part of the garden nearest to the building forms part of the Applicant's own demise and is subject to a right of way for the Respondents to access their garden to the rear together with access to a vehicular gate and public road. The Applicant's garden is on a raised level about

two feet above the rear garden and wooden steps have been placed in the Applicant's vehicular area to permit safe access to the lower level of the garden. The rear part of the garden is untidy and unkempt.

7 On 10 September 2019 the Respondents made an application to the Tribunal to adduce additional documents. This application was refused by the Regional Judge on the same day but was repeated at the commencement of the hearing. The Respondents said that they had not had sufficient time to prepare for the hearing because they had been on holiday. The Respondents confirmed their holiday dates as 5 July to 12 August 2019. The Tribunal noted that Directions had been issued by the Tribunal on 19 June 2019 and considers that the Respondents had ample opportunity both before and after their return from holiday in which to either comply with the Directions or to make a timely application for an extension of time. Making an application less than 48 hours before the oral hearing is not acceptable and to grant it would be prejudicial to the Applicant who would be put in the position of having to deal at the hearing with evidence which she had neither seen nor had an opportunity to consider. The parties had been engaged in previous litigation with each other, the Respondents would therefore have been aware of Tribunal rules of procedure and the need for compliance. After having adjourned briefly to consider the evidence, the application was refused.

8 The Applicant made five substantive allegations of breach of covenant against the Respondents which are dealt with in turn below. The Respondents did not dispute the wording of the relevant clauses in their lease nor, in essence, the factual situations on which the Applicant relies. For that reason, it has not been considered necessary in this document to set out the full wording of each of the lease covenants in the 1989 lease. The relevant number of the lease clauses is referred to in the context of the discussion below of each of the breaches.

9 Allegation 1: that the Respondents are in breach of Clause 3(14) in that they have sub-let the property without including in the sub-tenancy agreement a covenant by the sub-tenant to observe and perform the covenants in the 1989 lease. The Respondents assert that the sub-tenancy agreement (pages 85-90) is compliant with the lease because it contains on page 87 the words: 'the covenants of the Head Lease prevails (sic) in all circumstances'. The Respondents said that this agreement is the standard assured tenancy agreement as issued by Brighton council. That may well be the case and as an agreement between a freehold owner landlord and his/her tenant it would no doubt be acceptable. However, in the present case the Respondents acting as landlords are not freehold owners but are themselves tenants who are bound by the terms of their own lease. This requires any sub-tenancy they grant to contain a covenant (ie a legally binding promise in writing) given by the sub-tenant that he (and his family) will comply with and abide by the covenants and regulations contained in the head lease. It is the Respondents' responsibility to ensure that this is done. In order to prevent any breach of those covenants the sub-tenant should be given a copy of the relevant sections of the head lease. When questioned by the Tribunal the Respondents said that they had not shown Brighton Council (from whom they took advice) a copy of their own lease,

neither had they given a copy of the relevant provisions to their sub-tenant. The wording contained in the sub-lease under discussion is contained in an un-numbered paragraph headed 'Allowing access to third parties' and appears to have been added to the main agreement as an afterthought. It is not in the form of a covenant and does not comply with the requirements of the head lease. The Respondents are therefore in breach of Clause 3(14).

10 Allegation 2: that the Respondents are in breach of Clause 3 (6) by carrying out structural alterations to the property without the landlord's prior consent. It is common ground that alterations to the property consisting of extending the habitable area into the demised roof space by the creation of two additional bedrooms a bathroom and a new staircase access were carried out by the predecessors in title of both the current Respondents and the current Applicant. It does not appear that consent was previously given since neither party's title deeds contain a licence or any similar document which could be construed as formal consent. The Tribunal does not accept that an undated single page copy document produced by the Respondents which neither formally gives consent nor refers to any specific works can be regarded as a retrospective consent (page 203). The Respondents appear to have accepted that this breach has occurred in that they formally requested a retrospective licence in 2017 to which the Applicant agreed (see page 115) but ultimately the Respondents declined to complete the licence deed and now maintain that it is not required. Factually there has been and remains a continuing breach of Clause 3(6).

