

779



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

Case Reference : LON/00AE/LBC/2015/0107

Property : 84 Willesden Lane, London,
NW6 7TA

Applicant : EB Pension Fund

Representative : Mr Michael Collard Counsel-
instructed by Dunife Corporation

Respondent : Mr Nicholas Keith Froggatt

Representative : Mr Chris McCarthy Counsel-
Instructed by Crooks Commercial
Solicitors

Also in attendance : Ms E Muorah
Mr A Muorah

Type of Application : Application for a determination
UNDER Section 168 (4) of THE
COMMONHOLD AND LEASEHOLD
REFORM ACT 2002
in respect of whether the
Respondent has breached a
covenant in the lease

Tribunal : Judge Daley
Mrs L Walter MA

Date of Hearing : 09 September 2016 at 10 Alfred
Place, London WC1E 7LR

Date of Decision : 25 October 2016

DECISION

Decisions of the Tribunal

(1) The tribunal makes the determinations as set out below.

The application

- a. On 7 October 2015 the Applicant made an Application for an order that a breach of covenant or condition in the lease had occurred pursuant to Section 168(4) of the Commonhold and Leasehold Valuation Act 2002.
- b. The background to this matter was set out in the grounds of the Application which alleges that the Respondent had breached clauses, 10 and 25 of the fourth Schedule of the lease, and clause 9 of the eighth schedule.
- c. The Respondent Mr Nicholas Froggart did not accept that a breach of covenant had taken place.

(2) Directions were given on 21 October 2015.

(3) The directions stated at paragraph (3), that -: *"...The tribunal will reach its decision on the basis of the evidence produced to it. The burden of proof rests with the applicant. The Tribunal will need to be satisfied: (a) that the lease includes the covenants relied on by the applicant; and (b) that, if proved, the alleged facts constitute a breach of those covenants."*

(4) The Directions also provided that the Applicant should send the Tribunal and the Respondent copies of the hearing bundle by 25 May 2016, and thereafter that the matter be set down for hearing on 10 June 2016. The matter was originally set down for hearing on 14 December 2015, however it was adjourned and subsequently listed for 9 September 2016.

The Background

(5) The subject Premises, are a 2 bedroom flat situated in a three storey property, comprising a shop/office on the ground floor and the Respondent's flat on the upper floors. The Respondent resides in the first

floor flat. The ground floor premises are owned by the Applicant who is the freeholder.

- (6) The Respondents hold a long lease of the flat, which requires the landlord to provide services and the Respondent leaseholder to observe specific covenants under the terms of the lease. The specific provisions of the lease will be referred to below, where appropriate.

The Hearing

- (7) At the hearing the Applicant was represented by counsel Mr Collard, also in attendance was Ms Muorah on behalf of the Dunife Corporation, (together with her father). The Respondent Mr Froggatt was also in attendance, and was represented by counsel, Mr Chris McCarthy.
- (8) At the hearing the following additional documents were provided:-
- (i) A copy of the Applicant's Skeleton Argument
- (9) The Tribunal dealt with two preliminary issues:- One was the Respondent's objection to the witness statement of Ms Muorah, on the grounds that it had not expressly been provided for by the Directions. The Tribunal also had two sets of photographs which had not previously been seen by the Respondent or his counsel. (It was unclear whether the photographs had previously been disclosed to the respondent's solicitor.) The Tribunal needed to determine whether to admit the photographs in evidence.
- (10) The Tribunal noted that the statement had been served on 26 November 2015, and no previous objection had been made to the production of the statement. Paragraph 3 of the Directions which dealt with the preparation of the bundle, stated that -: "*The bundle shall contain copies of all documents exchanged between the parties; copies of any case law and any other documents to be relied on including witness statements...*" Accordingly the Tribunal decided that the statement ought to be admitted in evidence.
- (11) In respect of the photographs, it was decided that only 4 of the photographs were referred to in evidence. In respect of these photographs, the Respondent had no objection to these 4 photographs being admitted. The Tribunal accordingly admitted the 4 photographs which were considered germane to the issues.
- (12) Counsel, Mr Collard, referred the Tribunal to clause 4 of his Skeleton Argument which set out the clauses relied upon in support of the alleged breaches. The fourth Schedule clause 10 of the lease states:- " Not to make any alterations or additions to the Premises or the Service Conduits nor to commit any waste spoil or destruction in or upon the premises not to cut

damage injure or allow to be cut damaged or injured any part or parts of the premises without the Landlords prior written consent which consent which consent shall not be unreasonably withheld or delayed.” clause 25 states-: Not to allow rubbish or refuse to accumulate on the Premises or the common parts and not to obstruct the Common Parts or the Service Conduits.

