FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/00CN/LBC/2013/0012**
Properties	:	**Flat 2 and Flat 3, 122-124 Fentham Road, Erdington Road, Erdington, Birmingham, B23 6AN**
Applicant	:	**Mrs Coneca Patrick**
Representative	:	**Mr Sebastian Lerenzo**
Respondent 1	:	**Oakwest Ltd (Flat 2)**
Representative	:	**Unrepresented**
Respondent 2	:	**Gillian Moore (Flat 3)**
Representative	:	**Powell & Co Solicitors**
Type of Application	:	**Under section 168(4) Commonhold and Leasehold Reform Act 2002 (the Act) for an order that a breach of covenant has occurred**
Tribunal Members	:	**Judge S McClure** **J E Ravenhill FRICS**
Date of hearing	:	**Paper determination**
Date of Decision	:	25 FEB 2015

DECISION

Decision of the tribunal

In respect of Flat 2

(1) A breach of the covenants contained in paragraphs 9 and 11 of the First Schedule of the Lease, and of the covenant contained in Clause 3(6) of the Lease, has occurred.

In respect of Flat 3

(2) A breach of the covenant contained in paragraph 2 of the First Schedule of the Lease has occurred.

The application

1. The Applicant seeks an order under section 168(4) Commonhold and Leasehold Reform Act 2002 (the Act) for an order that a breach of covenant has occurred.

2. On 25 February 2014 the Respondents were barred from taking part in the proceedings due to their lack of response to the applications and subsequent directions.

3. On 4 August 2014 the Second Respondent made an application for the bar to be lifted. On 1 October 2014 the Tribunal lifted the barring order against the Second Respondent.

4. In October 2014 the First Respondent acknowledged receipt of the application and asked for, and received, an extension of time to respond. No response was received. The barring order remains in place against the First Respondent.

5. Neither party requested an oral hearing. The Tribunal was of the view that an oral hearing was not necessary and the matter was determined by way of paper determination.

The Background

6. The Applicant is the owner of the freehold of a block of four flats known as 122–124 Fentham Road, Erdington, B23 6AN (the Building). The freehold comprises the block of four flats, four garages in a separate block and a communal court yard area (the Property). The Applicant is also the leaseholder of one of the flats within the Building, Flat 4, and she is resident in Flat 4. The fact that she is a leaseholder and occupier of a flat within the Building, is not material to this application. She makes this application as freeholder of the Property.

7. The First Respondent, Oakwest Ltd, is the leaseholder of Flat 2 of the Building. The First Respondent lets the property to a residential tenant.

8. The Second Respondent, Gillian Moore, is the leaseholder of Flat 3 of the Building. The Second Respondent does not live at the property. Flat 3 is unoccupied, and has been so for several years.

9. The Applicant's representative, Mr Sebastian Lerenzo, is the leaseholder of Flat 1 of the Building. He has lived in Flat 1, but no longer does so. He provides caretaker services to the Property, under the instruction of the Applicant.

10. An application was made to the Tribunal on 13 December 2013 by the Applicant for a determination as to whether or not the Respondents were in breach of the terms of their respective leases.

11. On 8 May 2014 the Tribunal conducted an inspection of the Building. In July 2014, prior to the application being determined by the Tribunal, the Second Respondent made her application for the bar to be lifted.

12. Following the 1 October 2014 decision whereby the Tribunal lifted the barring order against the Second Respondent, further directions were issued and the matter proceeded to determination.

The law

Commonhold and Leasehold Reform Act 2002

Section 168

(1) A landlord under a long lease of a dwelling may not service a notice under section 146(1) of the Law of Property Act 1925 (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 finally been determined on an application [to a First-tier Tribunal] that the breach has occurred...

13. It is important to appreciate that an application by the landlord under section 168 (4) of the Act may lead to the service of a section 146 notice under the Law of Property Act 1925 and a subsequent application to the Court for an order for forfeiture of the lease.

The Lease

14. The leases for Flat 2 and Flat 3 are identical in all material respects in relation to this application.

15. Clause 3 of the lease contains the following provisions:

> (i) 3(5) to permit the Lessor and its duly authorised agent ... upon giving previous notice in writing, at all reasonable times to enter into the Flat for the purpose of [inspection and repair].
>
> (ii) 3(6) Not to make any structural alterations or structural additions to the Flat or any part thereof or remove any of the landlord's fixtures without the previous consent in writing of the Lessor.