11 Irrespective of any arguments about waiver or laches this unremedied breach creates a defect in the legal titles of both landlord and tenant but is likely to have the most serious consequences for the tenant because any prospective buyer will be unwilling to proceed unless the breach is remedied ie by the granting of a retrospective consent. This issue was touched on by the previous Tribunal (CHI/00ML/LSC/2016/0010 and 0089, page 235) who decided that the £3,000 demanded by the Applicant as the fee for granting the licence was reasonable (para 80 page 243). That Tribunal also found that the Respondents had agreed to pay that fee but subsequent to that decision the transaction never came to completion, a non-event for which each party blames the other.

12 Having discussed this matter with the parties in some depth, both agreed to record in this decision that the Applicant is willing to grant a retrospective consent on the same terms as are contained in the draft on pages 125-135 and for the previously agreed fee of £3,000 plus reasonable costs. Similarly, the Respondents, if offered the licence on the terms stated in this paragraph agree to complete the licence and to pay the agreed fee of £3,000 plus reasonable costs.

13 Allegation 3: that the Respondents have made alterations to the structure of the roof of the building which belongs to the Applicant and is not included within the demise granted by the lease (page 61). Factually this allegation cannot be refuted by the Respondents. The structure of the roof belongs to the Applicant and the Respondents' predecessors have inset three

velux windows in the roof on the garden side of the property and two on the road facing side. As above, no consent was obtained from the then landlord. Even if the copy letter on page 203 does constitute a valid authority for the alteration to the roof space (a proposition which the Tribunal does not accept) it does not mention the roof structure or veluxes and so cannot be used as a form of consent for those works. This is a clear breach of the terms of the lease by intrusion into the landlord's property. Planning permission was granted for these works but was not complied with because the permission only provided for two rear facing windows and three were inset into the roof. This is a breach of Clause 3(7) of the lease. It is not within the Tribunal's jurisdiction to decide whether the breach of the planning regulations might still be enforceable by the planning authority, given that the building is within a conservation area. The Applicant's assertions that the roof veluxes and other conversion works may have destabilised the building seem not to be supported by her surveyor's report (page 103) which did not identify any major faults.

14 Allegation 4: trespass over the Applicant's garden. The lease grants the Respondents a right of way over the passage at the side of the building and across the Applicant's lawn to access their own garden and parking space and the rear vehicular access on to the road. The Applicant complained that Respondents' tenants were abusing this right of way by walking all over the Applicant's garden and expecting to have the use of the Applicant's son's trampoline. The Respondents complained that the Applicant had erected a locked gate which prevented any access to the rear garden, had raised the level of their own garden which made it difficult for the Respondents to get to their garden and had destroyed a concrete path running through the Applicant's garden which had previously been used by the Respondents to access their part of the garden. The Tribunal did inspect the garden as part of their visit and so were familiar with the issues being raised. Some confusion appears to have arisen over the exact route of the right of way, not assisted by the fact that each of the three plans contained in the title deeds to the property shows a slightly different path. The Tribunal examined all of the plans and in discussion with the parties it was agreed by all present that the correct delineation of the right of way is as shown on page 260. This shows that the Respondents and their tenants share a right of access with the Applicants along the side passage. There is no mention in that document of any concrete path across the lawn as asserted by the Respondents. The Respondents' designated route then continues in a straight line over the Applicant's lawn keeping close to the right hand boundary of the garden. On reaching the far end of the Applicant's lawn the route turns left and keeping to the edge of the lawn reaches steps down into the Applicant's vehicle parking area from which the Respondents' garden can be entered. The parties agreed that there was no reason to prevent the Respondents from placing two steps into their garden at the far end of the Applicant's lawn and towards the right hand boundary of the garden. This would provide a shorter and more straightforward access route for the Respondents and would avoid their having to cross the Applicant's lawn to reach the existing steps. There is no right for the Respondents to park a vehicle or to leave objects, such as a push chair, on any of the land except within their own garden area.

