



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

Case Reference : **MAN/OOEC/LBC/2020/0003**

Property : **Flat 21, Constantine Court, Linthorpe Road, Middlesbrough, TS1 3GA**

Applicant : **Constantine Court (Middlesbrough) RTM Company Limited**

Representative : **Town & City Management Limited**

Respondent : **John Jefferson**
Representative : **Mrs R Jefferson**

Type of Application : **Commonhold & Leasehold Reform Act 2002 Section 168(4)**

Tribunal Members : **Tribunal Judge J.E. Oliver**
Tribunal Member S.A. Kendall

Date of Determination : **17th September 2020**

Date of Decision : **29th September 2020**

DECISION

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Decision

1. The Tribunal determines John Jefferson is not is in breach of Paragraph 4 of the Seventh Schedule of the Lease dated 12th May 2006.

Application

2. This is an application dated 27th January 2020 by Constantine Court (Middlesbrough) RTM Company Limited (“Constantine Court”) for an order, pursuant to Section 168(4) of the Commonhold & Leasehold Reform Act 2002 (‘the 2002 Act’) that there have been breaches of the covenant by the Lessee contained in Paragraph 4 of the Seventh Schedule of the Lease relating to Flat 21 Constantine Court, Linthorpe Road, Middlesbrough (“the Property”).
3. The Tribunal was provided with a copy of the Lease dated 12th May 2006 for a term of 125 years from 1st March 2004 and made between the Fairhold Homes (No.9) Limited (1) and Marjorie McDonagh (2) (“the Lease”).
4. Fairhold Homes appointed Constantine Court to manage the development of which the Property forms part in December 2009.
5. The Property is a flat on the first floor of a development comprising 74 flats, built for retirement living with an age limit starting at 60 for single ownership and 55 for joint.
6. Directions relating to the application were issued on 27th May 2020, providing for the filing of additional documentation and statement by both the parties and thereafter for the application to be determined without an inspection or hearing.
7. Neither party requested a hearing.
8. The matter was listed for determination on 17th September 2020.

The Law

9. Section 168 of the Act provides that before a landlord may apply to forfeit any lease for a breach of either a covenant or condition of the lease by the tenant, it must have been determined that a breach has occurred. This can be done either by a determination under 168(4) of the 2002 Act, by the tenant admitting the breach, or by a court making a determination.
10. Section 168 (4), under which the present application is made, provides as follows:

“A landlord under a long lease of a dwelling may make an application to a First-tier Tribunal for a determination that a breach of covenant or condition of the lease has occurred”

The Lease

11. Clause 3.2.2 of the Lease provides for the Lessee to perform the covenants contained within the Lease.

12. Paragraph 4 of the Seventh Schedule provides:

“Not to do or suffer to be done on the Premises or the Estate anything which may be or become a nuisance or annoyance or cause damage or danger to the Landlord or occupiers of any other apartment in the Building or any nearby or adjacent property or which may injure or tend to injure the character or reputation of the Estate.”

Submissions

13. In its application to the Tribunal, Constantine Court stated:

“The Seventh Schedule Section 4. The Respondent continues to live with a lack of care and hygiene to the point he has aksed (sic) not to use the lift, laundry room and residents lounge. The Respondent fails to maintain an acceptable level of personal hygiene and cleanliness (sic) of his flat. The Respondent has on two separate occasion (sic) block his toilet with incontinence pads and continue (sic) to use the toilet which caused the flat below to be contaminated with human waste. The House Manager has spoken to the Respondent on numerous occasions but the situation remains unchanged(sic). The Respondent has answered his door in a state of undress on numerous occasions.”

14. Constantine Court thereafter filed a Schedule of those matters complained of, together with three statements in support.

15. The Schedule listed four alleged breaches of covenant:

- (1) Mid August – September 2019. The respondent placed heavily contaminated laundry in one of the washing machines in the communal laundry room. This caused a danger to the health of other residents.
- (2) 19th December 2019. The respondent caused faecal contamination to the apartment below by using his toilet in a blocked state for bodily functions. This caused anxiety and was a danger to the health of the resident below who already had some serious medical issues.
- (3) 10th April 2020. The respondent again placed contaminated laundry in one of the washing machines in the communal laundry room. This caused a danger to the health of other residents.

