FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BE/LBC/2014/0015**
Property	:	**First Floor Flat, 241 Underhill Road, London SE22 0PB**
Applicant	:	**Ms B Allen, Freeholder**
Representative	:	**In Person**
Respondent	:	**Mr C Gardner, Leaseholder**
Representative	:	**In Person**
Type of Application	:	**For the determination that breaches of covenant in the lease have occurred.**
Tribunal Members	:	**Judge Samupfonda** **Mr Coffey FRICS** **Mrs J Hawkins**
Date and venue of Hearing	:	**23 June 2014** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**22nd July 2014**

DECISION

Decisions of the tribunal

The Tribunal, pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 declares

a. that the tenant is in breach of his covenant in clause 2 (xiii) of the lease that provides "no alterations whatsoever shall be made in the plan or elevation of any buildings for the time being in the demised premises.... Without...the previous consent in writing of the Lessor..." in that he has replaced 2 of the original bedroom windows with UPVC windows without the Lessor's written consent.

b. that the Respondent is in breach of clause 2(ix) in that he has sublet the property without the Applicant's consent.

c. that the tenant is otherwise not in breach of any other covenants or conditions in the lease.

The application

1. The Applicant Landlord seeks a declaration from the Tribunal pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 that the Respondent Tenant is in breach of seven covenants in the lease as follows

    (i) Kitchen and dining room knocked into one prior to the Respondent taking over the lease.

    (ii) New soil pipe and drainage system laid in the Applicant's garden without consent prior to the Respondent taking over the lease.

    (iii) Windows replaced by the Respondent on an unknown date without the Applicant's consent.

    (iv) Letting of property to students in 2011 leading to increased building insurance premiums, which the Respondent refused to pay and having three people in occupation.

(v) Cable for cable television being attached to outside of building in 2011 without consent.

(vi) Brick construction erected in the garden on an unknown date without consent.

(vii) Respondent entering onto the Applicant's retained property without consent at various times.

2. Both parties attended the case management conference that took place on 1st April 2014 at which the issues to be determined were identified (as set out above) and directions for the future conduct of the case were made. It was considered that an inspection was not necessary and neither party requested one.

3. In compliance with the directions, both parties submitted written statements and documentary evidence in support of their case. The Applicant also provided two copies of a surveyor's report by Angela Lyon FRICS.

The background

4. The property which is the subject of this application is a first floor flat originally comprising four rooms, kitchen, dining room, bathroom and W/C. It is held under a lease dated 4th May 1962 for a term of 200 years. The Applicant holds the freehold title and the Respondent acquired the leasehold title in 2000.

5. The hearing took place on 23 June 2014. The Applicant attended in person. Ms Lyons, FRICS of Orbital Chartered Surveyors accompanied her. The Respondent also attended in person and his father accompanied him.

6. The Applicant made an application for Ms Lyons to be granted permission to give oral expert evidence. She explained that Ms Lyons had inspected the property and prepared a report in 2013 and was able to clarify the reason why there were two versions of her report as well as explain the alleged breaches. The Respondent objected and argued that he had been given notice very late and as such he had not had sufficient time to consider instructing his own expert. He said that he would be prejudiced if the Tribunal permitted Ms Lyon to give evidence as he had no idea what she would say as she had not made a witness statement. Further, his statement was written in direct response to the issues and matters raised in the two reports that she had prepared.

7. The Tribunal considered the application and decided that it would not permit Ms Lyons to give evidence. The Applicant had not provided a

witness statement from Ms Lyons. She had notified the Tribunal and the Respondent on 16 June 2014 of her intention to call Ms Lyons. This did not give the Respondent sufficient time to consider his position and in the circumstances the Tribunal accepted that he would be prejudiced if Ms Lyons were permitted to give oral evidence. Therefore we refused to grant the Applicant permission but allowed Ms Lyons to remain in the tribunal room as an observer.

The Lease

8. The Schedule to the lease describes the property as four rooms kitchen bathroom and toilet. The Respondent as lessee covenants under Clause 2(ix) that "....no part of the demised premises shall at any time be used for aviation purposes or in any other manner than as a self-contained residential flat in one occupation only without in all such aforesaid cases the previous consent in writing of the Lessor being obtained".

9. By Clause 2(xiii) that "no additional building or any additional walls rails fences gates or other thing whether temporary or otherwise shall be erected or set up upon the demised premises and that none of the principal timbers iron or steel work or walls shall be altered cut or injured and that no alteration whatsoever shall be made in the plan or elevation of any of the building for the time being on the demised premises either internally or externally.....without in all such aforesaid cases the previous consent in writing of the Lessor or his surveyor or architect being obtained...."

