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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AE/LBC/2014/0097**
Property	:	**22B Goodson Road, London Nw10 9LR**
Applicant	:	**Mr Raymond Patrick McNamara and Ms Anna Marie Kenna**
Representative	:	**Mr R P McNamara supported by Ms H O'Brien**
Respondent	:	**Mr Steven Skeete and Ms Myrna Thomas**
Representative	:	**Mr S Skeete**
Type of Application	:	**Determination that a breach of covenant or a condition in the lease has occurred – section 168(4) Commonhold and Leasehold Reform Act 2002**
Tribunal Members	:	**Judge John Hewitt Chairman** **Ms Sue Coughlin MCIEH** **Mr N Miller BSc**
Date and venue of Hearing	:	**Monday 19 January 2015** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**19 February 2015**

DECISION

Decisions of the Tribunal

1. The tribunal determines that:

   1.1 the applicants have not persuaded the tribunal that any of the alleged breaches of covenant or condition set out in the application form and/or the applicants statement of case has occurred; and

   1.2 the applicants shall by **5pm Friday 20 March 2015** pay to the respondents the sum of £600.00 by way of costs.

2. The reasons for our decisions are set out below.

Procedural background

3. On 9 December 2014 the tribunal received an application from the applicants. The application was made pursuant to section 168(4) Commonhold and Leasehold Reform Act 2002 (the Act). The applicants sought a determination that alleged breaches of covenant and condition in the lease of 22B Goodson Road had occurred. The application form was signed '*R McNamara* and *A Kenna*'. Attached to the application form was a document said to be a copy of the lease of 22B Goodson Road. It is dated 2 October 1992.

4. Directions were given on 11 December 2014. The application form hinted that the Property might not be insured and the timetable sought to get the application heard fairly promptly. The gist of the directions were that the applicants were to serve on the respondents the evidence upon which they proposed to rely by 31 December 2014; the respondents were to serve a statement in reply by 9 January 2015 and the applicants were to prepare a trial bundle and serve a copy on the respondents and file two copies with the tribunal by 14 January 2015. The hearing was set for 10:00 Monday 19 January 2015. The directions were sent to the parties under cover of letters dated 11 December 2014.

5. On 14 January 2015 the tribunal received a letter from Burrows Solicitors acting for the respondents. The letter complained that the applicants had not complied with directions numbered 1 and 2 and in consequence the respondent had not complied with direction number 3. The letter addressed some of the issues raised by the applicants but suggested that there could not be an effective hearing on 19 January 2015 and asked that the hearing be postponed. The request was refused but the solicitors were informed that the application could be repeated on the morning of the hearing if considered appropriate.

6. On 15 January 2015 the tribunal received from the applicants a set of documents in duplicate which arguably were filed pursuant to the directions and comprised the applicants' statement or statement of case plus the documents or evidence upon which they proposed to rely. Included was a further copy of a lease dated 2 October 1992, which was identical to that which had been attached to the application form.

The hearing

7. At the hearing a gentleman who gave his name as Mr Raymond Patrick McNamara (Mr McNamara) attended and proposed to present the case for both applicants. He was accompanied and supported by a lady by the name of Ms Helen O'Brien.

8. Mr Steven Skeete, one of the respondents, attended and said he proposed to present the case on behalf of both respondents.

9. In the course of opening the hearing it emerged that Mr McNamara claimed he did not receive the directions until 5 January 2015 hence he was late in filing and serving his evidence. He said that on 13 January 2015 he had sent by post 2 sets of documents to the tribunal and one set to Mr Skeete. Mr Skeete told us that he had received his copy of the directions on 13 December 2014 but that he had not received any papers or evidence from the applicants. He also explained that since he had not been served with any evidence he had not served any evidence or documents in reply. He had brought with him some material documents.

10. Neither party wished to make an application for an adjournment and both parties invited the tribunal to proceed with the hearing and to do the best it could with the materials to be provided and the oral evidence to be given. The tribunal agreed to do so and arrangements were made for copies of some documents to be run off and exchanged. The lunch adjournment was extended to accommodate the parties.

Jurisdiction

11. The application form and other materials relied upon by the applicants asserted that there were arrears of ground rent and contributions to the costs of repairs or redecorations alleged to have been carried out. Such contributions, if payable, are services charges within the meaning of section 18(1) Landlord and Tenant Act 1985 (LTA 1985).

