



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

Case reference : **LON/00AK/LBC/2016/0038**

Property : **Upper Flat, 50 Brownlow Road,
Bounds Green, London N11 2BS**

Applicant : **Mr Carmine Spatola**

Representative : **Mr Varma instructed by Pittalis
LLP**

Respondent : **Ms Tonya Maria Henderson**

Representative : **Mr Wijeyaratne**

Type of application : **For the determination of alleged
breaches of covenant**

Tribunal members : **Judge Hargreaves
Michael Taylor FRICS**

**Date and venue of
hearing** : **10 Alfred Place, London WC1E 7LR
25th August 2016**

Date of decision : **2nd September 2016**

DECISION

Decisions of the Tribunal

1. The Tribunal has no jurisdiction under *s168(4) Commonhold and Leasehold Reform Act 2002 (CLARA)* to determine the alleged breaches of covenant relating to non-payment of ground rent and service charges.
2. The Respondent has breached the provisions of clause 3(5) and paragraph 12 of the Fourth Schedule of the Lease.
3. The Respondent has not breached the provisions of clause 3(7)(a)(b) of the Lease.

REASONS

The application

1. References are to those in the trial bundles (A for Applicant's, R for Respondent's).
2. On the 8th June 2016 the Applicant made an application (A1) for the Tribunal to determine that the Respondent tenant had committed three different breaches of covenants contained in a long lease of the upper flat at 50 Brownlow Road, N11, which is dated 7th April 1993 (A21). The three alleged breaches will be dealt with separately below.
3. There was a useful site visit attended by the Tribunal, the Applicant, and Mr McAloon, the Respondent's husband, as well as their legal representatives. The Respondent herself did not attend the hearing, where evidence was given by the Applicant and Mr McAloon. The Respondent's property is well maintained internally, as is the Applicant's, though we noticed that some of the external rainwater goods and pipe work require attention. There is an allegation on behalf of the Respondent that the roof leaks and requires repair: we cannot determine this dispute either.
4. The background is set out in the Applicant's statement at A47. It is clear that, generally speaking, it would be fair to say that the relationship between the Applicant and Respondent has been poor for a long time. The Applicant lives on the ground floor with his wife and three children and has recently extended his flat. The Respondent has never lived in the property but has used it as an investment and let it since she acquired it about 18 years ago, a few

years before the Applicant acquired the freehold. It is unlikely that this decision is going to assist the parties to resolve all their differences; in particular we consider that the Applicant had an unrealistic expectation of what these proceedings could actually achieve, and this is reflected in some of the parties' evidence, which is irrelevant, and explains why not all matters raised by the parties are referred to in this decision.

5. The Respondent's response is at R1, Mr McAloon's witness statement is at R5, and the current occupier's evidence (Joanna Williams) is at R86, though this does not assist the Tribunal so much as emphasise the poor relationships between the parties. The Respondent's written submissions are at R91.

Non-payment of ground rent and service charges

6. The Tribunal has no jurisdiction to deal with ground rent.
7. The Tribunal has no jurisdiction to deal with the service of a notice in respect of arrears of service charges in a *CLARA* application; the correct course would have been to issue a *s27A LTA 1985* application and for the parties to focus on the correct statutory framework for the resolution of a service charge dispute. In brief, *s168 CLARA 2002* provides that a landlord cannot serve notice under *s146 LPA 1925* without having first secured a determination from the Tribunal that a breach of covenant or condition of a lease has occurred. *S169(7) CLARA* exempts service and administration charges from the provisions of *s168*, therefore the Tribunal has no jurisdiction to determine that any non-payment of rent or service or administration charges amounts to a breach of covenant or condition.
8. It follows that the Tribunal declined to hear the evidence or submissions in relation to these disputes, some of which raised limitation issues, the question whether the service charge demands complied with statutory requirements, and whether *s20* notices were required. These issues raise technical questions about compliance with statutory requirements which need to be determined unless the parties can resolve their differences.

