



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

Case Reference : **LON/00AC/LSC/2020/0032V**

Property : **19A Seymour Road, London N3 2NG**

Applicants : **Michael Jaffer
Zeenat Jaffer**

Respondent : **John Raymond Heffernan**

Representative : **Dominic Levent Solicitors**

Type of Application : **Breach of covenant and payability of
service charges**

Tribunal Members : **Judge Nicol
Mr DI Jagger MRICS**

**Date and Venue of
Hearing** : **6th July 2020; by video conference**

Date of Decision : **7th July 2020**

DECISION

The Tribunal has determined that the Respondent has not breached the covenants relied on by the Applicants and that none of the service charges claimed are payable. Therefore, both applications are dismissed.

The Tribunal's reasons

1. The Applicants are the Respondent's landlords at the subject property, a Victorian house converted into 3 flats, one on each of the 3 storeys. The Respondent's flat is on the middle floor and he has lived there, with his wife, since 1997.

2. The Applicants seek two determinations, the first under section 168(4) of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) that the Respondent has breached the following clauses of his lease:-

2. THE Lessee HEREBY COVENANTS with the Lessor as follows:-

(20) Not during the said term to erect any temporary or additional buildings on any part of the demised premises nor erect or bring on the demised premises or any part thereof any caravan house on wheels or other chattel adapted or intended for use as a dwelling or sleeping apartment or for the sale of goods nor allow or permit the demised premises or any part thereof so to be used nor make any alteration to the plan or elevation of the demised premises or in the architectural decoration thereof or cut maim alter or injure any of the principal timbers or walls thereof nor construct any gateways or opening in any of the fences bounding the demised premises nor stop up or divert any surface water or other drain upon or under the demised premises

(21) Not to use or permit to be used the demised premises or any part thereof for any trade manufacture or business whatsoever and not at any time during the said term to do or permit to be done anything whatever upon the demised premises or any part thereof which may become or grow to be a nuisance damage grievance or annoyance of the Lessor or its tenants owners or occupiers of the lower maisonette but will throughout the said term use the demised premises as and for a private residential maisonette and for one family only

3. It is important to note that the Tribunal’s role under the 2002 Act is to determine simply whether there has been a breach of covenant on the evidence before it. Whether there are extenuating circumstances which would allow relief from forfeiture is irrelevant at this stage.

4. The second determination sought by the Applicants is under section 27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) that the following service charges, of which the Respondent’s share is one-third under the lease, are payable:

2017

(a) Electricity	£163.02
(b) Purchase and fitting of new sensor light (exterior)	£91.99
(c) Cleaning of leaves and debris on common pathway	£90
(d) Cleaning gutters and inspecting roof	£120
(e) Power washing communal pathway	£55
(f) Painting front door area exterior	£40

(g) Repair of front door closer £20

2018

(a) Electricity £121.07

(b) Purchase and fitting of new sensor light (exterior) £96.99

(c) Cleaning of leaves and debris on common pathway £100

(d) Power washing communal pathway £60

(e) Clearing unblocked drain £120

(f) Roof Inspection £140

(g) Repair to Door Entry System £110

(h) Building Insurance

2019

(a) Electricity £72

(b) Cleaning of leaves and debris on common pathway £100

(c) Power washing communal pathway £120

(d) Weekly cleaning of landing £520

(e) Property Management £600

(f) Building Insurance

5. The applications were heard by remote video conferencing on 6th July 2020. The attendees were:

- The First Applicant, Mr Michael Jaffer;
- The Respondent;
- Mr Thomas Horton, counsel for the Respondent;
- Mr Levent Hasan, the Respondent's solicitor; and
- Mr Ratnayake Kankanamge Dayananda, known as "Danny", a witness for the Respondent.

6. There was a number of problems with the preparation of this case:

(a) Mr Hasan filed what purported to be a witness statement. However, a witness statement is a written statement signed by a person which contains the evidence which that person would be allowed to give orally. As was said in *JD Wetherspoon plc v Harris* Practice Note [2013] EWHC 1088 (Ch); [2013] 1 WLR 3296, a witness statement should not contain a recitation of facts based on the documents, commentary on those documents, argument, submissions or expressions of opinion. Mr Hasan's statement is more akin to a statement of case, which is where his comments should have been. On this occasion the Tribunal decided to allow it in as a statement of case to which the Applicants have had a full opportunity to respond but Mr

Hasan cannot assume that this would happen in future if he seeks to file a similar statement.