12. Section 168(1) of the Act provides that a landlord under a long lease of a dwelling may not serve a notice under section 146(1) Law of property Act 1925 (LPA 1925) in respect of a breach by a tenant of a covenant or a condition in the lease unless subsection (2) is satisfied. Subsection (2) is met if one of three conditions is satisfied. One of those conditions is that it has finally been determined on an application under subsection (4) that the breach has occurred. Subsection (4) provides that a landlord of a long lease of a dwelling may make an application to the appropriate tribunal for a determination that breach of a covenant or condition in the lease has occurred. As regards England, this tribunal is the appropriate tribunal for the purposes of subsection (4).

13. Section 169 of the Act sets out supplementary provisions including in subsection (7) that nothing in section 168 affects the service of a notice under section 146(1) LPA 1925 in respect of a failure to pay a service charge within the meaning of section 18(1) LTA 1985.

14. Section 146(11) LPA 1925 expressly provides that the section does not, save as otherwise mentioned, affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent. Thus a notice under section 146 LPA 1925 has never been a pre-condition to forfeiture of a lease for non-payment of ground rent.

15. The effect of the combination of the above statutory provisions is that this tribunal does not, on an application under section 168(4) of the Act, have jurisdiction to make a determination in relation to alleged non-payment of ground rent or service charges.

16. Accordingly the parties were informed that we would not take any evidence on the alleged non-payment of ground rent and service charges (which allegation was contested) and that instead we would focus on the applicants' other allegations which may be summarised for convenience as:

Unauthorised and unlawful alterations to the flat;

Subletting of part of the flat;

Using or permitting the flat to be used other than as a single unit of residential accommodation and permitting the flat to be used so as to cause a nuisance or annoyance to the landlord;

Causing or permitting frequent water ingress into the downstairs flat thereby causing a nuisance or annoyance;

Failure to provide details of the buildings insurance effected on the upstairs flat by the respondents; and

Failure to ensure that the floors (other than the floors of a bathroom and a kitchen) are covered with good quality carpet laid over rubber felt or foam underlay;

17. We informed the parties that we proposed to invite Mr McNamara to give oral evidence in support the applicants' case and to draw attention to the documents he wished to rely upon on a subject by subject basis and that Mr Skeete would then have the opportunity to cross-examine him, or ask him questions on each subject before moving on to the next one. Once Mr McNamara had given his evidence Mr Skeete would be invited to give his oral evidence on each material subject and draw attention to his documents and that Mr McNamara would have the opportunity to cross-examine him and put questions to him.

18. Once both parties had presented their evidence and respective cases they would both have the opportunity to make final submissions.

19. Both Mr McNamara and Mr Skeete confirmed acceptance of the proposed arrangements.

20. On 4 February 2015 and after the tribunal had reached its decisions in principle, there arrived at the tribunal office some further written materials submitted by Mr McNamara. There was no proper covering letter. The documents were not dated save by manuscript annotations made, we infer, by Mr McNamara and did not appear to be complete or relevant. There was no explanation as to why the documents had not been submitted prior to or during the course of the hearing on 19 January 2015 and it was not obvious that the documents had been copied to the respondents. For these reasons we have not admitted the documents into evidence and we have not taken them into account in documenting our decisions.

Findings of fact
Title and the lease

21. Set out below are our findings and conclusions on the conflicting evidence presented to us. Clearly there is significant 'history' between Mr McNamara and Mr Skeete going back to about 1994 originally as neighbours because Mr Skeete owns the adjoining premises 20/21 Goodson Road and then more latterly as landlord and tenant when, in 2002, the respondents purchased the Property, the upstairs flat at 22 Goodson Road, as a buy-to-let investment.

22. 22 Goodson Road was originally constructed as a house. The freehold interest in the house was registered at Land Registry in 1951 with title number MX249645. On 18 November 1991 Anna Maria Kenna and Patrick McNamara were registered as the proprietors of that freehold interest.

23. On 2 October 1992 a lease was granted for a term of 99 years from 2 October 1992 (the lease). There is some dispute as to the extent of the premises demised by the lease which we shall have to return to shortly. It appears not to be in dispute that Mr McNamara lives on the ground floor and that the lease demised at least the first floor of the building.

