



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

Case Reference : LON/00AG/LBC/2014/0078

Property : 31B Lyndhurst Road, London NW3
5PB

Applicant : Hampstead Hill Properties Ltd
(landlord)

Representative : Child and Child solicitors

Respondent : Mr Oliver Larholt (tenant)

Representative : None

Type of Application : For the determination of an alleged
breach of covenant

Tribunal Members : Judge Sonya O'Sullivan
Mr Charles Norman FRICS

**Date and venue of
Hearing** : 10 Alfred Place, London WC1E 7LR

Date of Decision : 8 January 2015

DECISION

Decision of the tribunal

The Tribunal determines that there has been a breach of clause 11(1) of the Third Schedule of the Lease but no breach of clause 11(2).

The application

1. The applicant landlord seeks a determination pursuant to s. 168(4) of the Commonhold and Leasehold Reform Act 2002 that the respondent tenant is in breach of covenants contained in his lease.

Background

2. The respondent holds the property known as Flat B and Garage No.1 Lyndhurst Road, London NW3 5PB (the "Flat") pursuant to a lease dated 21 April 1981 and made between John Walton, William Henry Johnson, Robert Walter Hood Richmond (1) and Jacqueline Elizabeth Kunz (2) (the "Lease"). The lease is for 1000 years. We were told that the building dates from 1889. The property has been sublet and the sub lessee is not a party to this litigation.
3. Application was made to the tribunal dated 26 September 2014.
4. Directions were made dated 2 October 2014 which set out the steps to be taken by the parties to prepare for the hearing.
5. In accordance with those directions the landlord filed a bundle with the tribunal. The Respondent did not serve a bundle of documents as directed but had served a witness statement with exhibits.

The hearing

6. The hearing took place at 10am on 26 November 2014. The applicant was represented by Ms Gourlay of Counsel with Mr Blanksby appearing to give expert evidence for the applicant. The respondent appeared in person.
7. At the commencement of the hearing the respondent was asked to explain why he had not complied with the directions by serving a bundle of evidence by 30 October 2014. He explained that this had been due to time constraints as he had recently been through divorce proceedings. He confirmed that he had made an application for a postponement of the hearing but had not pursued this by providing the documentation in support requested by the tribunal.

8. Mr Larholt had brought further documentation to the hearing and requested permission for this to be considered. The documents comprised some guidelines and a copy of Mr Ogarrio's electrical report which he had annotated, photographs and an email from the landlord. The tribunal admitted the photographs given no objection was made by Counsel for the applicant. We did not admit the email as this appeared to concern the issue of access and was not therefore relevant to the alleged breaches before us. As far as the annotated report and guidelines were concerned these had not previously been disclosed to the Applicant and comprised Mr Larholt's comments on the categorisations contained in Mr Ogarrio's report. Given that the respondent is not an expert witness and that the matters could be raised in cross examination of Mr Blanksby, we decided that this annotated report should not be admitted. We therefore did not allow the report to be adduced as evidence.

The issues

9. The applicant set out its case in a document entitled "grounds for application" attached to the application.
10. In short the applicant alleges that the respondent is in breach of clauses 11(1) and (2) of the Lease as he has failed to remedy defects affecting the boiler and electric cables and wires serving the Flat. A series of reports were contained in the bundle. Also contained in the bundle was various copy correspondence between the parties which the applicant relied on to say that attempts had been made to ensure the defects were remedied and the landlord had no choice but to make the application to the tribunal.

The Lease

11. The provisions of the Third Schedule of the Lease relied upon are as follows;

11(1) During the said term to keep the said premises and the drains sewers watercourses waterpipes gas pipes electric cables and wires solely serving the Flat and all appurtenances thereto in good and substantial repair and condition.

(2) To execute all such works as are or may under or in pursuance of any Act or Acts of Parliament already passed or hereinafter to be passed be directed or required by any local or public authority to be executed at any time during the said term upon or in respect of the said demised premises (whether by Landlord or Tenant thereof) or in respect of the streets adjoining thereto or the sewers or drains thereunder."