- (4) 15th July 2020 The respondent used the public toilet in the apartment block and left faecal contamination on the walls, floor, toilet seat and base of the toilet. This caused a danger to the health of other residents.
16. The first statement was from the House Manager, Paul Davies (“Mr Davies”). In his statement he advised there had been three major incidents involving Mr Jefferson. These were:
- (1) The communal laundry facility. Here, Mr Davies referred to an occasion where Mr Jefferson had put heavily soiled bedding in the washing machine. The contamination was such that faeces could be seen in the machine. Mr Davies had advised Mr Jefferson to rewash the bedding and for him to dry it within his apartment. Mr Davies had had to run two disinfection cycles in the washing machine.
- (2) On 19th December 2019 Mr Jefferson’s bathroom had flooded and had been caused by a blocked toilet. Mr Davies stated Mr Jefferson had continued to use his toilet after it had become blocked resulting in urine and faecal contamination on his bathroom floor. It was said the continued use of the blocked toilet then caused flooding into the bathroom of the flat below. Mr Davies continued:
- “The lady occupant of the lower apartment has some quite serious medical issues and her exposure to such contaminated matter caused some serious anxiety”*
- Mr Davies advised he went to see Mr Jefferson who appeared unconcerned about events and he then arranged for a plumber to attend the property. He was unsuccessful in getting a plumber to attend the same day but one did attend the following day and the entire toilet was replaced.
- (3) On 15th July 2020 Mr Davies returned to the development and was advised by two other tenants, Mrs Atkinson and Mrs Martin that Mr Jefferson had used the public toilet near the lounge and had left it with faecal contamination on the walls, toilet seat and the base of the toilet. He went to Mr Jefferson’s flat and told him to return and clean the toilet. Mr Davies stated Mr Jefferson had apologised but *“ he was clearly unaware of the distress he had caused his fellow residents”*. Mr Davies returned sometime later to find Mrs Atkinson *“had been dissatisfied with Jefferson’s efforts and had brought her own cleaning materials to the scene and had completed and (sic) excellent clean of the facility”*.

17. Mr Davies further added that Mr Jefferson's personal hygiene was poor and that *"he smells-very badly". I frequently have complaints from residents regarding his smell. Similarly his apartment continuously carries a very strong odour which permeates the corridor every time he opens his door. It is clear that his understanding of the ordinary standards of personal hygiene is minimal."*
18. Constantine Court filed statements by Mrs Atkinson and Mrs Martin, neither of which had been signed or dated. Both statements confirmed Mr Jefferson had used the toilet in the lounge area on 15th July. Both statements referred to low noises coming from the toilet, suggesting Mr Jefferson was removing his clothing when using the toilet. When Mr Jefferson left the toilet they confirmed there was faecal matter as described by Mr Davies. They confirmed Mr Davies had asked Mr Jefferson to clean the toilet. In her statement Mrs Atkinson said:

"At this point Mr Davies arrived and I advised him of the event. He then said he would speak to Jefferson. Shortly thereafter Jefferson reappeared and attempted to clean up the mess. He used two full rolls of toilet paper and several paper towels. He then asked me to inspect and I said that it would do for now but would need an additional clean at some later time."

Mrs Atkinson confirmed she had then cleaned the toilet to her own satisfaction.
19. Mrs Jefferson confirmed she was representing Mr Jefferson, her brother-in-law who she visited weekly and dealt with his affairs and filed a statement on his behalf.
20. Mrs Jefferson challenged the allegations made by Mr Davies in his statement and maintained there was personal animosity by Mr Davies towards Mr Jefferson.
21. Mrs Jefferson advised Mr Jefferson had suffered from ill health from 2017 including diabetes and prostate cancer, the latter causing issues with incontinence. Mr Jefferson attempted to control this with incontinence pads and medication.
22. Mrs Jefferson submitted the allegations made within the Schedule and statements did not reflect the allegations made within the application. Further Mr Davies only addressed three of the four allegations made within the Schedule; no reference was made to the first allegations. In addition, other matters referred to in his statement were not referred to elsewhere in the application.
23. In response to the allegations within the Schedule, Mrs Jefferson stated:
 - (1) It was admitted that in 2019 Mr Jefferson used the laundry to wash soiled bedding. Another resident had advised Mr Davies it was badly soiled. Mrs Jefferson had subsequently spoken with