24. The lease was duly registered at Land Registry. The respondents' acquired an assignment of the lease in 2002. Following negotiations the respondents entered into a deed of variation whereby the term granted by the lease was extended. That was not in dispute. A copy of the deed of variation was not produced to us and there is a dispute about other matters it may have contained.

25. The deed of variation appears to have been treated by Land Registry as a surrender of the original lease dated 2 October 1992 and a re-grant with an extended term. Extracts of the register maintained by Land Registry seen by us show that on 29 March 2004 a lease of premises described as 22B Goodson Road was registered at Land Registry with title number NGL832404.

There are two notes in the property register:

"NOTE 1: As to the part tinted blue on the title plan only the first floor together with the staircase leading from the ground floor thereto is included in the title.
NOTE 2: As to the part tinted pink on the title plan only the first and second floors are included in the title."

We were not provided with a copy of the title plan.

The property register records the short particulars of the lease as follows:

"Date: *16 August 2002*
Term: *130 years from 2 October 1992*
Parties: *(1) Anna Maria Kenna and Patrick MacNamara* [sic]
(2) Steven Skeete and Myrna Thomas

NOTE: The original lease dated 2 October 1992 referred to in the above lease was formerly registered under title number NGL704738."

26. The applicants attached to the application form and to their trial bundle a copy of a document described as a lease. It is dated 2 October 1992. It bears copies of stamp duty paid and imprest to the value of £509 on 2 December 1992. It also bears a stamp, the date of which is difficult to read suggesting that particulars of the deed had been produced to Inland Revenue, which was a statutory requirement in 1992.

The landlord is described as *"[blank] PATRICK McNAMARA and ANNA MARIA KENNA of 22 Goodson Road NW10"* The address has been written in in manuscript. Before the name *PATRICK* there is a space which appears might have contained a first or forename. There is a similar gap on page 14 of the lease where we can see:

"Signed as a Deed
by the said [blank] *PATRICK McNAMARA*
in the presence of: *Signature* ... [there is then a manuscript signature] *R McNamara*

Witnessed by ..."

At the hearing Mr McNamara told us that his full name is Raymond Patrick McNamara but that he does not always use his full name; sometimes he is Raymond McNamara and sometimes he is Patrick McNamara. Mr McNamara confirmed the lease was granted by him and Ms Kenna.

27. Initially Mr McNamara relied upon the copy lease he had provided and drew to our attention a number of tenant's covenants which he alleged had been breached by the respondents. Later, as the hearing developed, Mr McNamara claimed that the two lease plans he had provided were not accurate. Also he said that other parts of the copy were not accurate

and the copy lease provided was not a copy of the original lease as granted.

28. Mr McNamara was not able to give us any clear explanation as to why he had not provided us with an accurate copy of the lease upon which the applicants wished to rely.

29. If the copy lease provided to us was not an accurate copy of the original the applicants' case was in some disarray because they would be unable to discharge the burden of proof upon them first as to what covenants the lease contained and secondly on the facts there had been breach by the respondent of some of those covenants.

30. Mr Skeete informed us that he had obtained a copy of the 1992 lease from Land Registry. He produced it to us. In all material respects it was a copy of the lease supplied by the applicants, save that the two lease plans showed markings in colour. Mr McNamara denied that the copy lease produced by Mr Skeete was an accurate or correct copy of the original. The first page of the copy produced by Mr Skeete was a cover note which, in the experience of the chairman, was typical in style of the cover note which Land Registry uses when sending out copy documents.

31. We shall set out shortly our findings as to whether the copy lease provided by the applicants and the copy produced by Mr Skeete is a true copy of the 1992 lease as granted by Mr McNamara and Ms Kenna.

32. First it may be helpful to set out some material passages from the document and to identify the tenant covenants upon which the applicants rely. In general we observe that the lease is rather crude and basic containing some spelling errors and some significant inconsistencies.

33. Recitals are as follows:
"(A) The premises hereby demised form part of a block of two residential flats which are together with [sic] *the curtilage known as ('the Building') 22 Goodson Road London NW10 in the London Borough of Brent"*

(B) It is the intention that each of the flats in the Building shall be demised in identical terms (mutatis mutandis) to those of these presents with a view to each of the tenants thereafter being able to enforce against the others [sic] *the restrictions contained in such leases.*

So far as we are aware the freeholder has not granted a lease of the ground floor flat.