16. The First Schedule of the lease contains the following provisions:

> (iii) Paragraph 2 – not to do or permit to do any act or thing which may render void or voidable any policy or insurance of any flat in the Building or may cause an increase premium to be payable in respect thereof.
>
> (iv) Paragraph 9 - no external wireless or television aerial shall be erected.
>
> (v) Paragraph 10 - not to obstruct or cause to be obstructed any part of the Building.
>
> (vi) Paragraph 11 - not without the consent of the Lessor to alter or permit or suffer to be altered any electric wiring, gas or water supply system, or any other systems provided in the Building.
>
> (vii) Paragraph 13 - Any complaints which may arise between any of the tenants of the Flats in the Building in relation to the above stipulations or otherwise, may be submitted to the Lessor which may if it thinks fit determine the same and in that event its decision shall be binding upon all parties.
>
> (viii) Paragraph 14 - To comply with such further rules and regulations as the Lessor may reasonably make for the food management of the Building and Property and for the benefit of the Tenants of the Flats in the Building.

Inspection and submissions

17. On 8 May 2014 the Tribunal conducted an external inspection of the Property in the presence of Mr Lerenzo. The Respondents were not present. They were, at that time, barred. The Second Respondent was

18. subsequently given the opportunity to attend a further inspection of the property and she chose not to do so.

19. The Building and the entire Property appeared to be in overall reasonable condition, save that there was damage to the garages following a fire. The common areas were reasonably clean and tidy.

20. There were detailed submissions from the Applicant and the Second Respondent.

The issues

Issues over which the Tribunal has no jurisdiction

Flat 2 and Flat 3

21. Claim - The Respondents have not paid ground rent for the three years 2011-2014 in the total sum each of £60 in breach of Clause 3(1).

22. Decision - The Tribunal has no jurisdiction in this application with regard to claims of non-payment of rent. Such claims are provided for under different statutory provisions.

23. Claim -The Respondents have not paid insurance for the three years 2011-2014 in breach of Clause 3(1).

24. Decision – Clause 1 and Clause 3(1) of the Lease reserves insurance as rent. The Tribunal has no jurisdiction with regard to rent, see paragraph 21.

25. Claim - The Respondents have not paid any service charge for the three years 2011-2014 Clause 3(2)

26. Decision - the Tribunal has no jurisdiction in this application with regard to claims for non-payment of service charge. The combined effect of section 81 of the Housing Act 1996 and section 169(7) of the Commonhold and Leasehold Reform Act 2002, provide that claims for non-payment of service charge must be dealt with by way of an application to the Tribunal under section 27A of the Landlord and Tenant Act 1985.

Flat 2 and Flat 3

27. The Tribunal identified the relevant issues for determination as follows:

(i) Whether the Respondents' acts or omissions alleged by the Applicant to have taken place did, in fact, take place.

(ii) Of those acts or omissions, if any, found by the Tribunal to have taken place, whether they amount to a breach of a covenant or condition of the lease.

Flat 2

28. Allegation – The First Respondent has erected a satellite dish in breach of paragraph 9 of the First Schedule.

29. Decision – The Tribunal noted the satellite dish at the inspection. The Tribunal finds the First Respondent erected the satellite dish. The Tribunal finds the First Respondent has breached paragraph 9 of the First Schedule.

30. Allegation – The First Respondent has repeatedly left items in the communal cupboard and hallway, causing an obstruction in breach of paragraph 10 of the First Schedule. The Applicant provided a witness statement from the occupant of Flat 1, Mr Howe, and from Mr Lerenzo, in support of the allegation.

31. Decision – The Tribunal finds that there is no term in the lease that confers responsibility on the First Respondent for the actions of their tenant. The Tribunal finds the First Respondent has not breached paragraph 10 of the First Schedule.

32. Allegation – The First Respondent has altered the light fittings to the kitchen and lounge, replaced the floor standing boiler in the kitchen with a wall mounted central heating boiler involving alterations to the original gas and water pipework, overboarded and plastered the original artexed wall and ceilings throughout the flat, in breach of paragraph 11 of the First Schedule. The Applicant provided a witness statement from Mr Lorenzo in support of the allegation.

33. Decision – The Tribunal finds that the First Respondent has carried out the alterations alleged. The Tribunal finds the Respondent has breached paragraph 11 of the First Schedule.

