FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AW/LBC/2015/0075**
Property	:	**69 Campbell Court, Queen's Gate Gardens, London SW7 4PD**
Applicant	:	**Campbell Court Property Inc**
Representative	:	**Mr Carl Fain (Counsel) instructed by DAC Beachcroft LLP**
Respondents	:	**St Martins Property Investment Limited**
Representative	:	**Mr Gary Cowen (Counsel) instructed by Berwin Leighton Paisner**
Type of Application	:	**Declaration as to a breach of covenant – section 168(4) Commonhold and Leasehold Reform Act 2002**
Tribunal Members	:	**Judge Robert Latham** **Ms Luis Jarero BSc FRICS**
Date and venue of Paper Determination	:	**7 October 2015 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**30 October 2015**

DECISION

(i) The Tribunal determines that for the purposes of section 168(4) of the Commonhold and Leasehold Reform Act 2002, a breach of the lease has occurred in that the Respondent unreasonably refused the Applicant access to enter Flat 69 Campbell Court to examine the state and condition therefore, the said refusals being notified to the Applicant on 16 June 2015 (orally), 24 June 2015 (by e-mail) and 7 July 2015 (by letter).

(ii) The Tribunal declines to make an order that the Applicant should pay the Respondent's costs pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

The Application

1. By an application issued on 17 August 2015, the Applicant seeks a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") that the Respondent tenant is in breach of a clause of its lease of 69 Campbell Court, Queen's Gate Gardens, London SW7 4PD in that it has unreasonably refused access to the landlord to investigate repeated leaks which in turn have damaged other flats within the block.

2. On 19 August 2015, the Tribunal gave directions. The Tribunal directed that the application is to stand as the landlord's statement of case. The alleged breach is pleaded in these terms:

> "The respondent's flat has suffered from repeated leaks since 2003 which have caused damage to other flats, notably Flat 63 within the Campbell Court block. The Applicant has been repeatedly requesting access to the respondent's flat to inspect the causes of these leaks and the state of the flat. The Respondent has unreasonably refused the Applicant's requests for access or has imposed unreasonable conditions, such as permission to access only parts of the flat but refused access to the full property. The Respondent has specifically failed to allow for a structural inspection of an area where a fence was erected without first seeking licence of the Applicant. It is suspected that this has caused structural damage."

3. Pursuant to these directions:

(i) The Respondent has served its Statement of Case in Response (at p.36 of the Bundle) and a witness statement from Mr Andrew Smith, an Asset Manager employed by the Respondent (at p.41).

(ii) The Applicant has served a Statement in Response (at p.55) and a witness statement from Mr Peter Tilbury, an Asset Manager employed by Arab Investments Limited who manage the block on behalf of the Applicant (at p.57).

(iii) On 30 September, the Respondent served additional statements, namely a second statement from Mr Smith (p.105) and statements from Ms Yusuf, the Respondent's In-House Counsel (p.109) and Richard Ratcliffe, the Respondent's Executive Director who is also a Surveyor (at p.112). These statements relate to the events which occurred at an inspection on 14 September in respect of which there is a dispute of fact between the parties.

4. The case was listed for two hours. The Applicant was represented by Mr Carl Fain, instructed by DAC Beachcroft LLP ("Beachcrofts"). He adduced evidence from Mr Tilbury. The Respondent was represented by Mr Gary Cowen, instructed by Berwin Leighton Paisner ("BLP"). He adduced evidence from his Mr Smith, Ms Yusuf and Mr Ratcliffe. Both Counsel provided Skeleton Arguments and we are grateful for the assistance that they provided.

5. Mr Cowen informed the Tribunal that the Respondent was making an application for costs pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules") complaining that it was manifestly unreasonable for the Applicant to issue this application and then to continue with the same after access had been afforded on 14 September 2015.

6. Mr Cowan submitted a Schedule of Costs in the sum of £26,395.20. Mr Fain indicated that the Applicant had incurred costs in the more modest sum of some £8,000. The extent to which parties are content to permit legal costs to escalate in a disproportionate manner is often the best indication of the entrenched position that the parties have adopted.

The Law

7. Section 168 of the Act provides 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.
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> (2) This subsection is satisfied if—
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> > (a) it has been finally determined on an application under subsection (4) that the breach has occurred,
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> > (b) the tenant has admitted the breach, or
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> > (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 the appropriate tribunal for a determination that a breach of a covenant or condition in the lease has occurred.

8. Strictly, all this Tribunal is asked to determine is whether the Respondents have breached a term of their lease. It is not for this Tribunal to consider whether another Court might grant relief from forfeiture.