34. The lease was granted :
"IN consideration of the sum of ... and of the rent hereinafter reserved ... and the covenants hereinafter contained the Landlord HEREBY

DEMISES unto the tenant ALL THAT First and Second Floor Flat more particularly described in the First Schedule hereto '(the Demised Premises') TOGETHER WITH ..."

35. The first schedule reads as follows:

"THE DEMISED PREMISES

ALL THAT residential flat forming part of and situate on the First and Second Floors of the Building known as 22 Goodson Road in the London Borough of Brent including the stairway leading to the Upper Flat in the Building and including the roof of the Building and the upper one half in depth of the joists supporting the ceiling of the lower flat in the Building and the external walls of the Building above the aforesaid level all which flat is delineated for the purpose of identification only on the plan annexed hereto and thereon edged red"

In fact there are two plans annexed to the copy leases provided by Mr McNamara and Mr Skeete. Both are headed *"22 Goodson Road, London NW10"*, both state they are drawn to a scale of 1:50 and both state: *"Drawn; J B Carroll May 1992"*. One is marked *"FIRST FLOOR PLAN"* and the other is marked *"SECOND FLOOR PLAN"*

The first floor plan has no other markings on it. The second floor plan bears, in manuscript the initials *"AMK"* beneath which there a small amount of manuscript which we are unable to decipher.

36. Clause 2 sets out a number of covenants with the landlord on the part of the tenant. Material covenants are as follows:

"3) Not to use or permit or suffer to be used the Demised Premises or any part thereof otherwise than as a single unit of residential accommodation for private residential purposes only and not to do or permit to be done in or upon the same or any part thereof any act or thing whatsoever which shall or may become a nuisance damage annoyance or inconvenience to the Landlord or the Tenant of the other flat in the Building or owners or occupiers of any adjoining or neighbouring property

4) Subject to subclause (7)(b) of this clause not to make or permit any structural alterations or additions to the demised Premises without the Landlord's consent which shall not be unreasonably withheld (such consent shall not be deemed unreasonably withheld where reasonable objection to the proposal comes from the Tenant [sic] *of the other flat in the Building*

8) Not to assign sublet mortgage charge or part with possession of part only of the Demised Premises"

37. Clause 3 sets out a number of covenants with the landlord and with the tenant of the other flat in the building for the benefit thereof on the part

of the tenant. Material covenants are as follows, but the page has been poorly copied and some words at the right-hand edge are missing:

"1a) At all times during the term hereby granted well and substantially to repair decorate and keep in good and tenantable repair and condition the Demised Premises and all walls and [??] *walls below the upper one half depth of the floor supporting the other flat in the Building together with all foundations drains pipes cables wires timbers floors and ceilings* [??] *appurtenances thereto and all additions which may at any time during the said term be made thereto*

b) to bear one half of the cost incurred by the Landlord in repairing rebuilding maintaining supporting renewing and cleansing all party walls roofs foundations drains gutters watercourses cisterns and external pipes and other things capable of being used or enjoyed in common with the other flat in the Building or adjoining property or both

2a) To permit the Landlord and any tenant of the other flat in the Building and any person respectively authorised by any [??] *person to enter the Demised Premises upon reasonable notice (except in emergency) to inspect the state of repair thereof* [??] *of adjoining and neighbouring property*
3a) Not to use or permit the use of the Demised Premises or any part thereof for any dangerous offensive noxious noisome [??] *or immoral activity or in any manner that may be or become a nuisance or annoyance to the Landlord or to the tenant or occupier of the other flat in the Building or any* [??] *neighbouring property*

6) Not to injure cut or maim any of the walls ceilings floors or partitions of the Demised Premises without the consent of the Landlord which shall not be unreasonably withheld (which consent shall not be deemed unreasonably withheld where reasonable objection comes from the tenant of the other flat in the Building

7) To permit the Landlord and his Surveyor and Agents with or without workmen at all reasonable times upon reasonable notice during the term hereby granted to enter upon the Demised Premises for the purpose of examining the state of repair and condition thereof and also for the purpose ...

