



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

**Case reference** : **LON/00BD /LBC/2017/0011**

**Property** : **Ground Floor Flat 'B', 47 Onslow Road, Richmond, Surrey TW10 6QH**

**Applicant** : **47 Onslow Road Limited**

**Representative** : **QS Rose & Rose**

**Respondent** : **Ms P. A. Campbell**

**Representative** : **Mr Halstead of Counsel**

**Type of application** : **Determination of an alleged breach of covenant**

**Tribunal members** : **Judge Carr  
Mr M Taylor FRICS**

**Venue** : **10 Alfred Place, London WC1E 7LR**

**Date of decision** : **1<sup>st</sup> June 2017**

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**DECISION**

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### **Decisions of the tribunal**

- (1) The tribunal determines that breaches of the lease, as per the table set out in paragraph 19 of the determination other than the breach of paragraph 10 of Schedule 4 of the lease, have occurred as a result of works carried out to Flat B.
- (2) The tribunal makes the determinations as set out under the various headings in this Decision.
- (3) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

### **The application**

1. The Applicant seeks a determination pursuant to s168 of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) as to whether there has been a breach/breaches of the lease.

### **The hearing**

2. The Applicant was represented by Mr Richard Turney of Rose and Rose Solicitors, at the hearing and the Respondent was represented by Mr Halstead of Counsel.
3. The hearing was originally listed for 6<sup>th</sup> March 2017. Following a request from the Respondent the hearing was postponed until Thursday 27<sup>th</sup> April 2017. At that hearing oral evidence and representations were heard. At the end of the oral hearing directions were issued requesting further submissions and an agreed chronology of events. Originally that information was requested for Monday 8<sup>th</sup> May 2017. However due to the illness of the Respondent’s representative the date for submission of further representations was postponed until 26<sup>th</sup> May 2017.

### **The background**

4. 47 Onslow Road is a four storey semi detached Victorian property divided into four self contained flats. There was a degree of confusion in the labelling of the flats. It was agreed with the parties that the lower ground floor flat shall be described as flat A for the purposes of this hearing and the flat owned by the Respondent and the subject property of this application, which is the raised ground floor flat level shall be described as flat B.

5. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute. However the tribunal had the benefit of photographs showing the relevant areas of flats A and B.
6. The Respondent holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease are set out below.

**The relevant terms of the lease.**

7. The relevant terms of the lease for the purposes of this application are Clause 2(4), 2(11), 2(13) and 2(15) and Paragraph 10 of the 4<sup>th</sup> Schedule to the lease. These provide as follows:

Clause 2 (4) To keep the demised premises and every part thereof (including the glass in the windows and the pipes wires drains sewers and sanitary and water apparatus in the demised premises which are used solely for the purposes of the demised premises ) in good and substantial repair throughout the term hereby granted (damage by accidental fire and other insured risks unless the insurance shall be vitiated by any act or default of the Lessee or his underlessees servants licensees or invites only excepted).

Clause 2 (11) Not at any time during the said term to erect make or maintain or suffer to be erected made or maintained on the demised premises or any part thereof any new or additional building erection or improvement or make or suffer to be made any material change or addition whatsoever in or to the Building erected or to be hereafter erected thereon or on any part thereof or in or to the use of the demised premises or any part thereof without the written consent of the Lessor and also if the Lessor shall consent in writing to any of the matters aforesaid to duly apply to the local Planning Authority as defined by the Town and Country Planning Act 1971 or any Act replacing or amending the same (hereinafter called 'the Planning Acts') for any necessary permission to erect make or maintain such building erection improvement material change or addition And also to make such application in the name or on behalf of the Lessor and all other persons (if any) for the time being interested in the demised premises and to give to the Lessor notice of such permission if granted within seven days of the receipt of same from the said planning authority And also at all times to indemnify and keep indemnified the Lessor against all proceedings costs expenses claims and demands whatsoever in respect of the said application.

Clause 2 (13) Not to do or omit or suffer to be done or omitted any act matter or thing in on or respecting the demised premises required to be omitted or done (as the case may be) by the Planning Acts or which shall contravene the provisions of the said Acts or any of them and at all times hereafter to indemnify and keep indemnified the Lessor against all actions proceedings

costs expenses claims and demands in respect of any such act matter or thing contravening the said provisions of the said Acts or any of them aforesaid.

