



**Residential  
Property**  
TRIBUNAL SERVICE

**Leasehold Valuation Tribunal**

**LON/00AG/LBC/2010/0070**

**London Rent Assessment Panel**

**Commonhold and Leasehold Reform Act 2002 section 168(4)**

**Address:** Flat 2, 17 Rosecroft Avenue, London NW3 7QA

**Applicant:** Mrs Greta Ainsworth-Davis

**Represented by:** Mr John Ainsworth-Davis

**Respondent:** (1) Mr Anthony Ian Sethill & (2) Mrs Oyunbileg Sethill

**Represented by:** Manches solicitors

**Tribunal members:** Mr T J Powell LLB (Hons)

**Application dated:** 1 October 2010

**Paper directions:** 8 October 2010 (as amended 1 November 2010)

**Paper determination:** 7 January 2011

**Decision:** 17 January 2011

### **Decisions of the Tribunal**

- (1) The Tribunal determines that the Respondents are in breach of paragraphs 8 and 9 of the Third Schedule of the lease (failure to provide entry);
- (2) The Tribunal determines that the Respondents are not in breach of Condition 2 of the Second Schedule, or of paragraphs 6, 14, 17 or 20 of the Third Schedule of the lease; and
- (3) The Tribunal determines that the Applicant has not acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings, and therefore declines to award costs against the Applicant.

### **Background**

1. This is an application made pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 seeking the Tribunal's determination as to whether there have been breaches of the terms of the lease granted in respect of Flat 2, 17 Rosecroft Avenue, London NW3 7QA, a flat owned by the Respondents.

### **The property**

2. The flat is one of four in a converted house. The Applicant owns the freehold of the house and she resides in garden flat, Flat 1, with her husband and representative Mr John Ainsworth-Davis. The Respondents own the leasehold of Flat 2, having become the registered proprietors of the flat on 13 July 2005. The Respondents resided in the flat until about mid-2010, when they re-located to live in Hong Kong and sub-let the flat in their absence.
3. The Tribunal did not consider that an inspection of the property was necessary for its determination and neither party asked the Tribunal to inspect.

### **The lease**

4. The lease to Flat 2 was granted on 21 June 2004 and was made between the Applicant and the Respondents' predecessor in title, Mr John David Sonabend. The lease was for a term expiring on 25 March 2156 and granted by way of an extension of an earlier lease of the flat dated 7 July 1967, under the Leasehold Reform, Housing and Urban Development Act 1993.
5. The relevant provisions of the lease are repeated below, where appropriate.

### **The law**

6. Section 168 of the Commonhold and Leasehold Reform Act 2002 states:
  - (1) A landlord under a long lease of a dwelling may not serve a notice under s.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 sub-section (2) is satisfied.

- (2) This sub-section is satisfied if –
  - (a) it has been finally determined on an application under sub-section (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 sub-section (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 sub-section (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.”

7. Paragraph 10 of schedule 12 of the Commonhold and Leasehold Reform Act 2002 allows the Tribunal to award up to £500 in costs if one of the parties has acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

#### **Determination of the application**

8. The Tribunal indicated that it was minded to make its determination on the basis of documents provided by the parties, unless either party asked for an oral hearing. In the absence of any such application, the Tribunal has made its determination on the papers, without a hearing.
9. The Tribunal considered the Applicant's original application, the Respondents' Statement in Response, the Applicant's Reply, the lease, correspondence passing between the parties and the Tribunal, and all other documents on the Tribunal's file. Having done so, the Tribunal makes the following determinations of the issues in dispute.

#### **Alleged breach of the lease in relation to the use of the garden**

10. The Second Schedule to the lease contains provisions relating to the calculation of the Maintenance Payment and conditions that are applicable thereto. Certain items of expenditure are to be shared equally between the lessees of all four flats,

and certain items equally between the lessees of flats 2, 3 and 4 only. Condition number 2 states:

"If the Lessor or its managing agents shall be of the opinion that any item of expenditure has arisen been incurred or its cost increased by the act neglect or default of the Lessee or any persons resorting to or using the demised premises the Lessor may charge the whole or such part as may be reasonable of such expenditure to the Lessee as part of the Maintenance Payment ..."