9) To observe and perform the regulations contained in the Fourth Schedule hereto

10) At all times to keep the Demised Premises insured to the full cost of reinstatement under a policy complying with terms of this paragraph:
a) to produce to the Landlord ... the insurance policy effected pursuant to this paragraph and the receipt for the last premium paid

thereon (or at the option of the Landlord) evidence from the insurers of the full terms of the policy and that the same is still in force ... "

38. The Fourth Schedule sets out a number of regulations. Mr McNamara relied upon paragraph 1(f) which is in these terms:

f) no floor (other than the floors of a bathroom and a kitchen) shall be left uncovered or covered other than with good quality carpet laid over rubber felt or foam underlay"

The alleged breaches

Unauthorised and unlawful alterations to the flat

39. The gist of the applicants' case was that the respondents had converted the flat into a hostel, had installed a second boiler on the first floor, between the middle room and the back room and, in 2007/8 had converted the loft space into a habitable room. Mr McNamara said that flues and overflow pipes had been cut through external walls and that in consequence his property had been damaged. Mr McNamara also alleged that the roof is now sagging and he said that the roof would not sag unless the supports had been taken out. Mr McNamara said he was a retired carpenter and that he knew about these things.

40. Mr McNamara confirmed that he relied solely upon clause 3(6) of the lease - not to cut or maim any of the walls, floors, ceilings or partitions of the demised premises. Mr McNamara was unable to tell us exactly what cutting or maiming had been carried out by the respondents and he made the generalised allegation that some cutting and maiming must have occurred. Mr McNamara was also unable to give us any satisfactory explanation as to why the applicants, as landlord, had not exercised the right contained in clause 3(7) of the lease to send in a surveyor to inspect the state of repair and condition of the demised premises.

41. Mr Skeete explained that the gist of the case for the respondents was first that the loft space had been converted into a habitable room prior to their purchase of the flat. In support of this Mr Skeete relied upon the 1992 lease and the lease plans which, he submitted plainly demised the second floor and the plan of the second floor annexed to the lease plainly showed stairs up to a room either side of which was cross-hatching marked *'roof space'*. In further support Mr Skeete produced a letter from solicitors written prior to the purchase making reference to the room in the attic and drawing attention to the fact that when the conversion works were undertaken planning permission had not been obtained. Mr McNamara said he had no knowledge about the planning position and asserted that the letter produced by Mr Skeete was a forgery.

42. Mr Skeete said that the respondents had purchased the lease from a lady, a schoolteacher, who lived in the flat and used the attic room on the second floor as her master bedroom. Mr Skeete was clear that works converting the roof space had been carried out prior to the respondents' purchase in 2002 and that the respondents had not carried out the conversion works in 2007/8 as alleged by Mr McNamara.

43. Mr Skeete said that the respondents have not installed a second boiler. In 2009 they carried out a major refurbishment of the flat and installed a new Combi boiler to replace the existing boiler. The new boiler required different venting flues. Mr Skeete said that following discussion with Mr McNamara permission was given to put a new flue and overflow pipe through a front wall of the building. In support of this Mr Skeete produced a letter which he said was signed by Mr McNamara which read as follows:

"28th July 2009

Reference 22 and 22B works Permission

I Raymond Patrick McNamara of 22 Goodson road [sic] *NW10 9LR (Freeholder)*

Give permission to Mr Steven Skeete the leaseholder of first and second floor flat 22Bb Goodson road to carry out works to front of property and communal hallway including painting and decorating. To move main electricity isolator unit into Hallway fit missing earth strap.

I have received the sum of £200.00 Two Hundred Pounds for permission for the above from Mr Steven Skeete.

[manuscript signature]

Mr R Patrick McNamara"

44. Mr Skeete told us that having spent some £30,000 refurbishing the flat he was keen to upgrade and redecorate the common parts entrance hall which he said Mr McNamara had allowed to become dated and grubby. Mr Skeete wished to redecorate the hallway and lay new flooring at his cost.

