



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

Case Reference : LON/00AE/LBC/2017/0093

Property : 57B Leghorn Road, London NW10
4PL

Applicant : Ms Lorna Coke

Respondents : Mr Kofi Osei-Tutu (First
Respondent) and The Official
Receiver (Second Respondent)

Type of Application : Application for determination
under section 168(4) Commonhold
and Leasehold Reform Act 2002
(breach of covenant in lease)

Tribunal Member : Judge P Korn
Mrs H Gyselynck BSc MRICS

Date of Decision : 12th February 2018

DECISION

Decision of the Tribunal

- (1) The Tribunal determines that, on the basis of the evidence provided, breaches of covenant under the lease have occurred.
- (2) More specifically, there have been breaches of clause 2(10) (failure to provide access), clause 2(7) (disrepair), clause 2(17) (damage, annoyance and inconvenience), clause 2(15) (alterations without consent) and clause 2(2) (unpaid electricity charges).

The application

1. The Applicant seeks a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("**the 2002 Act**") that breaches of covenant have occurred under the First Respondent's lease.
2. The Respondent is the leaseholder of the Property and the Applicant is his landlord. The Respondent's lease was granted as an "Extension Lease" on 23rd February 1990 for a term of 112 years from 19th March 1976. The Extension Lease cross-refers to a "Principal Lease", but the Applicant is unable to locate a copy of the Principal Lease. The Applicant believes that the Principal Lease was granted in terms materially identical to the terms of the principal lease for 57A Leghorn Road (the flat below, and the only other flat in the building), a copy of which has been supplied. The Applicant invites the Tribunal to determine that the Principal Lease in relation to the Property is materially in the same terms as the principal lease for 57A Leghorn Road.
3. The Insolvency Service Register records that the First Respondent is an undischarged bankrupt pursuant to an order of the High Court dated 4th November 2013. His discharge from bankruptcy is suspended indefinitely pursuant to an order of the High Court dated 18th June 2014. The Applicant is not aware of a trustee in bankruptcy having been appointed and therefore believes that the leasehold title to the Property remains vested in the First Respondent. The Official Receiver has been named as Second Respondent in case the title has in fact vested in the Official Receiver.
4. The Tribunal wrote to the Respondent's mortgagee (Platform Funding Limited) on 20th December 2017 to notify it of this application and also wrote to the occupiers of the Property on 22nd January 2018 to notify them of the application.
5. In her application the Applicant states that the First Respondent is in breach of a number of lease covenants (on the assumption that the Principal Lease in relation to the Property is materially in the same terms as the principal lease for 57A Leghorn Road). In particular, the

breaches complained of are (i) failure to provide the Applicant access to the Property, (ii) breach of covenant to decorate, repair etc, (iii) breach of covenant not to do, suffer or permit any waste, spoil or destruction or do or permit any nuisance, damage, inconvenience or annoyance, (iv) failure to obtain consent to alterations and (v) failure to pay electricity charges.

6. In her application the Applicant stated that she would be content with a paper determination, and in its directions the Tribunal stated that the case would be dealt with on the papers alone unless either party requested a hearing. Neither party has requested a hearing and therefore the determination is made on the papers alone.

Details of covenants relied on by Applicant

7.

Clause 1.6 of Principal Lease as varied by the Extension Lease

“The right for the Lessor ... at all reasonable times on giving forty-eight hours prior notice in writing (except in the case of emergency) to enter into and upon the demised premises for the purpose of inspecting repairing maintaining relaying renewing altering rebuilding or cleaning the Other Maisonette or ... any other building or structure abutting onto the demised premises ...”.

Clause 2(10) of Principal Lease

“To permit the Lessor and the Lessor’s agents at all reasonable times ... to enter the demised premises and examine the state of repair and condition thereof ...”.

Clauses 2(5) – (7) and 2(17) of Principal Lease

“(5) Once in every seventh year of the said term ... to paint all the interior of the demised premises ... with two coats at least of good paint in a proper and workmanlike manner And also ... to grain varnish whitewash colour and paper such parts ... as are usually so treated”.