Eighth Schedule

9. To cover the floors of the premises with felt or other sound proofing materials and place rubber insulators under all piano gramophones wireless or television cabinets sewing machines and other similar articles.”

(13) Mr Collard alleged that work had been carried out without obtaining the freeholder’s consent as required by the lease.

(14) In support of this he referred to the respondent’s statement in which he accepted that he had commenced work to the premises. Counsel for the Applicant referred to a document sent by the respondent’s solicitor entitled *Additional Leasehold Enquiries*; this document had been set prior to Mr Froggart completing purchase of the lease. At paragraph 17 of the document the respondent’s solicitors set out details of the work, which the respondent wished to undertake.

(15) Paragraph 17 stated-: “... *The property requires some upgrade works to make it habitable and safe to occupy. Please confirm that our client will be able to carry out the following works without requiring consent. 17.1 General refurbishment works including (but not necessarily limited to) new kitchen, bathroom, floor finish. 17.2 Sound and fire upgrade works to floors, electrics, plumbing, internal linings and finishes, stairs. 17.3 Internal re-planning works including alterations to room configurations, removal of chimney breast at first and second floor levels, enlargement of some existing windows (subject to obtaining planning consent) any repair work required throughout and decoration*”.

(16) Counsel noted that although there had been a reply to this request, in his submission the response had been too vague and imprecise to amount to consent.

(17) Counsel referred to the schedule of condition, which had been prepared by the Applicant’s surveyor together with the photograph of the front of the premises in support of the alleged breach. The photograph showed the position of a gas flue, which had been re-positioned at the property. Mr Collard contended that as no consent had been sought, this alteration was in breach of the lease.

(18) Mr Collard also relied upon the survey which noted that the layout of the premises had changed; the kitchen had been repositioned from the first

to the second floor, and had been made open plan. This had involved the removal of the partition walls. Counsel alleged that this was in breach of clause 10 of the lease.

(19) Counsel referred to the landlord's reply to the additional leasehold enquiries and noted that if the Tribunal accepted that the response amounted to consent, the respondent had not complied with the conditions set out.

(20) Mr Collard referred to the Witness Statement of Ms Muorah in support. In her evidence Ms Muorah relied upon a detailed pro forma which dealt with applications for consent for alterations, which had been produced by the Dunife Corporation. She stated that she would have expected to see something similar seeking consent from the landlord. However she had nothing which evidenced that written consent had been given by the previous landlord.

(21) Mr McCarthy, Counsel on behalf of the Respondent, queried whether Ms Muorah, on sight of the landlord's reply, still maintained that no consent had been sought, or given. Ms Muorah did not accept that the freeholder's reply was consent. She also stated that the works undertaken by the Respondent had gone beyond what had been stated in paragraph 17 of the Additional Enquiries.

(22) She also stated that the Respondent had not sought building control approval prior to the work being undertaken.

(23) Counsel for the Respondent referred to the procedures that could be used to self-certify or retrospectively apply for building control approval. Ms Muorah did not accept that this applied to the work carried out by Mr Froggart.

(24) Counsel asked Ms Muorah to confirm when the photographs relied on had been taken. Although she could not recall the exact date, Ms Muorah stated that they had either been taken on 24 September when she visited the premises to meet with Mr Froggart, or on 12 October either by herself, or by her surveyor, when she accompanied the surveyor on an inspection of the premises

(25) Mr McCarthy referred to section 17.1-17.3, of *The Additional Enquiry*. He stated that the description of the work was wide enough to include the work undertaken in relation to a replacement boiler.

(26) Ms Muorah did not accept this. She referred to additional concerns that had been outlined by her in an email sent to Mr Froggart on 13 October 2015, in relation to the adequacy of the electrical supply in relation to the electrical works carried out at the premises.

- (27) At paragraph 3 she stated: *"...In relation to your electrical works. I emailed a photo of the existing meters to a Shane McDonagh of UK Power Networks and have spoken to him about the ongoing electrical works and upgrades you are carrying out in the property. They have confirmed that there is only a single phase supply into the property which is approximately 100 amps for both the commercial premises downstairs and the flat upstairs. This supply may have been adequate for two unimproved properties but is unlikely to accommodate two improved properties..."*
- (28) Mr McCarthy referred to the photographs in the surveyor's report, one of which was of the front of the property. He asked Ms Muorah whether she agreed that there was nowhere to place a skip as there was a bus stop near the front of the premises.
- (29) Ms Muorah stated that this did not prevent Mr Froggart applying for a skip licence. Mr McCarthy stated that Mr Froggart had arranged for a "stop and go" collection of the rubbish. He also submitted that the lease did not prevent the storage of rubbish in the hallway, it prevented storage in the common parts and the hallway in his submission was not a common part as it was wholly in Mr Froggart's demise.
- (30) Ms Muorah stated that the lease required the property to be kept in good condition, and although she was not aware of the state of the premises, she did not consider that the condition of the hallway amounted to keeping the property in good condition. She stated that in addition there was no floor covering, this was in breach of Schedule 8, clause 9 of the lease. She stated that the lack of carpeting affected the ability of noise to travel so as to affect the confidentiality of the office.
- (31) In answer to a question concerning the occupation of the ground floor, Ms Muorah stated that it was currently unoccupied.
- (32) Mr McCarthy stated on behalf of the Respondent that there was provision in the lease for consent to be given. He stated that it had been given by the previous landlord, and that in any event there was no breach of the lease in respect of the rubbish. He stated that it was not clear when the photographs had been taken and in any event the accumulations were cleared out on a regular basis. He stated that the Applicant had not interpreted the lease correctly.
- (33) He submitted that you could not say that placing building material/deposits amounted to an accumulation even if left for a short period. Generally an accumulation was something which was left for a long period of time. As such placing the building debris in the hallway until it was collected did not amount to a breach of the lease.