- (b) Both parties attached exhibits to their witness statements. For a final hearing this is unnecessary as all relevant documents should be in the bundle prepared for use at the hearing. Inevitably, this has resulted in documents being redundantly included in the bundle more than once.
- (c) Both parties have also seen fit to repeat themselves frequently in their witness statements. The Tribunal is perfectly capable of hearing something the first time it is said.
- (d) The Respondent's witness statements all end with blank space after the final substantive paragraph before the statement of truth appears on another page. Doing this enables a solicitor to get the deponent to sign the statement of truth before the statement is compiled or even without the deponent ever seeing the statement. If a statement of truth is signed in such circumstances, it is abusive and the statement itself would have to be excluded, resulting in the witness not giving evidence. In this case, Mr Hasan has assured the Tribunal that this did not happen, on the basis of which the Tribunal allowed the statements to be used.
- (e) Some of the Applicants' language used in some of the documents before the Tribunal has been abusive, including alleging, without evidence or even genuine belief, that the Respondent and his wife suffer from mental illness. The Tribunal warned the First Applicant that, if such abuse were to be repeated, the Tribunal would take action. The First Applicant insisted that he had not intended to cause offence.

Breach of Covenant

- 7. There is a cupboard under the communal stairs which the Respondent and his wife have been using for many years to store some of their belongings. The Applicants allege that such use, and the later installation of a padlock to the cupboard door, constitute breaches of clauses 2(20) and (21) of the lease. However, they cannot maintain that allegation since clauses 2(20) and (21) concern actions carried out in or on the demised premises as defined in the lease. Their case is that the cupboard is not part of those demised premises which would mean, therefore, that its use is irrelevant to either clause 2(20) or (21).
- 8. The Respondent argues that the cupboard has become part of the demised premises by reason of encroachment or proprietary estoppel. If that were the case, clauses 2(20) and (21) would be engaged but the mere use of the land for storage or the installation of a padlock would not constitute breaches.
- 9. Either the cupboard is part of the Respondent's demise or it is not. Either way, there is no breach of clauses 2(20) or (21). In the circumstances, it is not necessary for the Tribunal to determine the ownership of the cupboard.
- 10. The First Applicant expressed considerable frustration that the Tribunal was not going to make such a determination. He indicated

that he might resort to his own remedy by removing the Respondent's belongings from the cupboard himself, leaving it to the Respondent to bring any legal action. The Tribunal urged him to take legal advice in order to find out what all his options were before taking action – he did the right thing in trying to use the legal system to resolve his dispute and that is still open to him.

11. The Applicants allege that material has fallen from the Respondent's terrace into the garden below and that this constitutes a nuisance in breach of clause 2(21). The evidence before the Tribunal shows that the following items have fallen into the garden:
 - (a) Photos show cracked pebble-dashed render to the side wall and what appear to be pieces of render on the surfaces below the cracked area. It is not disputed that it is the Applicants' responsibility to keep the side wall render in repair under clause 4(f) of the lease. Therefore, this cannot constitute a nuisance caused by the Respondent from the demised premises – indeed, the First Applicant emphasised in his oral submissions that he had never suggested otherwise.
 - (b) The Applicants produced two photos showing pieces of plastic which the Respondent admits come from one of his pieces of garden furniture on his terrace. However, no metadata was available from the photos, such as when they were taken – they were supplied by email dated 22nd March 2020 which means they might have post-dated the Tribunal application. Also, there were no photos which could put the photos of the plastic pieces in context, such as where they were taken relative to the terrace or the rest of the garden.
12. In his oral evidence, the First Applicant asserted that for a few years other debris has fallen from the terrace, namely pebbles and soil which he assumes come from the Respondent's plant pots. However, he also said that the wind blew the debris around to such an extent that it was impossible to take any meaningful photos. If the debris was affected to that extent, the Tribunal finds it difficult to understand how the First Applicant can be so adamant that he knows where it came from.
13. The First Applicant told the Tribunal he was extremely concerned that the debris could hit children who may be using the garden below. He was particularly concerned that heavy plant pots had been located close to the terrace wall edge and could fall and cause serious injury. However, if the concern were that serious, the Tribunal would have expected some evidence that the Applicants had raised this with the Respondent, particularly in correspondence with him or his solicitor. All that the First Applicant could identify is that he had raised the issue in previous Tribunal proceedings in 2018 – the Respondent said he does not recollect whether he had or not.
14. The problem here, for the parties and the Tribunal, is the lack of evidence to support the Applicants' case. The bits of plastic by themselves are not enough to constitute a nuisance or annoyance

sufficient to breach clause 2(21) of the lease. The Tribunal is not satisfied that the Applicants have made out their case on this issue.