“(6) Once in every third year of the said term ... to paint at a time and in a colour to be appointed by the Surveyor for the time being of the Lessor all the outside wood and ironwork ...”.

(7) ... well and substantially to repair uphold support cleanse maintain drain amend and where necessary rebuild and keep the demised premises ...”.

(17) Not to do or suffer or permit any waste spoil or destruction to or upon the demised premises nor to do or permit to be done any act or thing which shall or may become a nuisance damage or annoyance or inconvenience to the Lessor or the Lessor's tenants or the tenants or occupiers of the adjoining premises ...”.

Clause 2(15) of Principal Lease

“Not at any time ... without the licence in writing of the Lessor first had and obtained to erect or place any additional building or erection on any part of the demised premises other than a shed ... and not without such licence as aforesaid to make any alteration in the plan or decoration of the demised premises ... or in any of the foundations roofs party walls or the principal or bearing walls or timbers thereof ...”.

Clause 2(2) of Principal Lease

“To pay and discharge all rates taxes duties assessments charges and outgoings whatsoever ... which ... shall be imposed or charged on the demised premises or the Lessor or the Lessee or occupier in respect thereof”.

Applicant's case

8. The Applicant has provided copies of letters from her solicitors to the First Respondent requesting access to the Property on various occasions, and she states that access has not been granted in response to any of these requests.
9. The Applicant also states that the Property is in a severe state of disrepair. Two survey reports have been obtained identifying numerous problems, including damp and mould growth affecting the ceiling, damaged plasterwork, mould in the en-suite bathroom, re-routing of the electricity supply and relocating of the gas meter to a dangerous position. The Applicant has also given a witness statement regarding additional matters, including damp patches affecting the ceiling of 57A as a result of water leaks from the Property and the garage (which is part of the Property) being in a very poor state of repair and at risk of collapse.
10. As regards the covenant relating to the carrying out of alterations, the Applicant states that on an unknown date the Property was converted into four separate flats, completely altering the internal layout, and that the First Respondent did not obtain the Applicant's consent to these works. A surveyor visited the Property on the Applicant's behalf and observed the sub-division into flats. He recorded his observations in a letter to the Applicant dated 10th May 2017. A copy of that letter is in the bundle. He states that the fire escape has been removed, the door to the rear has been bricked up, holes have been made in the walls of

the building and the electricity supply has been re-routed and the gas meter relocated to a dangerous position. The surveyor also expressed the view that the alterations were in breach of fire regulations. In addition, planning consent was refused by the local planning authority in 2000.

11. In relation to the obligation to pay outgoings, the First Respondent has failed to pay electricity charges due in respect of the Property. On 23rd November 2015 the Applicant was contacted by EDF Energy advising that there were arrears amounting to £17,979.07. As far as the Applicant is aware, the arrears remain unpaid.

Respondents' case

12. Neither Respondent has responded in any way to the application or to the Applicant's statement of case.

The statutory provisions

13. The relevant parts of section 168 of the 2002 Act provide 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 in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2) This subsection is satisfied if –

- (a) it has been finally determined on an application under subsection (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.*

(4) A landlord under a long lease of a dwelling may make an application to a tribunal for a determination that a breach of a covenant or condition in the lease has occurred."

Tribunal's analysis

Whether the leases of the two flats can be assumed to be identical

14. In written submissions Counsel for the Applicant states that the Principal Lease in respect of the Property cannot be located and that a copy is not available from the Land Registry. This is certainly unusual, given that the lease has been registered at the Land Registry. However, Counsel has a duty towards the Tribunal and we are therefore happy to

accept that the Land Registry is unable to provide a copy. We note that the leases of 57A and 57B were granted on the same day between the same parties and we also note that the Respondent has not written to the Tribunal disputing the assertion that the two leases are identical or – at the very least – identical for all purposes relevant to this case. In the circumstances we are prepared to accept for the purposes of our determination that the two leases are indeed identical for all purposes relevant to this case.