The statutory provisions

10. The relevant provisions are set out under the Commonhold and Leasehold Reform Act 2002 (the Act). These provide under section 168

No forfeiture notice before determination of breach.

(i) A landlord under a long lease of a dwelling may not serve a notice under section 146(i) of the Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition unless subsection (2) is satisfied.

(ii) Subsection (2) is satisfied if (a) it has been finally determined on an application under subsection (4) that a 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 the breach has occurred.

11. A determination under section 168(4) of the Act does not require the Tribunal to consider the question of forfeiture neither does it require us to consider whether the landlord has waived the right to forfeit the lease. These are matters for the court to determine. The Tribunal's jurisdiction is limited to declaring whether or not a breach of covenant has occurred.

12. Covenants are subject to the implied terms under section 19(2) of the Landlord and a Tenant Act 1927 that consent is not to be unreasonably withheld. That implied term does not preclude the Lessor's right to require, as a condition of granting consent, the payment of a reasonable sum of money in respect of any damage or diminution in value caused or expenses incurred by the Lessor in connection with such consent.

The Tribunal's decisions

13. We turn now to consider each of the alleged breaches. The burden of proof rests on the Applicant and for her case to succeed the Tribunal needs to be satisfied that the lease includes the relevant covenants and that the alleged facts constitute a breach. The relevant covenants relied upon by the Applicant are Clauses 2(xiii) and 2(ix) and the Schedule to the lease.

Kitchen/diner, Bathroom/WC and Soil Pipe: Clause 2(xiii)

12. The agreed facts are that the Respondent's predecessors in title were responsible for these alterations. It was the Applicant's case that this was irrelevant as the burden of that covenant passed onto the Respondent on assignment. The Respondent did not dispute this. However, he referred the Tribunal to a document dated 5.10.1999 between D.M.L Laniggan & A Martin & Lloyds TSB Mortgage Limited, Simon William Attwood and the Applicant. He explained that he understood this document to be evidence of the Applicant accepting the sum of £1400 in full and final settlement of all and any claims for rent, service charges and breach of covenant as she has signed it. Therefore he could not understand why the Applicant repeatedly raised this as an issue. The Applicant explained that the document was erroneously drawn up. On querying this with her solicitors, she was re-assured that she could sign it and that it would be amended subsequently to remove the words breach of covenant. She said that it was never her intention to accept the payment on those terms. However the document was never amended. Given her position, she argued that she was not bound by it, as it did not accurately reflect her intentions.

13. The Tribunal agreed that it was irrelevant that the alterations were carried out by predecessors in title. Section 3 (1) of the Landlord and Tenant Act (Covenants) Act 1995 provides:-

> (1) The benefit and burden of all landlord and tenant covenants of a tenancy-
>
> (a) shall be annexed and incident to the whole, and to each and every part of the premises demised by the tenancy and of the reversion in them, and
>
> (b) shall in accordance with this section pass on an assignment of the whole or any part of those premises or of the reversion in them.

14. We considered the signed document very carefully and assessed the parties' evidence on this. We found it incredible that the Applicant would willingly sign a document, the contents of which she disagreed with. This was particularly so because she had handwritten an amendment by inserting the words "financial" and initialed against it thus expressing her wishes. She also had the benefit of solicitors advising her as evidenced by their letter dated 30 July 1999. The document is plain and there is nothing on the face of it to suggest that it was not intended to compensate the Applicant for the breaches of covenant occurring on or before 17 November 1998 as stipulated. For this reason the Tribunal concluded that the Applicant cannot now go behind the document that she freely signed with the benefit of legal advice. She has therefore failed to prove any breach in respect of the alterations to the kitchen/diner and bathroom/WC and the soil pipe.

The windows: Clause 2 (xiii)

15. The agreed facts are that the Respondent has replaced two bedroom windows without the Applicant's consent. It was not altogether clear what the make up of the original windows were as the Applicant stated that a previous surveyor had described them as casement windows and another as sash. (By "sash windows", the Tribunal understands that "vertically sliding sash" windows or "cased frame" windows was meant) The Respondent referred the Tribunal to correspondence between the parties in which he had raised concerns about the poor condition of the windows. The photographs he produced particularly struck us as they depicted crumbling and rotting frames, which he said, permitted water ingress. Whilst he acknowledged that he did not specifically request consent, he did invite the Applicant to discuss remedial options but the Applicant failed to respond to his concerns. When asked by the Tribunal whether or not consent would have been given had it been sought, the Applicant initially gave a less than clear answer and when

pushed said that she probably would have consented. She prevaricated because her primary concern throughout the hearing appeared to be what she considered to be her entitlement to compensation for all breaches of covenant as she did not accept that she had been compensated for the pre 1998 breaches. It was clear to the Tribunal that the parties had and in fact have an acrimonious relationship going back over a number of years and that the Applicant felt a strong sense of injustice at not recovering compensation. This meant that it was unlikely, had she been asked at the relevant time that she would have granted her consent to any requests made. Nevertheless on the strict construction of Clause 2(xiii) and in light of the Respondent's admission that he had installed the new windows without prior consent, the Tribunal decided that the Applicant had proved that a breach had occurred.