45. Mr Skeete further explained that on 22 July 2009 he had commenced court proceedings against the applicants - Claim No. 9W102907 in which he sought damages and an injunction to restrain the applicants from breaching covenants in the 1992 lease and/or for nuisance. One of the issues raised in those proceedings was the alleged habit of Mr McNamara isolating the electricity supply to the flat from a switch or fuse box located within the ground floor flat. The letter of 29 July 2009

was arrived at to try and settle differences between the parties. Mr Skeete produced some of the court papers to us, including a consent order made 24 July and drawn 31 July 2009 by which the claim and application for injunction were stayed to 24 January 2010, with liberty to either party to restore on written notice and which provided that if no party applies before 24 January 2010 to restore the matter the claim shall on that day be dismissed with no order as to costs. It was common ground between the parties that no application to restore was made.

46. Mr McNamara admitted that he had signed the letter dated 28 July 2009 but denied that it was referable to permission to cut into an external wall to accommodate a new flue and overflow pipe.

47. In the course of hearing the evidence Mr McNamara submitted that the copy of the 1992 lease provided by him on two occasions was not accurate and/or complete. Eventually Mr McNamara denied that the second floor had been demised by the 1992 lease. He asserted that the lease plans were not accurate and the words of demise were not accurate. He suggested that perhaps the solicitor who drafted the lease regarded the ground floor as floor 1 so that the first upper floor was referred to as the 'second floor'. Mr McNamara also sought to rely upon a contradiction in the lease because the words of demise include the roof of the building and the service charge provision in clause 3(1)(b) makes reference to an obligation to contribute one half of certain costs incurred by the landlord, including the cost of repairs and maintenance of a number items, including " ... *all party walls roofs foundations...*"

47. It was clear to us from an early stage that relations between Mr McNamara and Mr Skeete have not been good at all and this goes back to 1994 and a planning issue related to Mr Skeete's adjacent garage premises.

48. We heard conflicting oral evidence on this issue. We have considered the evidence carefully and we have sought where possible documentary or other evidence to corroborate the conflicting oral evidence.

49. As regards the lease we find that the copies of the 1992 lease provided to us by the applicants are copies of the lease as originally granted. There are several reasons for this finding. The copies were provided by the applicants on two separate occasions. No other copies have been provided by them. We find that Mr Skeete obtained a copy of the 1992 lease from Land Registry and that copy accords with the copies provided by the applicants. The stamp duty paid and other official markings show that the original document was produced to the relevant authorities and the signatures of the applicants on it were not disputed. We find the copies provided to us bear all the hallmarks of a lease as granted in 1992.

We also find that the lease plainly demises the first floor and the second floor of the building. We find that the lease plans provided to us were true copies (but uncoloured) of the lease plans annexed to the 1992 lease as originally granted. We find the plan marked 'Second Floor Plan' is a plan of the attic in the building and the room so marked has 'roof space' either side of it.

50. We reject Mr McNamara's assertion that the second floor of the building was not demised by the 1992 lease. We find that plainly it was. We are reinforced in this finding by the letter of 28 July 2009 which Mr McNamara accepts he signed which refers expressly to Mr Skeete being *"the leaseholder of first and second floor flat 22Bb Goodson road"*.

51. Having found that the 1992 lease demised the second floor of the building, we have to consider the allegation that in 2007/8 the respondents cut or maimed *"any of the walls ceilings floors or partitions of the Demised Premises"* to create a habitable space in the roof space. We find that they did not. Mr McNamara did not provide any direct evidence of what cutting or maiming he relied upon. We find it insufficient for him simply to allege in a generalised way that some cutting or maiming must have occurred.

52. We accept the oral evidence of Mr Skeete that the top floor bedroom was used by his vendor as her master bedroom so that it was in place at the time of the respondents' purchase. We are reinforced in this finding first by the terms of the lease itself which plainly refers to and the lease plans show a room on the top floor and by the letter produced by Mr Skeete from his solicitors prior to purchase drawing attention to the fact that there did not appear to be a planning permission for the creation of a habitable room on the second or top floor.

53. We must observe that Mr McNamara's obdurate and inconsistent evidence on this issue, which quite frankly lacked all credibility in large parts, caused us to conclude that Mr McNamara was not a witness upon whom we could rely with confidence and that the accuracy of his oral evidence was to be treated with a deal of caution.