11. The Applicant alleged that without authorisation or warning the Respondents erected numerous playground apparatus' in the garden, which had caused substantial damage to large areas of the communal lawn. When the managing agents asked them to remove these apparatus', the Respondents refused and ignored the letter. The apparatus' remained there for three to four years.
12. In her Reply to the Respondents' Statement of Case the Applicant stated that most of the playground equipment had been removed, but there remains one large swing, 8 feet high and 1½ square metres in ground area. The Applicant was not seeking an order that the Respondents should pay her anything, but was simply seeking a determination from the Tribunal that an item of expenditure has been incurred by the act of the Respondents in breach of condition no.2.
13. By Note 1 to this part of her Reply, the Applicant raised a new head of claim, namely that the Respondents by their actions listed above had breached paragraph 14 of the Third Schedule to the lease, which states:
 

"Not to do to permit or suffer anything to be done ... in the garden ... which may at any time be or become a nuisance or annoyance to the Lessor or the tenants or occupiers of any other flats in the Building ..."
14. The Applicant considered that "these playthings were not just a nuisance to us, but also to the children from Flat 4" because the children's' balls stuck in the play things.
15. By Note 4 of her Reply, the Applicant raised yet another head of claim, namely that the Respondents were in breach of paragraph 20 of the Third Schedule to the lease, which states:
 

"Not to leave any perambulator bicycle or other article or thing in the entrance hall or passages of the building or (unless satisfactory arrangements are made with the Lessor) in the garden or common parts".
16. With regard to this, the Applicant claimed that "Not long ago, we were looking for a spot in the garden at the end of a pathway where the Lessees might barbeque in peace keeping fumes away from any open windows. We found this pathway blocked with bicycles and other gear, which I discovered were owned by the Respondents".

### *The Tribunal's decision*

17. The Tribunal determines that the Respondents are not in breach of Condition 2 of the Second Schedule or paragraphs 14 or 20 of the Third Schedule of the lease.

**Reasons for the Tribunal's decision**

18. As part of their evidence, the Respondents produced copies of emails to and from the managing agents in May and June 2008 and again in April 2010, when they were asked to move the garden toys, swings and toddler's slide so that gardeners could treat and rejuvenate the grass areas. It was said by the managing agents that the garden toys had damaged the grass, but the Respondents denied this and complained that the lawn had been ruined by the Applicant's dogs digging it up. In any event, the managing agents agreed that the swing and slide could remain in place, though the gardeners themselves might move them if need be. No further correspondence appears to have been received by the Respondents.
19. Condition 2 of the Second Schedule is not a lessee's covenant susceptible to a finding of breach by the Respondents but, in any event, the Applicant produced no evidence that there was any "act neglect or default" on the part of the Respondents, that the children's play equipment had caused any damage, or that any additional cost had arisen as a result of any of these things, during or after the three or four years the apparatus remained in the garden.
20. The Applicant produced no photographic evidence relating to the play equipment or the alleged damage to the garden. The Applicant also failed to deal with the suggestion in the Respondents' papers that her own dogs had caused damage to the lawn.
21. So far as paragraph 14 of the Third Schedule was concerned, this was a late claim by the Applicant, which gave the Respondents insufficient time to deal with it. However, the allegation was not particularised in any way, so that it was unclear whether it was being said that existence of children's play equipment was a nuisance or annoyance, or its use, or the alleged damage to the grass.
22. Apart from a bald submission "that the Respondents did cause such a nuisance and annoyance", there was no evidence from the Applicant to say why or to support the allegation. In particular, the Applicant failed to produce any relevant correspondence relating to nuisance or annoyance, or any supporting witness statements, for example from other lessees, particularly from the lessees of Flat 4, whose children allegedly found the play things a nuisance, too.
23. The allegation of a breach of paragraph 20 of the Third Schedule was also a late claim by the Applicant, without any supporting evidence. The allegation that on one unspecified day in the past the garden path was blocked by children's bicycles, with nothing more, is insufficient to establish a breach of this covenant in the lease.
24. In addition to the above, the Tribunal notes that the use of the garden is governed by Part I of the First Schedule of the lease, which sets out the rights included in the lease. Paragraph 3 of Part I states:

"The right in common with others as aforesaid to use for the purposes of enjoyment and recreation the garden at the rear of the Building but subject to any reasonable regulations which the Lessor may from time to time make and

communicate in writing to the Lessee for the general comfort and convenience of all users thereof.”

25. The Applicant produced no evidence that the Respondents’ use of the garden (especially by erecting children’s play equipment) was inconsistent with the exercise of this express right, or that regulations existed which the Respondents had breached.

**Alleged breach of the lease in relation to water leaks**

26. Paragraph 6 of the Third Schedule to the lease, is the lessee’s covenant:  
 “To keep all baths sinks taps lavatory cisterns drains waste and other pipes and conduits serving the demised premises clear open and in good working order and free from obstruction and to indemnify the Lessor and keep the Lessor indemnified from and against all damage caused as a result of breach of this covenant including damage caused by flooding or freezing.”
27. In her application the Applicant alleged that they suffered from water penetration into their flat from above, on 16, 17 and 18 December 2005. The Applicant complained to the Respondents at the time and apparently made an insurance claim in respect of the damage.
28. The Applicant claimed that damage to the second bedroom of her flat had been assessed by loss adjusters in the following terms: “Inter alia - Brown and yellow coloured water smelling of urine soaked out the bed and bed clothes. Brown and yellow stains on ceiling - plus a wall to wall crack and ceiling cracks and stains in both wardrobes. Many clothes soaked and ruing. Carpet, bed clothes and mattress soaked and with the offensive liquid. In addition the lighting short circuited ...”

**The Tribunal’s decision**

29. The Tribunal determines that the Respondents are not in breach of paragraph 6 of the Third Schedule of the lease.

**Reasons for the Tribunal’s decision**

30. The Tribunal is satisfied that a water leak affecting the Applicant’s flat took place in December 2005, some five years ago. However, the Applicant supplied no documentary evidence relating to the leak and, in particular, no evidence at all relating to the source of it. The only documents provided came from the Respondents in the form of copy emails from December 2005 and from June 2008, which mentioned that a leak had taken place.
31. The Applicant provided no evidence that the leak emanated from the Respondents’ flat; that it was the Respondents’ responsibility under the lease; that the leak arose from a breach of the Respondents’ lease; or that the Respondents were liable for the leak in any way. In her Reply, the Applicant did not deal

adequately with the Respondents' point that "it is perfectly possible that the lease was from a common parts pipe or other source".

32. In her Reply, the Applicant referred to an assessment of the damage to her flat by "More Than" (Royal Alliance) Insurance Company and to photographs taken by them, but no copies were provided to the Tribunal.
33. Although the Applicant claimed that the insurance company and the plumbers involved were satisfied that the leak came from the pipe work peculiar to Flat 2, there was no independent evidence of this. An allied complaint was that the Respondents refused to give access to the Applicant's plumber, but this is dealt with separately below.
34. In addition to a lack of evidence to establish liability for this historic leak, there was no evidence from the Applicant as to what damage had occurred; the cost of remedying such damage (if any); or the result of the insurance claim. Although a description of the alleged damage was given, the document from which it was taken was not supplied so that the accuracy of the claim could not be confirmed.
35. The Tribunal notes that no formal demand has ever been made by the Applicant to the Respondents, and the level of any alleged damages has not been quantified in the application, or in the Applicant's Reply. Such very limited email correspondence as there was relating to the water leaks appears to stop in mid-2008, and there was no adequate explanation why the claim had taken the Applicant five years to pursue.