Clause 2(15) Not to do or permit any waste spoil or destruction to or upon the demised premises nor to do or permit any act or thing which shall or may become a nuisance damage or annoyance or inconvenience to the Lessor or the lessees tenants or occupiers of any other part of the building or to any neighbouring premises.

Paragraph 10 of the Fourth Schedule to the Lease – ‘All the Floors in the demised premises shall be covered by laying down and maintaining such carpets with underfelts or other similar suitable floor covering of a similar nature as the lessor may reasonably deem necessary to minimise so far as possible the transmission of noise to the remainder of the flats comprised in Building’.

8. In reaching its determination the tribunal has considered the extensive documentation provided by the parties, the oral evidence presented to it, and the submissions provided. The evidence and arguments are summarised below.

#### **The argument of the Applicant**

9. In summary the Applicant argues that works carried out by the Respondent during 2012 in particular the relocation of the bathroom within flat B breached the terms of the lease referred to above. There is a further argument in relation to the quality of floor covering to the flat.
10. The Applicant explains that the Respondent requested permission for works to be carried out to the property. The works included the relocation of the bathroom to its current position above the kitchen of flat A.
11. The Applicant granted the Respondent a licence to carry out the works. The relevant terms of the licence are as follows:
  - (i) Term 2.1 of the licence states – In consideration of the obligations on the Tenant in this Licence, the Landlord consents to the Tenant carrying out the Works on the terms set out in this Licence.
  - (ii) Term 3.1 of the licence states – The Tenant shall not start the Works until it has obtained all other licences and consents that may be required to carry them out.

- (iii) Term 3.2 of the licence states – The tenant must carry out the Works: using good quality, new materials which are fit for the purpose for which they will be used: in a good and workmanlike manner and in accordance with good building and other relevant practices codes and guidance: and to the reasonable satisfaction of the Landlord.
  - (iv) Term 3.6 - The tenant must notify the Landlord as soon as the Works have been completed and send the Landlord two copies of plans showing the Property as altered by the Works.
- 12. The Applicant argues that since the Respondent's completion of the works there have been repeated leaks from the bathroom of the property into the structure of the building and the flat below. The leaks have always been promptly brought to the attention of the Respondent by the Applicant. The parties provided a useful chronology of the leaks in their final submissions.
- 13. Following each leak the Respondent promised that permanent repairs would be carried out but nothing more than temporary 'quick fix' repairs which fell below the requirement for good and substantial repair were ever undertaken.
- 14. On 30<sup>th</sup> September 2015 there was a very serious leak which caused thousands of pounds worth of damage to Flat A. The Applicant instructed a surveyor's inspection and condition report which considered that the bathroom and plumbing were substandard and incorrectly/incompetently fitted. Following a further leak on 21 December 2015 another surveyor's inspection was conducted and a schedule of dilapidations report obtained and provided to the Respondent which provided her with a clear indication of her breaches and made clear the requirement for her to repair and to comply with other obligations under the lease.
- 15. Moreover the Applicant argues that the Respondent failed to notify the Applicant that the works had been completed and failed to provide the Applicant with the required plans of the altered layout or the necessary consents.
- 16. The Applicant provided evidence in support of its arguments. Firstly from Mr Sloggett a builder and a qualified building surveyor who inspected the bathroom in September 2014. He was requested by the leaseholder of Flat A to provide a professional opinion about the quality of the works in particular whether the bath had been correctly installed and on the causes of the leaks from Flat B into Flat A. His opinion in summary was that to regularly reapply mastic might provide a temporary solution but in the long term a better quality and properly

installed bath was necessary. Secondly a report was requested from Shaw and Company Chartered Surveyors. The author of that report dated October 2015 was Mr Prit Panesar who inspected both of the flats A and B and provided recommendations for further checks to be made by a competent plumber. Mr O'Doherty, a director of Shaw and Company and a chartered surveyor, prepared a schedule of dilapidations on 16<sup>th</sup> February 2016, which set out the wants of repair to the flat. That schedule was subsequently revised following Mr O' Doherty being informed that a consent had been provided. He noted that, despite that consent, no building consent had been provided and it was required. In summary he stated that 'the work undertaken and materials used by the Respondent fails to meet the standard of quality determined within the licence'.