The Lease

9. The lease is dated 24 June 1965. The tenant covenants by Clause 2(7)

> "to permit the Landlord and its agents and all persons authorised by it and them respectively at all reasonable times in the day time upon reasonable prior notice being given to the Tenant to enter upon the Flat with or without workmen and others and examine the state and condition thereof....."

Our Determination

10. Since 29 November 1982, the Respondent has been the registered proprietor of the leasehold interest in Flat 69. The Respondent holds the leasehold interest on trust for the State of Kuwait. The flat is used to house diplomats and other officials linked to the Kuwaiti Embassy. At the relevant time, the Flat was occupied by Mr and Mrs Boshalbah and their young family. Mr Boshhalbah is employed by the Kuwait Embassy. However, it is accepted that no issue of diplomatic immunity arises.

11. Mr Tilbury described how there had been 17 "events" connected to the Flat since he had been managing the property in 2000 and how he had wanted to inspect all the plumbing appliances. The Flat is situated on eighth floor. Flat 63 is situated immediately below it on the seventh floor.

12. The Tribunal is concerned with the events that occurred in 2015. However, there is a long history to this dispute with which we can deal briefly:

> (i) At some date which the Respondent contends was prior to 30 August 2007 (see p.103), a wooden fence was erected to the outside parapet wall on the eighth floor of the building. It seems that this was erected without either planning consent or the licence of the Applicant. Through 2013, 2014 and 2015, there was correspondence between the parties' solicitors relating to the grant of a retrospective licence. The Applicant required access to inspect the structure before it would grant the licence. On 14 May 2015 (at p.79), Beachcrofts

wrote repeating that the landlord would require access before the licence could be granted. On 15 June 2015 (at p.80), BLP responded that no further inspection was required as the landlord had inspected it on 2 May 2014.

(ii) In September 2013, there had been a leak causing damage to Flat 63. This flat is occupied by Mr Al Arayedh and Mrs Ali Hassan Alsahi. After this flood, the tenants redecorated their flat.

13. In about June 2015, there was another leak affecting Flat 63. The precise date of the damage is unclear. Mr Al Arayedh and Mrs Ali Hassan Alsahi had been abroad since about April. On 15 June, the leak was discovered when the Head Porter entered the flat to clear the post. Mr Tilbury inspected the flat on the same day. There was water staining to the ceiling, wall and cornices. The wallpaper was stained and peeling. There was also water staining to a mirror, television, carpet and settee.

14. It is not necessary for this Tribunal to determine the cause of the leak. The respective position of the parties is as follows:

(i) Mr Tilbury believes that it was caused by a leak from the washing machine in Flat 69. The Contractors' Logbook which is maintained by the porters records visits by a plumber (20.3.15), maintenance contractor (2.4.15), "a leaking washing machine" (16.4.15), "a Hotpoint engineer" (24.4.15) and "a new washing machine delivery" (5.5.15).

(ii) Mr Ratcliffe suggests that it is plausible that the water could have run down the shaft of the service riser which supplies the landlord's services and is located in the hallway immediately behind the location where the washing machine was fitted. It is apparent that none of the witnesses called by the Respondent had asked Mr or Mrs Boshalbah about the cause of the flood.

15. At 18.25 on 15 June (at p.61), Mr Tilbury e-mailed the Respondent (copied to Mr Ratcliffe, Mr Young and Mr Bousfield) complaining of "yet another leakage of water from Flat 69 into the newly decorated Flat 63". The e-mail states:

"I must hold St Martins Property Investments Limited fully responsible for the damage and ask a representative of your company attends tomorrow together to view the damage together with access to Flat 69 to ensure that no further water leaks occur".

16. At 08.10 on 16 June (at p.47), Mr Bousfield responded and proposed a meeting at 14.00. He stated that he had advised the Embassy of the problem and was awaiting their response. At 14.00. Mr Tilbury and Mr Bousfield inspected Flat 63. Mr Bousfield stated that he did not have

permission to carry out an inspection of Flat 69 to investigate the cause of the leak.

17. Mr Bousfield is no longer working for the Respondent and was not called to give evidence. In his witness statement, Mr Smith asserts that Mr Tilbury had not requested access to Flat 69 in his e-mail. Mr Smith is wrong. The Tribunal is satisfied that the Applicant made a reasonable request for access to inspect Flat 69. The Respondent did not afford access. The effect of this was to refuse the landlord the access that it had requested.

18. Mr Tilbury had informed Mr Al Arayedh of the damage to his flat. Mr Tilbury described how Mr Al Arayedh had been "incandescent". He confirmed that a family member had last been at the flat in mid-April.