Access

15. Clause 1.6 of the Principal Lease as varied by the Extension Lease reserves a right of access in favour of the landlord, but we are not persuaded that it contains a tenant's covenant. Therefore we do not accept that a failure to provide access constitutes a breach of a covenant contained in this clause.
16. However, clause 2(10) of the Principal Lease contains a tenant's covenant to permit entry, and on the facts of the case the First Respondent has not permitted entry. Whilst there is no evidence before us that he has actively barred entry, in our view the requirement to permit entry is wider than merely failing to bar entry. The Respondent has offered no evidence, and in our view the failure to respond to perfectly reasonable letters written on behalf of the Applicant requesting entry onto the Property constitutes a breach of the covenant contained in this clause to "permit the Lessor and the Lessor's agents at all reasonable times ... to enter the demised premises and examine the state of repair and condition thereof".
17. Therefore, there has been one or more breaches of the covenant contained in clause 2(10) of the Principal Lease as varied by the Extension Lease.

Repair and decoration

18. There is compelling evidence that the Property is in a state of disrepair, and we have received no submissions from either Respondent to counter any of the Applicant's evidence.
19. In relation to the specific wording of the relevant covenants, clauses 2(5) and 2(6) of the Principal Lease refer to an obligation to decorate at specific intervals. Whilst the evidence indicates that there have been problems with damp, in our view there is insufficient evidence specifically to show that the Property has not been decorated at specific intervals.
20. However, clause 2(7) of the Principal Lease requires the tenant "well and substantially to repair uphold support cleanse maintain drain

amend and where necessary rebuild and keep the demised premises ...". We are satisfied on the basis of the evidence provided that the Property is in a state of disrepair such that the tenant is in breach of this clause.

21. In relation to clause 2(17), the Applicant has not explained in what respect the Respondents are in breach of this provision. The relevant covenant is "Not to do or suffer or permit any waste spoil or destruction to or upon the demised premises nor to do or permit to be done any act or thing which shall or may become a nuisance damage or annoyance or inconvenience to the Lessor or the Lessor's tenants or the tenants or occupiers of the adjoining premises ...". Whilst it is possible that the actions of the First Respondent have caused waste, spoil or destruction it is unclear precisely what the Applicant is arguing in relation to these issues. As regards "nuisance damage or annoyance or inconvenience", the word "nuisance" could be argued to mean only the tort of nuisance and again we are not persuaded that the Applicant has demonstrated that a tort has occurred. However, the concepts of damage, annoyance and inconvenience are less severe, and – although the point has not been properly argued – we consider that causing damp to the ceiling constitutes "damage" and that – looked at in the round – the First Respondent's actions can be said to have caused the landlord annoyance and inconvenience.
22. Therefore, there has been one or more breaches of the covenant contained in clause 2(7) of the Principal Lease as varied by the Extension Lease. On balance, there have also been breaches of the covenant contained in clause 2(17), specifically in relation to the causing of damage, annoyance and inconvenience.

Alterations

23. The evidence indicates that the First Respondent has carried out alterations without obtaining landlord's consent in breach of clause 2(15) of the Principal Lease.
24. Therefore, there has been a breach of the covenant contained in clause 2(15) of the Principal Lease as varied by the Extension Lease.

Unpaid electricity charges

25. Clause 2(2) of the Principal Lease requires the tenant "To pay and discharge all rates taxes duties assessments charges and outgoings whatsoever ... which ... shall be imposed or charged on the demised premises or the Lessor or the Lessee or occupier in respect thereof". Whilst many leases contain a specific clause regarding the payment of utility charges, in our view this clause is clearly wide enough to cover payment of electricity charges.

26. The evidence indicates that the First Respondent has failed to pay outstanding electricity charges relating to the Property in breach of clause 2(2).
27. Therefore, there has been a breach of the covenant contained in clause 2(2) of the Principal Lease as varied by the Extension Lease.

Cost applications

28. No cost applications have been made.

Name: Judge P Korn

Date: 12th February 2018

RIGHTS OF APPEAL

- A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.
- B. 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.
- C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- D. 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.