this resident who confirmed he had told Mr Davies, but had realised Mr Jefferson was unwell. It was said this had happened at a time Mr Jefferson was receiving treatment for cancer. Mrs Jefferson argued that had the incident been as significant as had been claimed, the exact date when it had occurred should have been included within the application, Further, if the bedding had been as soiled as complained of, it should not have been put in the washer a second time and should have been disposed of. The machine had been disinfected and was therefore no danger to other residents, as alleged.

- (2) Mrs Jefferson agreed Mr Jefferson's toilet had become blocked and had overflowed into the flat below. She challenged the allegation that the cause of the overflow was that the toilet was blocked with incontinence pads and that Mr Jefferson had continued to use it, when blocked. She had arranged for a plumber to visit the day following the blockage and he had replaced the entire toilet. He had advised Mrs Jefferson the toilet had overflowed due to wear and tear on the flushing mechanism. It was accepted there was damage to the bathroom carpet in the flat below. This had been replaced at the behest of Mr Jefferson and an ex gratia payment of £100 and some flowers had been given. The owners of the flat had cleaned their bathroom and so the allegation of there being a danger to someone with a health condition was not accepted.
 - (3) The allegation that Mr Jefferson used the laundry on 10th April 2010 to again wash contaminated bedding was completely denied. Mrs Jefferson said it did not happen and submitted it is referred to in neither the application, nor the statement of Mr Davies.
 - (4) Mrs Jefferson confirmed Mr Jefferson used the communal toilet on 15th July 2020 and was asked by Mr Davies to return and clean it. She explained Mr Jefferson had been out and when returning home, needed to use the toilet, but could not reach his flat in time. He soiled his clothing and therefore returned to his flat to shower. Mr Davies arrived at his flat and told him to take two toilet rolls down and clean the toilet, which he did "*to the best of his ability*". Another resident had confirmed it had been cleaned satisfactorily and Mr Jefferson then returned to his flat. Mrs Jefferson submitted that the incident had taken place at around 5pm; Mr Jefferson cleaned the toilet to a standard satisfactory to another resident. It could not be said the incident presented a danger as alleged.
24. Mrs Jefferson submitted the statements, containing identical phrasing, given by Mrs Atkinson and Mrs Martin were questionable and appeared to have been written by Mr Davies and were unsigned. Further, there was personal animosity by Mr Davies to Mr Jefferson.

She referred to conversations with Mr Davies when he suggested that Mr Jefferson would be unable to care for himself following his cancer diagnosis.

25. Mrs Jefferson advised demands for both Ground rent and Service Charges had been made during the period of the alleged allegations. They are payable 6 monthly, on 1st March and 1st September and are always paid “*in good time.*” In respect of this Mrs Jefferson referred the Tribunal to ***Thomas v Ken Thomas Ltd [2006] WWCA Civ 1504*** in reliance of the argument that where any breached of covenant are proved, those are waived if there are demands for Service Charges and Ground rent.
26. Mrs Jefferson further advised the Tribunal Mr Jefferson had had a new bathroom fitted in April/May 2020 and Constantine Court had given their consent to this.