16. **Letting of the property: Clause (xi)**

The basis of the application under this clause was said by the Applicant to be that the Respondent has let the property to three people and thereby breaching clause 2(xi). The Applicant explained that her solicitors informed her that this clause prohibited the occupation of the property by more than two people. The Respondent informed us that he had let the property to a brother, sister and a friend under a single tenancy agreement in 2010. Therefore it was his view that there was no breach as this constituted, "one occupation." as permitted by this clause. Neither party raised the issue of consent. We considered clause 2 (xi) very carefully and it is clear that prior written consent is required. The Respondent admitted he had not sought it. The Applicant indicated that had prior consent been requested she would have granted it. We take the view that it is the number of tenancy agreements rather than the number of occupants that is meant by "one occupation." Thus a letting under a single tenancy agreement to three people as in this case does not constituent a breach of covenant. However, on the strict construction of clause 2(xi) the Tribunal was satisfied that a breach of covenant had occurred in light of the fact that prior written consent was not sought or given.

Cable for cable television: Clause 2(xiii)

The Applicant alleged that the Respondent has breached this covenant by drilling into the exterior walls in order to install a telecommunications cable outside the front of the building without her written consent. The Respondent explained that this was a phone line cable also used for broadband that he installed in 2010. He said that the Applicant had on two occasions cut the phone lines that he had installed. Consequently, this cable now runs along his neighbour's wall then along the demised premises into the flat. It does not encroach onto the Applicant's premises at all. He referred the Tribunal to the Schedule to the lease and argued that this entitled him to install the cable. He said that the hole is 1 centimeter and there's no damage. We considered the

Schedule, which describes the demised premises. The Schedule grants various rights and easements which includes a provision granting "the free right of passage and running of water and soil gas electricity from and to the demised premises through all sewers drains watercourses water pipes cisterns gutters gas pipes and electric cables and wires which for the purpose of serving the demised are now or may hereafter be in or under any other building or land of the Lessor adjoining or near to the demised premises." From this, we are not satisfied that a breach has occurred as we construe that the Respondent is entitled by this Schedule to erect a cable in the manner that he has done.

The brick construction in the rear garden: Schedule to the lease

The Applicant alleged that the Respondent had removed a shed and built a patio in the back garden and in so doing had encroached onto her land without her consent. The Respondent admitted that he built the patio in 2001. He produced a copy of HM Land Registry plan; a number of photographs taken before, during and after the work was completed. He explained that it is a shared garden and his share is on the left hand side. The shed belongs to him. His mother had taken the dimensions of the shed, which although situated on his side had always jutted out slightly over to the right into the Applicant's section of the garden. He referred to the lease plan and his photographs that showed that the patio was built on the concrete foundations of the shed. Having considered all of the evidence, the Tribunal was not satisfied that a breach had occurred. The lease plan (LN219435) filed at HM Land Registry appears to indicate that the notional boundary passes along the right hand flank of the shed and this shed overlies the generality of the notional boundary which means that the new patio was built on the footprint of the old shed and within the curtilage of the subject flat. We observed that the Respondent is obliged by clause 2(iii) "to keep and preserve as a garden in good and proper order and condition such parts of the demised premises as are now used as a garden ...." In the circumstances the Applicant has not proved that a breach of covenant has occurred.

Trespassing onto the Applicant's land

The Applicant explained that on one occasion water leaked into her flat below. The Respondent's wife entered her flat and sprayed the ceiling with an oil-based paint without her consent. She said that she was quoted £700 as she was advised that the walls needed to be decorated together with the ceiling although the walls were not damaged. The Respondent explained that the Applicant's tenant in the flat below expressed concern that the ceiling was water stained and invited the Respondent's wife into the flat where upon she sprayed the ceiling with a stain block. We were not referred to any covenant in the lease that the Applicant alleged had been breached in respect of this. There is no covenant that prohibits the Respondent from this conduct. In the circumstances the Applicant did not prove that a breach had occurred.

Application under s.20C and refund of fees.

No application under section 20C and refund of fees was made.

Name: Judge Samupfonda **Date:** 22nd July 2014