#### **Alleged breach of covenants in relation to a failure to permit entry**

36. By letter dated 2 October 2010 the Applicant enclosed a further alleged breach of lease, which had been omitted from the original application in error. The Applicant stated that by email (dated 6 June 2010) the Respondents had categorically refused entry to the Applicant and that by this action the Respondents had made it virtually impossible for the Applicant to obtain evidence in this matter.
37. Paragraphs 8 and 9 of the Third Schedule to the lease, are the lessee's covenants:
  - "8. To permit the Lessor its agent and all persons authorised by the Lessor respectively at all reasonable times upon not less than twenty four hours notice to enter upon the demised premises ... and inspect the condition and user thereof ... and ... give ... notice in writing requiring the Lessee to remedy all defects decays and wants of reparations then and there found ...
  9. " To permit the Lessor its agent and all persons authorised by the Lessor respectively at all reasonable times to examine the state and condition of the demised premises ... and to execute and do any repairs or work for which the Lessor is liable under the Lessor's covenants hereinafter contained ..."

38. The allegation of a failure to give entry to Flat 2 was repeated in relation to the December 2005 leak, when in her Reply the Applicant claimed that the Respondents refused to let her enter their flat and have her expert plumber check their water works.
39. In their Statement of Case the Respondents complained that this allegation was not particularised sufficiently, and denied that they had ever refused reasonable requests by the Applicant or her agents to inspect their flat.
40. In "Exhibit A" to her Reply, the Applicant provided two emails exchanged between the parties on 6 June 2010. The first was from the Applicant's husband laying out full reasons why the Applicant wished to enter the Respondents' flat. He suggested "that an experienced surveyor should enter Flat 2 under the authorisation of your Covenants 8 and/or 9, on page 9 of the lease. This surveyor could then report as to the marble flooring and other floor coverings, mostly on the question of sound proofing; the utility room, formerly a bedroom, converted without consent with added toilet and washing machine, all of which sound out through the dark hours in to the bedroom below..."
41. The second email was from the First Respondent stating, "I do not believe we have in any way breached the lease. I will not grant access".

#### **The Tribunal's decision**

42. The Tribunal determines that the Respondents are in breach of paragraphs 8 and 9 of the Third Schedule of the lease.

#### **Reasons for the Tribunal's decision**

43. Although the Applicant appears to complain about several instances when it is alleged that the Respondents had refused access to their flat, the only instances, which can be dated, are at the time of the December 2005 leak and in the email of 6 June 2010. In relation to the former, and in relation to all other alleged instances, the Applicant has failed to give any details of the alleged refusal to give access. This is despite the Respondents in their Statement of Case complaining that the application fails to particularise these details.
44. In particular, the Tribunal does not know to whom a request was made, by whom or in what manner; whether any such requests were made on not less than twenty-four hours notice or at a reasonable time; or what the response to the request was, if any.
45. While there is no documentary evidence from the Applicant to substantiate these requests, there is evidence of a reasonable request for access and a refusal, in the form of the emails exchanged on 6 June 2010.
46. It is important for the proper working of the lease and the mutual obligations that it contains that lessor have access to the flats for legitimate purposes. The bar in paragraphs 8 and 9 is not high: the lessor may request access simply to "inspect



the condition and user” of the demised premises (paragraph 8) and “to examine the state and condition of the demised premises” (paragraph 9). The email did not give a time or date for the access to take place, but the reasonable assumption is that a convenient time could have been arranged in the future between the parties.

47. The Respondents may have objected to the way in which the Applicant made her request (though the Tribunal passes no judgment on that), but at the end of the day, a legitimate request to inspect the demised premises was made, which the Respondents should not have refused.