Determination

27. The Tribunal considered the submissions made by both parties. It is noted that for the Tribunal to find there had been a breach of the covenant contained in the Seventh Schedule, it must be satisfied, on the balance of probabilities that such a breach has occurred.
28. Constantine Court had not responded to the statement filed by Mrs Jefferson, although they had permission to do so under the directions dated 27th May 2020.
29. The Tribunal found that of the four allegations contained within the Schedule, Mr Jefferson denied the allegation regarding his use of the laundry on 10th April 2020. This is not referred to in the statement of Mr Davies. It is assumed this statement is in chronological order and the reference to soiled bedding relates to the first allegation that took place in 2019. In the light of the denial made by Mr Jefferson and the absence of any evidence in support, the Tribunal does not find there has been a breach of covenant as alleged on 10th April 2020.
30. Upon the same basis, the Tribunal noted that additional allegations were made in the statement of Mr Davies that were not contained within the Schedule and were, in any event, denied by Mr Jefferson. In particular, these are the references made about Mr Jefferson’s personal hygiene, the condition of his flat and his occasional state of undress. The Tribunal notes these are not included within the Schedule as being allegations of a breach of covenant.
31. The Tribunal noted that for each of the alleged breaches Constantine Court stated they had caused a danger. The normal interpretation of the word danger is that it has caused exposure to harm or death. It is therefore an action that must have a serious consequence.

32. The Tribunal thereafter considered the first allegation regarding the use of the laundry and as admitted by Mr Jefferson, namely that he had used it to wash soiled bedding. Constantine Court says this was a danger to the health of other residents. The Tribunal agrees with the comments made by Mrs Jefferson, in that it appears at odds for there to be an allegation of danger to other residents when Mr Davies allowed Mr Jefferson to wash his laundry for a second time. Mr Davies disinfected the washing machine such that no other resident had the use of the machine before this had been done. In those circumstances, the Tribunal does not agree that this was an incident that would be so severe to cause harm or death to either another resident or Mr Davies. It further noted that no independent evidence was brought before the Tribunal to show the level of harm or danger this would cause. The Tribunal therefore does not find this incident was a breach of covenant as alleged.
33. Mr Jefferson admitted the incident of 19th December 2019 when his toilet overflowed into the flat below. However, both parties provided different explanations as to how this had occurred. Mr Davies alleged Mr Jefferson had allowed his toilet to become blocked with incontinence pads and had continued to use his toilet, whilst Mr Jefferson said the flush mechanism had failed causing the toilet to overflow. He also denied having continued to use his toilet as stated by Mr Davies. Neither party provided a plumber's report in support of their submissions. The Tribunal had to consider whether Mr Jefferson's actions had caused the overflow, or the cause had been mechanical from the failure of the toilet. It could not know from the information provided what had been the cause, but to show a breach of covenant there must have been some action from Mr Jefferson to show he had breached the covenant. Constantine Court had not proved this to the standard required.
34. The Tribunal noted Mr Jefferson had admitted he had used the communal toilet and that he had had returned to clean it when asked to do so by Mr Davies. The Tribunal has noted the statements provided by Mrs Atkinson and Mrs Martin are unsigned and therefore the Tribunal can give little weight to them. The Tribunal has considered the explanation given by Mr Jefferson for the incident and has taken into account the circumstances of how it occurred. Whilst the incident must have been unpleasant for everyone involved, the Tribunal does not find this caused a danger as claimed. If there had been a potential exposure to harm or death, further action would have been taken and Mr Davies would, presumably, have prevented further use of the toilet and Mrs Atkinson would have been unwilling to clean it. The Tribunal therefore does not find this incident was a breach of the covenant as claimed.
35. The Tribunal considered the submissions made by Mr Jefferson that any breach of the covenant had been waived by the acceptance of both Ground Rent and Service Charge. Further, Constantine Court had indicated their agreement to the continuation of the Lease by consenting to the installation of a new bathroom in April/ May 2020.

36. The issue of waiver is not a matter to be determined by the First-tier Tribunal (formerly the LVT). In ***Swanston Grange (Luton) Management Ltd v Langley-Essen LRX/21/2007*** HHJ Huskinson said:

“Nothing I say is intended to indicate any jurisdiction in the LVT to consider the separate question of waiver which arises when it is necessary to decide whether a landlord has waived the right to forfeit a lease on the basis of a breach of covenant.”

The issue of waiver would be a matter for the Court should any application be made for forfeiture of a lease should it be found there had been a breach of covenant.

37. The Tribunal does not find Mr Jefferson in breach of the covenant contained within Paragraph 4 of the Seventh Schedule of the Lease as claimed by Constantine Court.

JE Oliver
Tribunal Judge
29th September 2020