The boiler

12. In relation to the alleged defects to the boiler the applicant relied on the expert evidence of Mr Blanksby. We were informed among other things that he has City and Guilds qualifications in electrical installation, inspection and testing and verification. He is gas safe registered and hold qualifications to install various appliances including boilers and pipework. We also note that he is the principal of his own firm and appeared to the tribunal to be a suitably qualified expert in respect of both electricity and gas installations.
13. Mr Blanksby had prepared a report dated 1 August 2014 in relation to the condition of the boiler. The tribunal was also supplied with colour photographs showing the pressure release valve pipe and its point of termination.
14. He submitted that the boiler had not been property installed/kept in good repair in accordance with the manufacturer's instructions. Those specific instructions took precedence over the gas safety regulations [The Gas Safety (Installation and Use) Regulations 1998]. The main issue was that the pressure release pipe was connected to a washing machine hose which in his view could not withstand the temperature of any discharge of steam or boiling water and was thus vulnerable to becoming split or limp. In addition the pipe did not discharge outside the Flat but rather within the garage doors and reference was made to a photograph in the bundle at page 205 which clearly showed the pipe discharging within the garage. Mr Blanksby also expressed concern that the pipe, which he estimated was some 3 metres long, was unsupported and also contained joints which were not rigid copper plate as required by the manufacturer. In addition there was some concern about the placement of the boiler overall as it was not installed against an external wall. To comply with the manufacturer's instructions the pipe and any joints should be made of a material tested to withstand high temperatures and it should be fitted in a rigid position with a discharge externally over a suitable drain.
15. He concluded that the boiler is deemed "*at risk*" in accordance with the Gas Safety (Installation and Use) Regulations 1998.
16. The respondent informed the tribunal that as far as he was aware the boiler had been fitted in accordance with the manufacturer's instructions and any necessary approvals had been obtained on its installation such as landlord's consent or building control approval. He was not however able to provide the tribunal with any evidence of these. Since its installation we heard that the respondent has had British Gas landlords cover in place who deal with any issues arising at the Flat as soon as they are reported. We had no evidence of the policy in place before us. The respondent also relied on various British Gas safety certificates which were provided in the bundle to say that the

boiler had been assessed as safe over a number of years and thus did not have the defects alleged.

17. Mr Larholt accepted that the pressure release pipe comprised a short section of copper pipe followed by a washing machine discharge hose. This was agreed to contain a joint. However he submitted that this hose by its very nature was designed to withstand high temperatures and also suggested that the joints in the pipe likewise were fit for purpose. He denied that the pipe discharged internally into the garage but said rather that it discharged outside the garage door directly into a drain. He relied on a photograph showing the location of the pipe outside the garage door. When shown the photograph of the pipe discharging internally he submitted that it must have been moved as it was a flexible hose.

The boiler - the Tribunal's decision

18. We accepted the expert evidence of Mr Blanksby that the boiler had not been installed in accordance with the manufacturer's specification. We referred to the manufacturer's specification (page 66) and in particular noted that, the pipe is not a continuous fall but rather much of the pipe lies flat and further that it does not face downwards outside the building. For correct installation it is implicit that the pipe must be in a fixed position which is clearly not the case given on Mr Larholt's own evidence the pipe had been moved at some point to discharge internally.
19. In the absence of any expert evidence to the contrary we also accepted Mr Blanksby's evidence that the washing hose and joints are not fit for purpose given they will not have been rigorously tested for purpose as a release from a pressure release pipe. We had no evidence before us of the type of hose and joints in question and their specification. Although we accept in principle that many washing machines do discharge extremely hot water, given the lack of evidence as to the specification and type of hose before us, we could not conclude that the pipe was able to withstand the pressure it may be subjected to.
20. We considered the various British Gas landlords gas safety records contained in the bundle dating from November 2011 to 11 July 2014. We noted that in November 2011 under "details of defects" a note had been made of "PRP". This appeared to be a reference to the Pressure Release Pipe. On this occasion the appliance was held to be unsafe. Despite no action being taken to remedy the defects on this occasion the boiler was subsequently found to be safe on subsequent occasions. Mr Blanksby had suggested that the reports were unreliable. We consider that this variation demonstrates that competent installers may reach a range of slightly different opinions as to the status of a particular installation. Further, gas installers are concerned with safety

whereas we are concerned with whether clause 11(1) has been breached, which is a different question.