15 The Applicant had complained that the Respondents and their tenants had been walking all over her lawn (photo page 143). It is noted that the photograph shows a large trampoline on the right hand side of the lawn which may have prevented the Respondents from taking the correct path across the lawn on that occasion. The Tribunal does not accept the Respondents' assertion that the Applicant was blocking the Respondents' access by the erection of a locked gate. Despite Mr Choudhry's assertion that he had been denied the PIN number to the gate it is clear from his own email (page 252) that he had received it and lost it. The Applicant agreed that she would send the Respondents the PIN number for access. The Respondent wanted the gate removed. The Tribunal said that the Applicant was entitled to erect the gate if she chose and by supplying a PIN number she was not preventing or impeding the Respondents' access. The gate was a sensible security precaution and was beneficial to the Respondents and their tenants. The Respondents raised a similar complaint about the fact that the landscaping by the Applicant of her own garden had altered the levels and had made it difficult for the Respondents to access their garden. The Tribunal finds that the Applicant is entitled to make alterations to her own garden and has not impeded or obstructed access to the Respondents' section. The Applicant has made two steps down from her garden area to the vehicle area which provides a safe access to the lower level. There have clearly been some difficulties over the Respondents' and their tenants' access to the garden area which the Tribunal considers may have a number of causes including a misinterpretation of the lease plans, a misunderstanding by the Respondents of their rights (eg that use of the side passage is not exclusive to them) difficulties in keeping to the prescribed route because of placement of the trampoline and a failure by the Respondents to explain clearly to their own tenants the extent of their use of the outside areas. In strict terms there have been breaches of the Schedule 5 regulations in the lease but the circumstances outlined above do not justify a finding of fault by one party alone.

16 The Applicant's final complaint was in respect of breach of Clause 2 of the lease which contained a covenant that the tenant and his successors in title would observe the regulations contained in the fifth Schedule of the lease. In particular the Applicant complained of washing being hung out of windows on a Sunday (para 10 page 69) of obstruction (para 7 page 68) and of noise (paras 3B, 8 and 17 pages 67-68) The subject property comprises the extended upper floor of an older semi-detached house. It was not designed for multiple occupation nor was it constructed subject to modern building regulations or with modern sound proofing materials. The noise of which the Applicant complains appears to be general living noises consistent with the family of two adults and five children who are living in the upper flat. Although the Tribunal is sympathetic to this situation the evidence produced by the Applicant (one example given of illegal washing, no specific dated examples of repeated noise no decibel readings) is not sufficient to persuade it to find a breach of Clause 2 in this particular case.

17 In the light of the above, the Tribunal has little option but to find that the Respondents' breaches of covenant are breaches of their lease.

18 This does not however preclude them from seeking relief against forfeiture in the event of such action being taken against them by the Applicant.

19 The Tribunal orders the Respondents to repay to the Applicant the £100 application fee.

20 The Respondents asked the Tribunal to make an award of costs against the Applicant under Rule 13 of the Tribunal Rules of Procedure but brought no evidence in support of that claim. No schedule of costs had been served. In the light of the Tribunal's decision in this matter this application has no prospect of success.

21 The Respondents also asked the Tribunal to appoint a Manager to the property. This request was not accompanied by any reference to the grounds under s24 Landlord and Tenant Act 1987 nor was any suitable person named as a prospective candidate. The Respondents were advised that if they wished to initiate this procedure they need to make a separate application to the Tribunal.

22 The Respondents complained that the Applicant was in breach of the rights of first refusal provisions in relation to her acquisition of the freehold. The Tribunal said that this was not a matter which could be determined on the present application and would need a separate application by them to the Tribunal.

The Law

23 **Commonhold and Leasehold Reform Act 2002 168**
No forfeiture notice before determination of breach**E+W**
This sectionnoteType=Explanatory Notes has no associated
(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) 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.

Rule 13 Tribunal Rules of Procedure

Orders for costs, reimbursement of fees and interest on costs 13.—
(1) The Tribunal may make an order in respect of costs only—

under section 29(4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

if a person has acted unreasonably in bringing, defending or conducting proceedings in— (i) an agricultural land and drainage case,

(ii) a residential property case, or (iii) a leasehold case; or

in a land registration case.

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.

(3) The Tribunal may make an order under this rule on an application or on its own initiative.

(4) A person making an application for an order for costs—

(a) must, unless the application is made orally at a hearing, send or deliver an application to the Tribunal and to the person against whom the order is sought to be made; and

(b) may send or deliver together with the application a schedule of the costs claimed in sufficient detail to allow summary assessment of such costs by the Tribunal.

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the Tribunal sends—

1. (a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
2. (b) notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by—

1. (a) summary assessment by the Tribunal;
2. (b) agreement of a specified sum by the paying person and the person entitled to receive the costs (the "receiving person");
3. (c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

Name:	Judge Frances Silverman as Chairman	**Date:**	16 September 2019

Note:
Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.