17. The tribunal reviewed the various reports and photographs and shared concerns about the quality of the fittings, in particular the quality of the bath, and the quality of the installation, and the connections from the WC to the soil stack.
18. The Applicant also argues that inadequate floor covering was provided in breach of paragraph 10 of the Fourth Schedule to the Lease.
19. The application was not very focussed. Indeed the Respondent comments upon the scattergun approach. The final submissions of the Applicant provided greater focus. For the sake of clarity the tribunal has set out the Applicant's allegations of breaches in tabular form.

<b>Behaviour</b>	<b>Breach</b>	<b>Evidence</b>
Incompetent completion of works/failure to use good quality materials	Licence Term 3.2	Surveyors reports
Nuisance caused by repeated leaks	Lease Clause 2.15	Evidence of lessee of Flat A and the surveyors report.
Failure to keep in repair	Lease Clause 2.4	Evidence of disrepair to bathroom fittings and plumbing.
Failure to notify landlord of completion and provide plans	Licence term 3.6	No evidence provided

Failure to respond to surveyors' requirements	Clause 2.4 of the Lease and Terms 3.2 and 3.3 of Licence	There has been no substantial repair/replacement of bathroom fittings and plumbing.
Failure to obtain consents including statutory consents for works	Clause 2.11 of Lease Term 3.2 and 3.3 of Licence	No evidence of statutory consents and Respondent admitted that no consent was obtained
Failure to provide evidence of necessary structural reinforcement	Terms 3.1 and 3.2 of Licence	No evidence of such consents
Failure to provide necessary floor covering	Paragraph 10 of Schedule 4 to the Lease	No carpeting to the property

### **The argument of the Respondent**

20. The Respondent argues firstly that the Applicant's case rests upon the breaches of the Licence granted by the Applicant in relation to the proposed works. The Respondent argues that the Applicant has waived the right to allege a breach of the covenants contained in the licence because the works were approved by the Applicant company through the actions of its director at the time, Mr Vince Mountain. He approved the builders used, having used them himself for 14 years. It was a requirement of the licence that all licences should be obtained prior to the commencement of the works and that the works should be completed within 18 months of the date of the licence. Having approved the works and having made no complaints of breach of covenant, the company has made a clear representation to the Respondent that the covenants continued in the licence would not be relied upon. The Respondent has relied on that representation to her detriment and the Applicant is estopped from claiming that she is in breach of the licence to alter.
  
21. The Respondent further argues that it is irrelevant that the Applicant as currently constituted has no knowledge of the approval of the works. It

is the responsibility of the Applicant to keep its paperwork in good order.

22. The Respondent argues that all instances of leaks into the lower ground floor flat A have been addressed as soon as the Respondent was made aware of them and steps were immediately taken to repair or stop the leak. No further leaks from the bath installation have occurred since December 2014 and the report of Mr Whitehouse found no evidence of leaking from the pipework serving the fittings.
23. The disrepair which is currently relied upon refers to leaks of grey water from the toilet. The management were put on notice of the cause of these leaks and failed to adequately prevent rats from gaining access through the common parts of the sewage services into the sewage pipe connection to the Respondent's toilet.
24. The Respondent notes that the obligation in Clause 2(4) of the lease is excepted where the damage is caused by an insured risk. The buildings insurers accepted that the damage caused to the ground floor flat was caused by rats and have accepted liability as an insured risk. The Respondent argues that every leak since October 2015 has been caused by rats which are accessing the Respondent's sewage pipes via the Applicant's sewage pipes. The Respondent argues that she has done everything in her power to engage Thames Water to resolve the problem and the Applicant appears to have done nothing.
25. The Respondent also argues that the complaint with respect to carpeting is unsustainable as the right to rely on the covenant at paragraph 10 of the 4<sup>th</sup> Schedule to the lease has been waived by the confirmation of Mr Mountain that he was happy with the works especially the sound insulation.
26. The Respondent provided a report from David Whitehouse a chartered building surveyor. He carried out an inspection in March 2017. He concluded that there was no evidence of leaking from the service pipes to the bath. However he noted water standing on the surface of the floor behind the WC pan. To quote from his report, 'My inspection of the floor surface behind the WC pan however found water standing on the surface of the suspended concrete floor in addition to staining to the floor surface and the framing of the timber panelling. I was unable to establish if the water originated from the service pipe behind the WC or the soil pipe where this connects to the rear of the WC pan. Following my inspection I have been sent a photograph showing a section of damaged soil pipe which was found behind the WC and which would appear to be the cause of the water ingress onto the floor in this area. The photograph indicates that the UPVC soil pipe has been damaged. My view is that this appears to be consistent with a rat infestation'.