21. However, in light of Mr Blanksby's evidence we concluded that the lessee had failed to keep the pipe in good condition. We therefore found it to be a breach of Clause 11(1) of the Lease.
22. We went onto consider whether this constituted a breach of clause 11(2). The applicant says that this is a breach of The Gas Safety (Installation and Use) Regulations 1998.
23. No specific breaches of these extensive and complex regulations were particularized by the applicant. Further, contrary to Mr Blanksby's evidence, the Regulations do not use the expression "at risk". Rather Reg. 34(1) states "*The responsible person for any premises shall not use a gas appliance or permit a gas appliance to be used if at any time he knows or has reason to suspect that it cannot be used without constituting a danger to any person.*"
24. Regulation 36 (2) requiring a landlords safety certificate states;

"Every landlord shall ensure that there is maintained in a safe condition—

(a)any relevant gas fitting; and

(b)any flue which serves any relevant gas fitting,

so as to prevent the risk of injury to any person in lawful occupation or relevant premises."
25. However, the difficulty with Regulation 36 is that it only applies directly to leases of less than seven years. This provision therefore has no direct application in the present proceedings between the freeholder and long leaseholder. The subtenant is not a party. The existence or otherwise of a valid safety certificate is however relevant to the lessee's state of knowledge at the relevant time (see below).
26. The question for the tribunal is therefore under regulation 34(1) whether or not the boiler in its present condition can be used without constituting a "*danger to any person*". The regulations do not distinguish between the risk of danger and immediate danger. The Tribunal approaches the construction of the regulation in a purposive way, namely the protection of the public from unsafe gas appliances and installations. We have accepted Mr Blankby's evidence that the pressure discharge pipe was unsuitable, not in accordance with manufacturer's instruction and might split. The tribunal therefore

finds that there is the risk of harm by scalding to a person standing near the pressure relief pipe if the boiler safety valve is engaged and if the pipe or its join splits. There is also personal injury risk to a person near the unsecured end of the pipe whilst there is a steam discharge.

27. However, that is not the end of the matter because the duty under Regulation 34 is qualified by the expression "***knows or has reason to suspect that it cannot be used without constituting a danger to any person***". The tribunal therefore has to go onto consider the respondent's state of knowledge as at the date of application to the tribunal. The tribunal considers that it would be wrong to make an adverse finding against the respondent on this point if a valid safety certificate was in force at the relevant time.
28. The Tribunal has noted the Landlord's Gas Safety Record of 11 July 2014 signed electronically by Robert Harrison 2999236. This states that the appliance is safe. The tribunal finds that Mr. Larholt was entitled to rely on this certificate, having been procured from his own gas installer, in informing his state of knowledge for the purposes of Regulation 34. The Tribunal therefore finds that Mr. Larholt did not have reason to suspect a breach of Reg 34.
29. The tribunal therefore finds that there is no breach of Regulation 34(1) and that consequently a breach of clause 11(2) has not been proved.

The alleged electrical defects

30. In relation to the alleged electrical defects the applicant relied principally on the report of Mr Ogarrio dated 26 June 2013 and a further report following a re-inspection dated 7th October 2013. Mr Ogarrio was not present to give evidence and the applicant relied on Mr Blanksby commenting on that report and giving his own view where appropriate.
31. The nature of Mr Ogarrio's report was a National Inspection Council for Electrical Installation Contracting ("NICEIC") "Domestic Electrical Installation Condition Report". NICEIC is a private organisation and not part of government. The report uses a categorisation system to explain the severity of defects found. "C1" means "*Danger present- risk of Injury. Immediate Action required*". "C2" means "*Potentially dangerous, urgent remedial action required*". C3 means "*improvement recommended*". During the hearing it was conceded that items categorised as C3 did not give rise to breaches of covenant.
32. During the hearing, in response to a question from the Tribunal in relation to the alleged breach of clause 11(2) in relation to electrical installations, which had not been particularised, Counsel conceded that such a claim was no longer being pursued.

33. The respondent submitted that he was required to keep the Flat in good and substantial repair and that many of the items referred to would constitute upgrades for which there were no legal requirements. He also again relied on the fact that he had British Gas landlord cover in place that would attend the Flat and rectify any problems. He submitted that he had done all that a reasonable landlord could do. As far as the individual items were concerned he submitted that there were now only a few items outstanding from the works recommended in Mr Ogarrio's reports. He also suggested that many of the categorisations should in fact be C3 which did not relate to disrepair. As a general note we would mention that the wiring at the Flat dated in part from 40-45 years ago and in part from 20-25 years ago.