34. Allegation – The Respondent's tenant, the occupier of Flat 2, has failed to respond adequately to requests from Mr Lerenzo to cease carrying out acts of anti-social and criminal behaviour, in breach of paragraph 13 of the First Schedule.

35. Decision - The Tribunal finds that there is no term in the lease that confers responsibility on the First Respondent for the actions of their

tenant. The Tribunal finds the First Respondent has not breached paragraph 13 of the First Schedule.

36. Allegation – The First Respondent's tenant, the occupier of Flat 2, has acted in an anti-social and criminal way and, as a result, the First Respondent has breached paragraph 14 of the First Schedule. The Applicant provided a witness statement from the occupant of Flat 1 and from Mr Lerenzo, in support of the allegation.

37. Decision – Paragraph 14 of the First Schedule provides for the Applicant to make such further rules and regulations as are reasonable to be made. The Applicant does not specify any such rules and regulations, so the Tribunal cannot find there has been a breach of Paragraph 14 of the First Schedule. Even if such rules and regulations did exist, the allegation is against the actions of the tenant of the First Respondent and, as stated above, there is no term in the lease that confers responsibility on the First Respondent for the actions of their tenant. The Tribunal finds the First Respondent has not breached paragraph 14 of the First Schedule

38. Allegation – The First Respondent removed the original window and door frame to the rear, causing movement to the wall above, in breach of Clause 3(6) of the lease. The Applicant says that the First Respondent did not request or receive written consent for the works nor was oral consent given.

39. Decision – The Tribunal saw the replacement window and door at the inspection and found that there was some cracking to the external wall, apparently as a result of these works. The Tribunal finds that the Respondent carried out this work and that no consent was requested from the Applicant. The Tribunal finds the First Respondent has breached Clause 3(6).

Flat 3

40. Allegation – The Respondent has caused the insurance premium and the excess charge to be increased due to the long term non-occupation of Flat 3, in breach of Paragraph 2 of the First Schedule.

41. The Second Respondent's solicitor submits that they were told by an insurance broker that it would be prepared to insure the building at no extra cost despite Flat 3 being empty.

42. Decision – The Tribunal finds the evidence submitted by the Applicant of an increased premium to be credible, and more so than the statement of the Second Respondent's solicitor regarding insurance.

The Tribunal finds that the insurance premium was higher due to Flat 3 being unoccupied in the long term, than it would be if Flat 3 was occupied. The Second Respondent has breached Paragraph 2 of the First Schedule.

43. Allegation – The Respondent has failed to allow the Applicant access to the property to carry out an inspection to assess any necessary works, in breach of Clause 3(5).

44. The Applicant contends that she has made several attempts since 2011 to get access to Flat 3 and the Second Respondent has not responded.

45. Decision – The Tribunal finds that, by way of a letter from her solicitor of 20 June 2013, the Second Respondent provided the Applicant with the contact details of her property agent and her permission for the agent to allow the Applicant access to Flat 3. Therefore, at the date of the application, access had been offered. The Tribunal finds the Respondent has not breached Clause 3(5).

Application under Regulation 13 for payment of costs

46. The Applicant makes a claim for costs for this application of £250. She provided a breakdown of costs and the Tribunal finds those costs are reasonable.

47. The Tribunal's powers to award costs are contained in Regulation 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and may only be exercised if a person has acted unreasonably in 'bringing, defending or conducting' proceedings. The Tribunal finds that the First Respondent did act unreasonably in choosing not to respond to the application once it had come to their attention, save acknowledging receipt of the application and asking for, and receiving, an extension of time to respond. The First Respondent is to pay half of the Applicant's costs of the application, a sum of £125.

48. The Tribunal finds that the Second Respondent did not act unreasonably in either her defence of, or her conduct of, the proceedings and no costs order is made against the Second Respondent.

In reaching their determination the Tribunal has had regard to the evidence and submissions of the parties, the relevant law and their own knowledge and experience as an expert Tribunal but not any special or secret knowledge.

If either party is dissatisfied with this decision they may apply for permission to appeal to the Upper Tribunal (Lands Chamber). Prior to making such an appeal, an application must be made, in writing, to this Tribunal for permission to appeal. Any such application must be made within 28 days of

the issue of this decision which is given below (regulation 52 (2) of The Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rule 2013) stating the grounds upon which it is intended to rely on in the appeal.

Name: Judge S McClure **Date:** 25 FEB 2015