27. The Respondent suggests that earlier leaks from the bath were caused by the irresponsible behaviour of her tenant at the time and that following the termination of his tenancy the leaks from the bath stopped.
28. The Respondent provided some evidence to the tribunal about the quality of the bath installed in the flat. However not only was that evidence provided subsequent to the date for submissions to the tribunal it also comprised a quotation dated 3<sup>rd</sup> May 2017 and does not appear to relate to the bath that was installed during 2012. The tribunal has therefore disregarded this evidence.
29. In its final submissions the Applicant provides a response to the Respondent's argument on estoppel. Firstly it submits that the Respondent represented to Mr Mountain that the works were undertaken in accordance with the Licence to the requisite standard and that a correct report of works had been given to building control. These representations were false and therefore the Respondent did not have clean hands and it would be unconscionable for her to be able to rely on an equitable remedy of estoppel.
30. Secondly the Respondent relies upon the case of Fladi v Ellit Corporation, but the Applicant distinguishes the current case on the basis that there was no agreement by the Applicant not to enforce the terms of the Licence.  
  
Thirdly there is no evidence that the Respondent acted to her detriment in reliance on any alleged representation. She chose and purchased the materials for the works and instructed they be fitted by her chosen contractors prior to any attendance at the property by the Applicant and has taken no action since that time to put her at any detriment whatsoever.
32. In essence the argument of the Applicant is that any approval of the works was based upon a representation from the Respondent that the works had been carried out properly and fully in accordance with the licence. As the representation that the works were carried out properly and fully in accordance with the licence was incorrect then any approval given was given on a false basis and the Applicant cannot be bound by that approval.

### **The tribunal's decision**

33. The tribunal determines that there has been breaches of covenant as set out in the table at paragraph 19 other than breach of Paragraph 10 of Schedule 4 to the lease.

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

34. The dispute between the parties results from works carried out to flat B which have had detrimental consequences for flat A. The tribunal agrees with the Respondent that the Applicant has had a scattergun approach to its application but considers that this arises from the Applicant's frustration with the continuing problems suffered by Flat A and the unwillingness of the Respondent to do any more than temporary fixes to any inadequacies to the works.
  
35. The tribunal of course is not making such a broad brush finding, but making determinations on each of the alleged breaches of covenant on the balance of probabilities. The tribunal relies on the evidence of reports commissioned by the Applicant and on the admitted failure of the Respondent to obtain building regulation consent and structural engineers approval for the works to find that the works were not carried out to the appropriate standard, that there was continuing disrepair to the property, that necessary consents were not obtained, that no plans were provided on completion of works that there was a failure to respond to the requirements of the landlord for remedial works, and that there was no evidence of necessary structural works. The tribunal bears in mind that it was only at a very late stage that a rodent proof connector pipe was installed to the WC.
  
36. The tribunal rejects the Respondent's argument on estoppel and accepts the argument of the Applicant. It determines that any approval that was given by the Applicant was given on the basis that the works had been properly carried out. There is no evidence that the Applicant was aware of the deficiencies in the works at the time of giving approval and no evidence that the Respondent acted to her detriment on any approval given.
  
37. The tribunal does not accept the argument of the Respondent that she has no responsibility for the leaks because they were caused by the irresponsible behaviour of her tenant or by rodent problems. In the opinion of the tribunal the quality of the works carried out has to be sufficient so that foreseeable problems such as rodent infestation and less than impeccable tenant behaviour are prevented. The tribunal does not consider that the quality of the bath and its installation and the quality of the soil pipe to the WC were sufficient to prevent leakages, disrepair or continued nuisance.
  
38. With regard to the floor covering and the alleged breach of paragraph 10 of Schedule 4 to the lease, the tribunal considers that there was insufficient evidence before it to conclude on the balance of probabilities that such a breach had occurred.

## **Application under s.20C and refund of fees**

39. At the hearing, the Respondent applied for an order under section 20C of the 1985 Act. Having read the submissions from the parties and taking into account the determinations above, the tribunal determines not to make an order under section 20C of the 1985 Act.

**Name:** Judge Carr

**Date:** 1<sup>st</sup> June 2017

### **Rights of appeal**

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).