54. We also reject the applicants' allegation that the respondents cut or maimed an external wall of the building by inserting a boiler flue and overflow pipe through the wall in breach of a covenant in the lease. We accept and prefer the evidence of Mr Skeete on this point that Mr McNamara granted permission for those works to be carried out. We are reinforced in this finding by the letter dated 28 July 2009 produced by Mr Skeete which corroborates his oral evidence. We accept that the letter does not expressly grant permission but taken in context of a substantial refurbishment of the flat and that fact the it was not disputed a new boiler had been installed and the flue and overflow pipe are inserted in the front wall of the building we find that such works were embraced within the expression 'works to the front of property' as used in the letter.

55. Accordingly we find that the applicants have not persuaded us that the breaches alleged have occurred.

Subletting of part of the flat

56. First it is helpful to remind ourselves that the lease does not prohibit the subletting of the whole of the flat; the tenant is free to sublet the whole as they see fit. What clause 2(8) of the lease does prohibit is the subletting of part only.

57. The applicants' case was a little difficult to follow. The gist of Mr McNamara's oral evidence was that the roof space loft had been sublet separately from the living room and the middle room. Mr McNamara alleged that there were different people coming and going all the time. Mr McNamara then alleged that the whole of the flat is sublet by the respondents to the Katsande family and that they in turn sublet parts of the flat to others who come and go all the time. Mr McNamara asserted that all this was happening with the knowledge and consent of the respondents. Mr McNamara then argued that he assumed Mr Skeete had sublet part because in 2007/8 he created the room in the attic and installed a second boiler at the same time

58. Mr McNamara was not able to provide any documents to support any of the allegations made in respect of this part of the applicants' case. Mr McNamara did produce a document issued by Brent Council to Mr T Katsande which contained private details of Mr Katsande's income and entitlement to housing benefit. The circumstances in which Mr McNamara claims to have come by the document are dubious. What Mr McNamara claims can be derived from the document is that housing benefit is based on a couple plus one person over 18 living at the property. Mr McNamara claimed that the Katsandes have two sons who live at the property which he alleges contravenes the housing benefit rules. Mr McNamara claimed that he had written to Mr Skeete two years ago complaining about subletting by the Katsande family but he was not able to produce a copy of his letter.

59. Mr Skeete told us that following the refurbishment of the flat in 2009 he approached Brent Council with a view to finding a family to let the flat to. He said that the flat was laid out to comprise a room on the top floor, a kitchen diner on the first floor plus three other rooms and a separate bathroom/wc. When he purchased, his vendor had the flat furnished in a manner that provided two bedroom, a kitchen/diner and a separate reception room. It occurred to him that a family may prefer to use the separate reception room as a third bedroom if they so chose. Thus the flat could quite legitimately be marketed as a three bedroom flat.

60. Brent Council introduced the Katsande family to Mr Skeete. In the event he let the whole of the flat to Mr Katsande. Mr Skeete produced the first sheet of the tenancy agreement. It is dated 7 August 2009 and

names the tenant as Mr Tsikirayi Katsande. The let property is described as being 22B Goodson Road. The tenancy granted a fixed term of 12 months from 7 August 2009 at a rent of £475 per week.

The document names the occupiers as being:

Full Name	Gender	Date of Birth	Relationship
Mr Tsikirayi Katsande	M	07/08/1960	Tenant
Mrs Patricia Katsande	F	06/09/1965	Wife
Mr Pasipamire Katsande	M	06/05/1986	Son
Master Tatenda Katsande	M	01/02/1992	Son

Mr Skeete said that the Katsande family have remained in occupation of the flat with Mr Katsande as tenant since the expiry of the fixed term. He has visited the flat on numerous occasions since August 2009 and his understanding is that the flat is furnished as a three bedroom flat; one for Mr & Mrs Katsande, and one for each of the two boys. Mr Skeete receives the rent direct from Mr Katsande and he is unaware of their housing benefit entitlements as that is a private matter between the family and Brent Council. He remarked that one of the boys has been away at university which may have had some bearing on housing benefit.

61. Mr Skeete told us that the Katsande family had been model tenants and the last time he had visited the flat was Christmas Eve 2014 when he stayed about for about 30 minutes or so. He was not aware of any unauthorised or subletting of the flat by the Katsande family and he has never noticed anything on his regular visits which suggested to him or put him on notice that the flat was being sublet or overcrowded.

62. Doing the best we can with Mr McNamara's contradictory submissions it appears he now accepts there is a subletting of the whole flat by Mr Skeete to Mr Katsande and his complaint is that Mr Katsande has been subletting part to numerous other persons to Mr Skeete's knowledge. Mr McNamara asserted that the flat, 22B, is a two bedroomed flat and he appears aggrieved that it is being used as three bedroomed flat.