#### **Alleged breach of covenant not to make alterations**

48. Paragraph 10 of the Third Schedule to the lease, is the lessee’s covenant:

“Not without written consent of the Lessor such consent not to be unreasonably withheld in the case of minor alterations not affecting the structure of the Building to make any alterations in the demised premises or remove any partitions doors or cupboards or other fixtures therein and not to cut maim or injure any of the floors walls or timbers thereof.”

49. The Applicant originally claimed that, without her consent as Lessor, the Respondents’ predecessor in title Mr Sonabend had altered the original bathroom into a utility room with a toilet and washing machine, and had altered the original dining room into a combined dining room and kitchen, together with kitchen equipment. The Applicant submitted that she had “never accepted the legality of these alterations”, that they were made by the previous lessee “without anyone’s knowledge or consent”, “secretly” and as “a fait accompli”.
50. As part of their Statement of Case the Respondents produced a copy of a Licence for Alterations dated 13th September 1995 granted by the Applicant to the previous flat owner Mr Sonabend, and bearing the Applicant’s own signature, which permitted the alteration to a combined dining room and kitchen. In addition, the lease plan to the extended lease, also signed by the Applicant, showed the existence of a utility room at the time the extended lease was granted.
51. As a result, in her Reply, the Applicant withdrew this allegation and therefore there was nothing under this head for the Tribunal to determine.

#### **Alleged breach of covenant in relation to floor coverings**

52. Paragraph 17 of the Third Schedule to the lease, is the lessee’s covenant:

“At all times during the said term to keep all passages and rooms inside the demised premises (except the kitchen bathroom and toilet) close-carpeted and under-felted and the kitchen bathroom and toilet floors covered with suitable floor coverings to deaden the penetration of sound...”

53. In the application the Applicant alleged that the flooring or sound proofing in the dining room of the flat does not comply with the lease. In particular, it was said that the Respondents have laid marble stone flooring in their dining room, despite

oral and written warnings from the lessor that this was in serious breach of the lease. In her Reply the Respondents' Statement of Case, the Applicant complained that she and her husband "spend a lot of time directly under this marble above. It has to be heard to be believed. The smallest sound is magnified ten times ..."

54. In addition, the Applicant alleged that the flooring or sound proofing in the bathroom of the Flat 2, directly above the bedrooms of Flat 1, does not comply with the lease. In particular, it was said that there is no suitable floor covering to deaden the penetration of sound.
55. In their Statement of Case, the Respondents denied any breach of the lease and claimed that any changes in the floor coverings had occurred before the period of their ownership of the flat, that is to say when the flat was owned by the original lessee, Mr Sonabend. They claimed not to be liable for any breaches that Mr Sonabend may have committed, but insofar as he may have breached the lease, such breaches had been waived by the Applicant.

#### **The Tribunal's decision**

56. The Tribunal determines that the Respondents are not in breach of paragraph 17 of the Third Schedule of the lease.

#### **Reasons for the Tribunal's decision**

57. With regard to the bathroom, there was no evidence as to the floor covering currently in place, so the Tribunal is unable to make a determination as to whether or not the floor was covered with suitable floor coverings, or not. The Applicant failed to satisfy the burden of proof that the floor coverings were unsuitable.
58. With regard to the dining room, the lease requires this to be close-carpeted. However, by the Licence to make alterations dated 13 September 1995, the current Applicant gave Mr Sonabend permission to remove the partition wall between the kitchen and dining room, to create a unified kitchen/diner.
59. The opportunity should have been taken by the Applicant at the time to consider the appropriate floor covering of that new room, because the lease covenant in paragraph 17 refers to different floor coverings in the two separate rooms, before unification. In the Tribunal's view, paragraph 17 of the Third Schedule of the lease does not extend to the unified kitchen/diner.