Service Charges

15. The Applicants accept that the Respondent has paid his share of the insurance premiums. They still object that he paid late and that this is a breach of the terms of the lease but that is not a matter for the Tribunal in relation to section 27A of the 1985 Act.
16. The Applicants admit that the charges for following items constitute a nominal amount for their own time which they spent doing the work in question themselves:
 - Cleaning of leaves and debris on common pathway
 - Power washing communal pathway
 - Painting front door area exterior
 - Part of the 2019 property management charge (the rest was incurred by having someone check on the property while the Applicants were away).
17. There is no power under the lease for the Applicants to charge for their own time. Therefore, the charges for these items are not payable.
18. The Respondent stated in his First Witness Statement and Response that, since he had not seen the alleged work being carried out, he needed to see evidence of the expenditure. The First Applicant, in his written submissions, made much of the Respondent mentioning he hadn't seen the work carried out. However, the Respondent wasn't suggesting that this alone meant the work hadn't been done but putting it forward as a reason why he needed the evidence of the expenditure.
19. Again, the Applicants' case suffers from a lack of supporting evidence. The First Applicant told the Tribunal that the exterior sensor lights had been ordered from the Amazon website. Also, the electricity supplier was EON, the billing for whom was entirely online. In either case, it is a simple process to download copy bills. When this was put to the First Applicant he variously said he was too busy or he was "unable" to do it, without giving any details of either. The Tribunal is satisfied that he could have devoted sufficient time to provide this evidence. The Respondent had asked and the Tribunal had ordered the Applicants to provide any relevant documents. The Applicants have no excuse for their failure to provide such evidence.
20. In relation to the electricity charge, the Tribunal accepts that there must have been a cost for powering the lights and sockets in the communal areas but such a cost is not necessarily reflected in a bill which may be affected by other matters such as refunds and meter or meter reading errors. The Applicants could easily have obtained

evidence to support the charges claimed, namely downloaded bills, but chose not to provide it.

21. The First Applicant made much of the fact that he and his fellow Applicant, his niece, were not out to make money and tried to keep the charges low for their and the Respondent's benefit. However, the method by which he did so was to use exclusively contractors who insisted on being paid cash-in-hand and would not provide supporting invoices or receipts. The Applicants referred to such contractors as being "casual" or "migrant".
22. It may well be that the First Applicant is telling the truth when he says he never asked any of his contractors to work cash-in-hand in order to evade tax but it is not credible that he would not know that this is the purpose of working cash-in-hand. Since the purpose of the contracts entered into by the Applicants was to evade tax, they are unlawful as a matter of policy and unenforceable. Not only can the parties to such a contract not sue each other on it, but the Applicants are not entitled to pass on the costs to the Respondent.
23. When this point was put to the First Applicant by the Tribunal, he was clearly frustrated. He pointed out that the cost of using contractors with the proper paperwork would be higher, resulting in higher service charges. He asserted that he was only trying to "do the right thing" to keep costs down. This is nonsense. The Applicants are imposing charges pursuant to a legal contract. Using illegal methods to keep costs down is not an acceptable method of complying with the lease and certainly does not constitute "the right thing".
24. Due to the lack of evidence and the exclusive use of illegal contracting arrangements, the Tribunal is not satisfied that any of the charges claimed are payable. Even if the Tribunal is wrong to any extent on these issues, they are not the Applicants' only problems.
25. Clause 2(6) of the lease envisions that the lessor will make an interim charge, based on estimated costs, at the beginning of each year and then recover any excess costs at the end of the year, supported by a Certificate which specifies the excess and its calculation. The First Applicant conceded that no interim charges had ever been calculated or demanded. Mr Horton submitted that this was fatal to the Respondent's liability for any charges but the Tribunal is satisfied that it is open to the Applicants not to make interim charges.
26. However, the payment of the excess, which is 100% of the Respondent's share of the costs when there is no interim charge, is only payable within 28 days of the service of the Certificate. The First Applicant conceded that no Certificate had ever been issued either. The Tribunal is satisfied, on the basis of the wording of clause 2(6), that the service of the Certificate is a pre-condition to the Respondent's liability. Without it, he is not liable under the lease for the alleged charges.

27. Further, the Applicants sent a demand for the 2017 service charge in 2017 but not in correct form, in particular not including the Summary of Rights and Obligations required under section 21B of the 1985 Act. The consequence is that the demands were not payable. Compliant demands were eventually provided in December 2019 or January 2020. This satisfied the requirements of section 21B because its effect is only suspensory – service charges are not payable only until it is complied with.
28. However, under section 20B(1) of the same Act, if any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment, then the tenant is not liable to the extent of those costs. All the 2017 costs were incurred more than 18 months before the service of a proper demand. Therefore, they are not payable on that basis as well.

Conclusion

29. On the basis of the material before the Tribunal, the Applicants have not made out their case. The Respondent has not breached the covenants relied on and the service charges alleged to be owing are not payable.
30. Mr Horton indicated that the Respondent wishes to apply for an order requiring the Applicants to pay his costs of these proceedings under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. The Tribunal refused to take an application at this stage, before either party has seen the Tribunal's decision, but it is open to the Respondent to make a proper application, supported by a statement of the costs claimed, within 28 days of this decision.

Name: Judge Nicol

Date: 7th July 2020

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
 - (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard; and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 20B

- (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
- (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 21B

- (1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.
- (2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.
- (3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand.
- (4) Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it.
- (5) Regulations under subsection (2) may make different provision for different purposes.
- (6) Regulations under subsection (2) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Section 27A

- (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
 - (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,
 - (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
 - (a) the person by whom it would be payable,
 - (b) the person to whom it would be payable,
 - (c) the amount which would be payable,
 - (d) the date at or by which it would be payable, and
 - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
 - (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.