Alterations and damage

9. By *clause 3(5)* of the Lease (A26) the Respondent covenanted "*Not at any time during the said term to make any structural alterations in or additions to the Demised Premises or any part thereof or to cut maim or injure any of the walls or timbers thereof or to alter the Lessors' fixtures therein without first having made a written application (accompanied by all relevant plans and*

specifications) in respect thereof to the Lessor and secondly having received the written consent of the Lessor thereto". By clause 4(5) the Respondent covenanted to "observe and perform the Regulations in the Fourth Schedule" which include (A31 and 43) a covenant "Not at any time to do or permit the doing of any damage whatsoever to the Building and fixtures fittings or chattels therein ...".

10. The "Demised Premises" are defined in the *First Schedule* (A38) and include "the plastered coverings and plaster work of the walls and partitions lying within the Flat" and "the surfaces of the floors including the whole of the floorboards and supporting joists (if any) ..". "The Building" means the building of which the Demised premises forms part ..." (clause 1(8) at A25). See also the definition of the "Demised Premises" at A38 for 3 main exceptions, which indicate that the excepted parts must therefore be part of the building.
11. It is beyond doubt that the Respondent breached *clause 3(5)* because she instructed her builders to remove the original internal partition wall previously separating the WC and the bathroom, to reconfigure the bathroom to make one room, without obtaining the Applicant's consent as required. That was admitted. Whether or not the removal of the wall amounts to a structural alteration is irrelevant because the works carried out in the autumn of 2014 amount to a clear breach of the part of the clause which prevents the Respondent from proceeding to "cut maim alter or injure any of the walls or timbers thereof" without permission. The circumstances in which this was done might be relevant to an application for relief from forfeiture if necessary, but are not relevant to our determination as to the fact of a breach.
12. The Applicant discovered the works because one of the workmen put his foot through the floor of the bathroom and therefore the bedroom ceiling of one of the Applicant's children, below. That caused some water damage as well. Mr McAloon arranged for replastering of the ceiling within days. There are ongoing disputes about the costs of further redecorating which we do not have to resolve. This damage would breach the obligation contained in *paragraph 12 Fourth Schedule* because the damage to the Applicant's ceiling is damage to the *Building* (see *clauses (i) and (ii)* at the bottom of A38).
13. The Respondent admits the breach but alleges that the Applicant is estopped from relying on the breach or has waived his right to rely on it, alternatively acquiesced in the removal of the wall. In order for these defences to provide a defence to the breach so as to negate liability, the evidence has to be clear and compelling. It transpires that after the damage was caused, there were two incidents upstairs

at which the Applicant must have seen the damage. The first was shortly after it happened, the second was (probably) within a week when police attended the property to resolve a dispute about whether some of the Respondent's new bathroom floor tiles had been stolen by the Applicant.

14. As Mr Varma submitted, the factual basis on which the Respondent sought to make good these defences simply could not be made out. It is impossible to derive from the parties' evidence as to what was said and done on these two occasions, when tempers seem to have been flaring, that the Applicant gave any hint, never mind a clear representation, that he noticed that the wall had been removed but was prepared to forego his legal rights in respect of the breach or the damage, or indicated the same to the Respondent or her representative. That is the case despite his arguable tardiness in instructing solicitors to do something about it, and the fact that on the first occasion he was arguably more concerned about floor joists than the wall – but that might be understandable when a builder has just put his foot through the bedroom ceiling of a young child. The burden of proof is on the Respondent who has failed to discharge it on the balance of probabilities – any coherent detail was lacking. There is no satisfactory probative evidence, direct or inferential, on which the Respondent can escape the breach in this case: nothing in the Applicant's behaviour suspended the effect of the covenant as alleged.
15. It follows that the breaches in respect of alteration to the demised property and damage to the building, are made out.