19. On 19 June (p.63), Mr Tilbury e-mailed Mr Bousfield asking to be advised when an inspection could be carried out "to ascertain the cause and or confirm that repairs have been carried out to prevent and further occurrence of the escape of water". He noted that it was now 5 days since the discovery of the damage caused by the flood.

20. On 22 June (p.64), Mr Tilbury sent a further e-mail asking whether the Respondent had managed to arrange access to Flat 69. He added that it was very important to inspect and ascertain the cause of the flood "in view of past experience". He described how the tenants of Flat 63 were "understandably most upset at the damage to their flat". He concluded: "I must hear from you now as this was reported last Monday the 15th June 2015".

21. At 16.05 on 24 June (at p.65), Mr Ratcliffe responded in these terms:

> "Based on our inspection of the property on 16 June, it appears to be a one-off problem which – presumably – arose whilst the owners were away. All the relevant areas are now dry.
> There is no evidence that the damage was caused by a water leak from Flat 69 and we therefore do not accept responsibility for it."

22. The Tribunal concludes that this e-mail can only be construed as a further refusal of access. Access had been sought on a number of occasions. A response is finally received in which no access is offered.

23. On 25 June (at p.66), Mr Tilbury responded to Mr Ratcliffe setting out his grounds for believing that the leak emanated from Flat 69. He concluded:

> "I cannot accept your statements below and confirm that there is every evidence that water has escaped from Flat 69. Is this the reason why our requests to inspect Flat 69 are being denied?"

24. On 26 June (at p.67), Beachcrofts wrote to BLP requesting access to Flat 69. The relevant part of the letter states:

> "Our client requests that your client arranges for access to be given to Flat 69 for the purposes of investigating the leak immediately.
> As we have mentioned in previous correspondence, the right to inspect is reserved under the lease at clause 2(7) and your client is in breach of his obligation.
> We reiterate that access to Flat 69 for the purpose of inspection of the leak and the fence should be given immediately as there are real concerns about damage to the structure and the building. We consider your refusals of access unreasonable. In light of the two letters received from you yesterday, we consider any Court action to be premature.
> We look forward to hearing from you as a matter of urgency".

25. On 7 July 2015 (p.69), BLP responded. They repeated their suggestion that the leak was a historic matter. Beachcrofts' interpretation of events was stated to be "selective and inaccurate". The request for access was seen as "a further attempt to obfuscate matters". The Solicitor asserted that the Respondent does not have a right to enter the Flat for investigative purposes. In any event, any such investigation was not necessary. The letter concludes in these terms:

> "That said, in the interests of moving forward, our client is prepared to allow access for your client to view the condition of areas reported to have been originally affected by the leak. Your client should contact Andrew Smith of St Martins Property Investments Limited to arrange this (Tel: 020-7940 7700).
> As your client has already inspected the fence and the supporting structure, our client's position remains that it is unreasonable and unnecessary for your client to inspect again. The only outstanding item is the licence for alterations to formally record this position, which you have so far failed to provide.
> In the light of the above, our client is proceeding with its intended action."

26. The Applicant did not telephone Mr Smith. On 13 July, Beachcrofts responded. They describe why the leak is not a historical issue. The Applicant required confirmation that the leak had been repaired. The Solicitor asserted that the landlord had a general right to enter the Flat to inspect its state and condition. This right existed regardless of any application for a retrospective licence in respect of the fence. The Applicant could not understand the Respondent's refusal of access to inspect the fence. It was suggested that the Respondent had something to hide. The letter concluded:

> "We look forward to hearing from you with confirmation that access will be provided for an inspection of both the leak and the fence..."

27. No response was received. On 14 August, the Applicant issued the current application.

28. Mr Fain, for the Applicant, submits that the letter of 7 July was a refusal of access to examine the state and condition of the Flat. The Respondent had no basis to refuse this.

29. Mr Cowen, for the Respondent, submits that the letter of 26 June did not make a valid request for access. The Applicant demanded "immediate" access. Clause 2(7) rather permits access on "reasonable prior notice". In any event, he suggests that the letter of 7 July offered access.

30. The Tribunal makes the following findings:

> (i) Clause 2(7) affords the landlord a general right to enter the Flat to examine its state and conditions.
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> (ii) By their letter of 26 June, the landlord was seeking to exercise its general right to enter to inspect for two specific purposes, namely to investigate the cause of the leak in so far as this emanated from Flat 69 and to inspect the fence.
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> (iii) We do not construe the letter as demanding access "immediately" upon receipt of the letter by BLP. It should rather be construed having regard to the background facts to which we have referred. Upon receipt of the letter, BLP would be expected to take immediate action to seek instructions from their client, the tenant as to when access could reasonably be afforded.
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> (iv) The tenant's letter of 7 July can only be construed as a refusal of access to inspect the fence.