34. The tribunal sets out below the items identified in the report and the tribunal's decision in each instance. The reference to a C number is a reference to the categorisation of urgency of works (see above). In each case, the question for the tribunal is not the categorisation per se, but whether there has been a breach of clause 11(1) of the lease. This is to be judged as at the date complained of in the past and it is irrelevant for the purposes of this application whether the breach has since been remedied. In addition, a degree of necessary improvement does not take work beyond "repair".

i. Absence of main protective C2

We agree this was lacking and is correctly categorised. We find that this is disrepair and a breach of covenant to keep in good condition.

ii. Access to live parts via missing distribution board cover in electrical cupboard C1.

It was admitted that there had been access at the time of inspection although this had now been rectified. We find that this is both disrepair and a breach of covenant to keep in good condition.

iii. 2 no double sockets in lounge and 1 no double in each of 2 bedroom installed upside down. C2

This was accepted as a fact by the respondent who alleged there were no safety concerns. We accepted Mr Blanksby's evidence in relation to these safety concerns as we heard that installation upside down would put pressure on the flex. We find that this is disrepair and a breach of covenant to keep in safe condition.

iv. No visible supplementary equipotential bonding in bathroom area (en suite) C2

We accepted Mr Blanksby's evidence that this had not been present and was a category C2. We find that this is a breach of the covenant to keep in good condition.

- v. Absence of RCD protection C2

We accepted Mr Blanksby's evidence that this had not been present and was a category C2. We find that this is a breach of the covenant to keep in good condition.

- vi. Inadequate size earthing conductor connected to first distro board in cupboard C2

We accepted Mr Blanksby's evidence that this had not been present and was a category C2. We find that this is a breach of the covenant to keep in good condition.

- vii. Inadequate labelling of protective devices at 3 distribution boards C3.

Items categorised as C3 were not pursued by the applicant.

- viii. Absence of fire rating down lighters in main bathroom C2

We accepted Mr Blanksby's evidence that these had not been present and was a category C2. We find that this is a breach of the covenant to keep in good condition.

- ix. Skirting located socket outlets too low for safe/proper insertion of plug tops C2

We accepted Mr Blanksby's evidence that this was a C2 hazard due to safety concerns.

- x. 3 pole 15A circuit breaker C3

Not pursued by the applicant. We considered this a minor issue and made no finding of a breach of covenant.

- xi. Timber surround fuse board potential fire hazard C2

This complaint was conceded by Mr Blanksby as he did not consider it was dangerous. We find no breach of covenant.

- xii. Sheathing of home automation C3

C3 category items not pursued. We considered this a minor issue and made no finding.

- xiii. Absence of RCD protection bathroom supplies

We considered this a minor issue and made no finding.

- xiv. Absence of RCD protection cabling C3

We considered this a minor issue and made no finding.

- xv. Sheathing of hall light

This was conceded by Mr Blanksby

- xvi. Absence of individual means of isolation for 3 No distribution boards

This was conceded as not dangerous by Mr Blanksby

- xvii. Single socket in bathroom area C2

We accepted Mr Blanksby's evidence that this was a C2 matter. However, the mere positioning of a wall socket in a bathroom is not in itself a matter of disrepair, nor can it be categorised as being in poor condition. Rather this is a design defect which is outside the scope of clause 11(1). We therefore find no breach of clause 11(1).

- xviii. Further Insulation resistant value at 0.12 C2 (further item from the report at page 35)

This matter appeared to us to be the most serious. We accepted Mr Blanksby's evidence that the insulation levels found by Mr Orarrio in relation to the internal wiring at the premises of 0.12 M/ohms were far below an acceptable level of 2 M/ohms. We also accepted Mr Blanksby's expert opinion that this indicated a breakdown in wiring installation which could lead to a shorting of the circuitry and a fire risk. Wiring in that condition is in a state of disrepair and not in good condition. Taking the above findings into account we concluded that certain elements of wiring and electrical installations as identified above were in a state of disrepair and/or not in good condition and thus were in breach of clause 11(1) of the Lease.

The Law

35. Section 168(4) provides that;

“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.”

Summary of the Tribunal’s decision

1. The Tribunal determines that there has been a breach of the covenant 11(1) of the Lease, but not of clause 11(2) for the reasons set out above.
2. The tribunal’s jurisdiction is limited to a determination of whether a breach of covenant has occurred.
3. The Tribunal notes that the property is subject to a charge to HSBC Bank plc dated 9 July 2008. The Tribunal directs that a copy of this determination is sent to HSBC Bank within 14 days of the date of receipt of this decision.

Name: S O’Sullivan

Date: 8 January 2015