Unauthorised sub-letting

16. There was a twist in the facts which was noted by the Tribunal at the hearing but which appears to have evaded the attention of the parties for years. The Respondent is the registered proprietor of the property. Any disclosed tenancy agreements (A117 and R51-85) were in the name of Mr McAloon as landlord, two of them (28th February 2015 and 28th February 2016) witnessed by the Respondent, a matter which Mr McAloon regarded as a mere matter of practicalities and legally irrelevant, given that he and his wife manage several flats and obviously had confused themselves about the ownership of this one. The effect for the current occupier Ms Williams is that she has, on any view, the benefit of a tenancy by estoppel¹.
17. The Applicant contends that the Respondent has breached *clause 3(7)(a) and (b)* of the lease (A27) because she has either (i) sub-let for a period exceeding 12 months or (ii) parted with possession of

¹ See eg Megarry & Wade, 8th ed, 17-125-17-127.

the whole of the demised premises without first obtaining a deed executed by the landlord and the proposed sub-lessee/assignee etc whereby the latter agrees to observe the covenants in the lease directly with the landlord. It is accurate that no such deed has ever been procured. But the pleaded complaint is not that the Respondent is in breach of the covenant; see A49. What the Applicant actually complains of is that only once has he been provided with a copy AST (see A117²). But he is only entitled to a copy where the sub-letting exceeds 12 months or there has been an assignment or parting with possession, the latter two not applying at all in this case (the Respondent remains the registered proprietor). So there is a factual weakness in the Applicant's contentions.

18. It was tempting for a moment to consider that because Mr McAloon is described inaccurately as the landlord in the disclosed agreements, that the Respondent has parted with possession to him and would therefore be in breach of *clause 3(7)(a)(b)*. As Mr Varma submitted persuasively, the letting agreements could arguably only be valid if Mr McAloon held a reversionary interest at the time of the sub-letting. As we pointed out to him in the course of his submissions, that is taking an extremely technical hammer to a practical walnut, because in the real world this Tribunal often observes that matters are arranged with occasional scant regard to legal niceties, and the tenancy by estoppel analysis would fill the technical gap if required so far as the occupier is concerned. Of course, as far as the Respondent is concerned, she might have argued that she had not parted with possession at all, except for (or because of) the fact that she was a willing participant in the lettings of the flat because she witnessed the AST agreements.

19. In our judgment Mr Varma's approach does not work in this case. At most there is a mistake in the tenancy agreements which are capable of rectification. There has been no effective assignment of any interest legally or in equity to Mr McAloon on the facts put before the Tribunal³. The clear evidential impact of Mr McAloon's evidence is that he manages the flat for and on behalf of himself and his wife as a joint enterprise (we do not intend to make any observations or findings that might affect the parties' taxation arrangements) and that it never occurred to either of them (or their lawyers or agents apparently), that they were mixed up – even after these proceedings were issued.

² May 2002, again Mr McAloon is the landlord

³ See eg Megarry & Wade 17-138 et seq. There is no evidence on which the Tribunal could properly decide that the Respondent has sub-let the entirety of the demised term to Mr McAloon.

20. On the basis that the actual letting agreements are capable of immediate rectification on the facts before us on the basis of an obvious mistake, the real analysis is that the evidence before the Tribunal is that there are 4 AST's in evidence which do not breach the first part of *clause 3(7)(a)*. They do not sub-let for more than 12 months. The fact that these would then be converted on termination by statute to monthly periodic tenancies does not breach the 12 month rule either. Taking the evidence as a whole, we listened to Mr McAloon's evidence, and whilst we might be less than impressed by his grasp of some of the basic niceties of landlord and tenant relationships, we were persuaded by his oral evidence that all lettings have been in accordance with the terms of the lease ie for no more than 12 months. That is supported by the documentary evidence, and is a matter on which we consider we are entitled to accept his oral evidence, there being no real reason to come to any contrary conclusions which would arguably be counter-factual in the case of an investment property in this sector of the London residential market.
21. It follows that on the facts before the Tribunal, there is no breach of *clause 3(7)(a) or (b)*.
22. In the circumstances of this case we do not intend to encourage either party to make an application for Rule 13 costs, and make no directions accordingly

Judge Hargreaves

Michael Taylor FRICS

2nd September 2016