#### **The issue of waiver**

60. If Mr Sonabend had been in breach of his lease by changing the floor coverings, the Tribunal does not consider that the Respondents can evade liability under the lease simply because there is no privity of contract between the parties (the argument at paragraph 40 of the Respondents' Statement of Case). So long as there is privity of estate between the parties - i.e. they stand in the position of

lessor and lessee - the Respondents will be liable for any breaches of the lease caused by Mr Sonabend, unless the Applicant has waived them for any reason.

61. The Tribunal has power to consider whether the Applicant as lessor has waived any breach of covenant (in the sense of being estopped from relying upon her rights against the lessee under the covenant): see paragraph 16 of the judgment of HHJ Huskinson in the Lands Tribunal decision of *Swanston Grange (Luton) Management Limited v Eileen Langleigh-Essen* LRX/12/2007.
62. While the acceptance of rent after a breach of covenant may perhaps amount to a waiver of the right to forfeit, that is not a matter for this Tribunal but for the court.
63. A more important consideration is whether the Applicant has waived the breach of covenant (if any) by granting a new extended lease to Mr Sonabend on 21 July 2004. In their Statement of Case the Respondents claim this to be the case. The Applicant in her Reply claimed that the marble flooring had been laid by the Respondents in November 2005, after they had acquired the lease. There was no independent evidence of this fact, though the Applicant sought to rely upon her letter (in fact, an email) to the Respondent dated 20 November 2005, at page 37 of the Respondent's exhibit.
64. That email complained about "breaches of covenant that you have inherited from Mr Sonabend as his successor-in-title" and goes on to state that "The granite [sic] floor was left there by Mr Sonabend after a three year absence from the flat in absolute breach of covenant which he had undertaken to put right before completing the sale of his property ..."
65. On the face of it, the Applicant's own contemporaneous email contradicts her claim that the Respondents had laid the marble/ granite flooring in November 2005. However the date when the flooring was laid by Mr Sonabend remains unclear. The Respondents suggested that it was before the grant of the new lease to Mr Sonabend and the Applicant did not or was unable to contradict this in her Reply.
66. The Tribunal has insufficient evidence to reach a determination about the issue of waiver, but if there were evidence that Mr Sonabend changed the floor coverings before the grant of the new extended lease to him on 21 July 2004, so that the current floor coverings were in place when the lease was granted to him by the Applicant, that would in the Tribunal's view prevent the Applicant from alleging a breach of the lease.

#### Application for costs

67. The Respondents contended that the application was vexatious and an abuse of process, and contained statements which are obviously false.
68. Their costs of instructing solicitors and counsel exceeded £500. Given the manner in which the application had been brought without prior warning, the basic lack of justification for the claims made, the failure to provide full particulars of the

alleged breaches and the fact that the application makes false and misleading claims, the Respondents asked that the Tribunal exercise discretion to award costs in their favour pursuant to paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002.


**The Tribunal's decision**

69. The Tribunal determines that the Applicant has not acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings, and therefore declines to award costs.

**Reasons for the Tribunal's decision**

70. The major defect in the Applicant's case was the unfounded allegation that the Respondents were in breach of lease for making unauthorised alterations to the demised premises. The Applicant withdrew that allegation at the first opportunity after receiving the Respondents' Statement of Case and documents attached.
71. Although the Tribunal has found mostly in favour of the Respondents, this was due in large part to a lack of evidence produced by the Applicant, and thus an inability on her part to substantiate her allegations or to contradict the Respondents' case.
72. It is clear that the parties have not had the most cordial of relationships in the past. The Respondents complain about the Applicant's conduct and the way she has approached her complaints, especially not pursuing them for many years, indeed not until the Respondents had re-located to live abroad. However, from the correspondence some blame for the parties' poor relationship may lie with the Respondents and their somewhat brusque replies to emails and an apparent unwillingness to engage in discussions with the Applicant.
73. It is beyond this Tribunal to make findings about the rights and wrongs of the parties' conduct before the proceedings began, but nothing during the proceedings justifies an award of costs being made against either party.

Chairman:

  
\_\_\_\_\_  
Timothy Powell

Date:

17 January 2011