(34) In respect of the failure to cover the flooring, this was temporary as work was on going. In respect of the repositioning of the gas flue, he stated that permission had been granted or waived.

(35) Counsel stated that it would be inconsistent in his reply to the additional enquiry, if the landlord used the word "subject to consent" to refer to consent from himself, logically he must have been referred to planning or building consent. In Mr McCarthy's submission, it was not fatal if consent had not been obtained in advance of the work being undertaken as it was possible that consent could be obtained by self-certifying.

(36) In addition the previous landlord had been aware of the scope and nature of the work and had not asked Mr Froggart to stop work.

(37) In his evidence set out in the statement of the Respondent Mr Froggart stated in paragraph 3 that-: *"...upon purchase of the property, it was obvious to the Respondent that the electrics had been altered over the years and required a complete rewire. Due to the installation of a ceiling over the entrance to the ground floor, the Respondent was unable to access the electrical meter and consumer unit. The wires have been relocated to the first floor landing in the Respondents property where the proposed meter will be located...It should be noted that at the present time the Respondent has no access to the consumer unit and meter and in the event of an emergency or power cut..."*

(38) In his statement, the Respondent set out that he had appointed DJM solicitors who had sent the *Additional Leaseholder Enquiries* referred to above.

(39) In reply the landlord stated *"...confirmed subject to necessary consents and building regulations being received and complied with and to all work being carried out under supervision."*

(40) Mr Collard, counsel for the Applicant asked whether Mr Froggart accepted that consent was required under the terms of the lease. Mr Froggart accepted that it was required however it was his case that he had received consent from the former landlord.

(41) Counsel for the Applicant queried whether the consent applied to the work which had actually been carried out by Mr Froggart. Mr Froggart stated that he had had constant discussions with the landlord who had regularly attended the premises and had seen the work and that he had kept him fully apprised of what he was doing. However the former landlord had died and as a result he did not have confirmation of this.

(42) He stated that he had relied on the response from the landlord in the replies to *Additional Leaseholder Enquiries* at point 17 which stated-:

Confirmed subject to necessary consents and building regulation being received and complied with...” He had also relied upon advice from his previous solicitor.

- (43) In answer to what work he had undertaken, Mr Froggart stated that in the latter part of 2014, he had put a stud partition wall in to divide a room in two, Mr Collard asked whether Mr Froggart had provided any calculations to Brent Council in terms of Building control or planning permission. Mr Froggart stated that he had applied for retrospective consent.
- (44) Mr Froggart referred to a letter dated 17 September 2015 from Brent Council which confirmed that a building notice had been received from him on 9.09.2015.
- (45) Mr Collard referred to the surveyor’s report which had detailed action to be taken such as confirmation that any door replaced was a fire door and building regulation approval being obtained.
- (46) In relation to the carpet/flooring his plan was to install thermal and acoustic installation. Mr Froggart confirmed that he could not lay the flooring until the electrics had been installed. He stated that he had undertaken laeve and plastering, and had applied for a skip licence but had been refused permission. He had arranged for three loads to be removed by “a stop and go van”. In relation to the plumbing and the repositioning of the flue he had obtained a gas certificate.
- (47) Mr Froggart had expected to be able to purchase the freehold and as such he expected to be able to regulate the situation. However he still maintained that he had sought and obtained permission from the former landlord prior to carrying out the work.

Closing submissions

- (48) In reply Mr Collard stated that if consent was given then there were conditions and the respondent had not complied with building regulation as an application was not made until 9 September 2015.
- (49) The work undertaken was work which was liable to affect the structure and fire regulation approval was needed. Mr Froggart was a carpenter and the work had not been supervised as required by the previous landlord.