31. We therefore conclude that this was a further refusal of access on 7 July. We note, however, that the tenant did offer the landlord access to inspect the areas of the Flat originally affected by the leak. Had the landlord been minded to take up this offer, it should have telephoned Mr Smith. Had the landlord had any real concerns about the continuing risk of a further flood, the Tribunal would have expected the landlord to take up this offer.

32. The Tribunal makes further findings that the tenant did offer access by a letter dated 27 August (at p.54) and that an inspection occurred on 14 September in the presence of the occupant, Mrs Boshalbah. Mr Cowen seemed to suggest that this cured any previous refusal of access. We do not accept this.

33. There is a dispute as to what occurred on 14 September. This inspection is not material to our finding that there had already been three unreasonable

refusals of access. We therefore set out our findings briefly. The inspection had been arranged for 10.00. However, it was re-arranged for 17.00 for the convenience of Mr Boshalbah. In the event, he was unable to attend and access was afforded by his wife.

34. Mr Tilbury, Mr Quinn (Quantity Surveyor) and Mr Mattieson (Architect) attended on behalf of the landlord. Mr Smith, Mr Ratcliffe and Ms Salma Yusuf attended for the Applicant. Ms Yusuf was present to provide some reassurance to Mrs Boshalbah. On their arrival, Mrs Boshalbah was caring for her baby and was cooking a meal.

35. Mr Smith described Mr Tilbury's demeanour as being "bombastic" and complained that he did not introduce his team or adequately explain which parts of the Flat they wanted to inspect. The inspection lasted for one hour. They did inspect the fence and most of the flat.

36. Mr Tilbury complained that he was not allowed to move the washing machine and inspect the pipes behind it. Mr Tilbury was sure that he had asked whether the washing machine could be moved. However, neither his team not any of the tenant's team were willing to move it themselves. They all agreed that it would have been unreasonable to ask Mrs Boshalbah to move it. Had any of the landlord's team wished to move the washing machine, they could have asked to do so.

37. Mr Tilbury also complains that he was unable to inspect one of the four bathrooms. We find that towards the end of the inspection, Mr Tilbury opened the door into the master bedroom to access this en-suite bathroom. Mrs Boshalbah evidenced some ill ease about this party of six going into her bedroom. We accept the evidence of Mr Smith that the landlord then agreed not to proceed. It does not seem that this bathroom was the cause of the leak.

38. Mr Tilbury stated that there was some discolouration to the floor render by the washing machine consistent with a historic leak. This was disputed by Mr Smith. After the Inspection, Mr Smith requested a copy of any report prepared relating to the inspection. Mr Tilbury stated that he took handwritten notes. However, no report was provided to the tenant. We find this surprising.

39. If the landlord had concluded that the scope of this inspection had been inadequate, it could have arranged for a further inspection. No further inspection has been requested.

Rule 13 Application

40. Mr Cowan made an application for costs against the Applicant under Rule 13(1)(b) of the Tribunal Rules on the ground that it had acted "entirely

unreasonably" in bringing this application. He described the application as "wholly disproportionate" using "a sledgehammer to crack a nut".

41. Rule 13 of the Tribunal Procedure Rules provides (emphasis added):

> "(1) The Tribunal may make an order in respect of costs only:
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> .....
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> (b) if a person has acted unreasonably in bringing, defending or conducting proceedings in ...(ii) a leasehold case ...."

42. The Tribunal have found in favour of the Applicant and are satisfied that it acted reasonably in bringing this application. In their letter of 7 July, BHL denied that Clause 2(7) afforded the landlord a general right to enter to inspect the condition and state of the flat. They were wrong on this. Further, access has been unreasonably refused on a number of occasions over many years. We have made express findings in respect of three such refusals.

43. Even had the Applicant failed in their application, the Respondent would have had great difficulty in persuading us that an order should be made. Mr Fain referred us to *Ridehalgh v Horsefield [1994] Ch 205*. This Tribunal is satisfied that an order under Rule 13 is only justified if on an objective assessment a party has behaved so unreasonably that it is only fair and reasonable that the other party is compensated by having their legal costs paid. This tribunal remains essentially a costs-free jurisdiction where an applicant should not be deterred from using the jurisdiction for fear of having to pay the other party's costs should she or he fail in their application. Were the tribunal to adopt an unduly punitive approach to any breach, it could have a chilling effect upon access to justice. Parties with good claims could be deterred from bringing them before this tribunal.

Judge Robert Latham

30 October 2015