(50) The work to the boiler and the flue had not been set out in the Additional Enquires, even if, Mr Froggart had thought that he had consent, he had not complied with the requirements in that he had neither applied for planning permission or building control regulation. He was in breach even if he may be able to remedy the breach.

(51) In closing Mr McCarthy stated that the respondent had sought and been given consent. His request had been in great detail, and it was unnecessary to use a consent form. The document before the tribunal was sufficient. Accordingly there was no breach of the lease.

(52) When it was necessary to get building control consent Mr Froggart could obtain it.

(53) There was an evidential burden on the landlord which had not been discharged.

The decision of the Tribunal on the breach of clause 2(4) of the lease

(54) The Tribunal having heard from the parties and considered the documentary evidence find in relation to clause 10 of the Fourth Schedule that the Respondent is not in breach of clause 10 of the fourth schedule. The Tribunal finds that prior to the work being carried out Mr Froggart had the consent of the former landlord Mr Benyohai.

(55) The Tribunal finds that prior to purchasing the lease Mr Froggart sought clarification of whether consent would be needed to carry out an expensive program of work which was set out at 17.1-17.3. The reply indicated that formal consent would not be necessary as long as the necessary building and planning consents were obtained.

(56) The Tribunal finds that this refers to planning permission and building regulation in the event that they should prove necessary. The Tribunal has no evidence before it that the work undertaken was of a nature and quality to requiring planning permission or building control regulation.

(57) The Tribunal note informed by the Applicant that load bearing walls had been removed. The Tribunal did not have any evidence that the repositioning of the flue required building control approval or planning permission.

(58) The Tribunal noted that the specific details of the repositioning of the boiler, was not included in the leaseholder's additional enquiries. However the Tribunal noted that in his evidence, Mr Froggart stated that the former

landlord had been kept informed of progress in relation to the work and was aware of the nature of the work from his visits to the property. No evidence has been presented by the landlord to undermine any oral permission or variations which may have been agreed by the previous landlord.

(59) The Respondent applied to waive the necessity for formal consent and that consent was given by the landlord, although this was not in a form which was acceptable to the Applicant. The informality was agreed and the consent was given in a format which was deemed acceptable by her predecessor in title.

(60) The Tribunal also noted in the surveyor's report that potential breaches of the lease were identified. These included references to clause 26 .1-: "To comply in all respects with the Planning Acts." This breach was not relied upon by the Applicant in respect of the Respondent's failure to obtain planning permission. The Applicant has also not provided evidence that building control regulations have not been complied with.

(61) Accordingly the Tribunal finds that there is no breach of the fourth schedule, clause 10 of the lease.

(62) The Tribunal noted that the rubbish and refuse at the premises was left in the hallway of the Respondent's premises. This was not in the common parts, of the property and accordingly is not a breach of clause 25 of the lease.

(63) The Tribunal noted that this may potentially be a breach of clause 4 of the lease, however this is not what was alleged in the application and this clause was not relied upon by the Applicant. In any event, the Tribunal finds that the building debris was left in the hallway until collected. This does not amount to allowing rubbish or refuse to accumulate on the premises.

(64) Accordingly the Tribunal finds that there is no breach of the fourth schedule, clause 25 of the lease.

(65) The Tribunal noted that the Respondent had not covered the floors of the premises, however the panel noted that work was still ongoing at the property. The Tribunal finds that although the Respondent has not covered the floor of the property the tribunal accepts the evidence of the Respondent in paragraph 6 of his statement in which he stated that -: "*The Respondent has not yet finished the works to the floors. At present, the Respondent has removed the old floor boards to enable new First Fix Plumbing and Electrics... Once these works have been fully carried out, an acoustic (impact, reducing felt underlay) will be installed prior to laying carpet and timber boards.*"

(66) The Tribunal finds that the temporary failure to provide floor covering is not a breach of the lease. The Tribunal notes that no time table was agreed by the former landlord for the work to be completed, in respect of this work this must by implication be time limited, and by agreement with the Applicant.

(67) In the absence of agreement. The Tribunal finds that this work ought to have been completed within 6 months. The Respondent having failed to cover the flooring as required is in breach of the lease.

(68) Accordingly the Tribunal finds that the Respondent has breached clause 9 of the eighth schedule of the lease.

(69) Accordingly the Tribunal finds that the respondent is not in breach of clauses 10 clause and (25) of the fourth schedule.

The Tribunal finds that the Respondent is in breach of clause 9 of schedule 8 of the lease.

Name:

Ms M W Daley

Date: 25 October 2016

Appendix of relevant legislation

A summary of the legislation is set out below

The Law

Appendix

Section 168 (2) of Commonhold and Leasehold Reform Act 2002

(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 covenant or condition in the lease has occurred.

(5) But a landlord may not make an application under (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.

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 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.