63. Clause 2(8) of the lease is a simple covenant - 'not to sublet part only of the demised premises'. Mr McNamara appears now to accept that Mr Skeete has sublet the whole flat and that he has not sublet part only. That of itself is sufficient to show that the respondents are not in breach of the covenant as alleged.

64. However in case this matter should be taken further it may be helpful for us to set out some further findings. We accept and prefer the evidence of Mr Skeete on this issue and we find that the flat is occupied by the Katsande family and that Mr Katsande has not sublet part only of the flat to others and that even if it could be shown that Mr

Katsande has done so that has not been done with the knowledge or consent of Mr Skeete.

65. We reject Mr McNamara's complaint that according to Brent Council and the housing benefit rules there should only be three people living in the flat and when one of the Katsande boys is home from university there are four people living there, so that proves there is unlawful subletting. First not everyone who lives in a flat is a tenant or a subtenant. A person living in a flat may be a guest or a family member. The basis on which housing benefit may be assessed or paid is a matter for the local authority and has no bearing on the covenant in question

66. Accordingly we find that the applicants have not persuaded us that the breach alleged has occurred.

Using or permitting the flat to be used other than as a single unit of residential accommodation and permitting the flat to be used so as to cause a nuisance or annoyance to the landlord;

67. In part this follows on from the alleged subletting and overcrowding complained of by Mr McNamara. The gist of his case was that Mr Skeete has allowed 20, or 30 or 40 adult people into the flat for meetings, doing of drugs, prostitution and other anti-social behaviour. He said that there are regular meetings, nearly every day and that 10-15 people attend them – more at weekends. His oral evidence was very generalised, contradictory and imprecise. Mr McNamara claimed that Mr Skeete was aware of what has been going on but was not able to explain how he became aware of these activities. Mr McNamara said that the police had visited the flat on two occasions and that in August or September 2014 people were removed by the police.

68. Mr McNamara also alleged that he has seen strange adult persons leaving the building with young children early of a morning which has led him to conclude that abuse has been going on. Mr McNamara said that in October 2014 he reported this to Brent Social Services but he does not know what enquiries, if any, have been carried out, but claimed Brent Social Services were (unknowingly) the suppliers of the children visiting the flat. This worried him a lot but has now stopped.

69. Mr McNamara was not able to provide any documentary evidence to support his allegations.

70. Mr Skeete told us that the allegations were absurd and that Mr McNamara had not raised them with him on any previous occasion. He said that he was unaware of any visits to the flat by the police or by Brent Social Services. He was aware that over the years Mr McNamara has made numerous complaints about him to various departments of Brent Council, including Environmental Health, Health and Safety and Planning Enforcement and that sometimes visits have been made to the subject flat or his adjacent property. Mr Skeete claimed that Mr McNamara is well known locally for making numerous complaints to

just about everyone who might listen to him but invariably there is no resulting action taken.

71. Clause 2(3) of the lease contains a covenant as to the user of the flat as a single unit of residential accommodation and then *"... not to do or **permit to be done** in or upon the same or any part thereof any act or thing whatsoever which shall or may become a nuisance damage annoyance or inconvenience to the Landlord ..."*

72. We have found that the whole of the flat is sublet to Mr Katsande. Thus if the use of that flat has been of the character complained of by Mr McNamara then that is the use by Mr Katsande, and not use by Mr Skeete.

73. However the covenant is more widely drawn and not only provides that something is not to be done but also the tenant is not to permit something to be done. Generally a covenant will only be broken where the prohibited activity is carried out by the covenantor (usually the tenant) himself. Sometimes where a prohibited activity is carried out by a third party, such as a sub-tenant, there may be a duty on a tenant to take steps to bring it to an end.

74. There is a helpful discussion in *Woodfall: Landlord and Tenant* paragraph 11.199 on the effect of words such as *"not to do or permit or suffer to be done..."*. The authors suggest that the word 'permit' may mean one of two things. First it may mean not to give leave for something to be done which without such leave could not lawfully be done. Secondly, it may mean not to abstain from taking reasonable steps to prevent the act where it is within a person's power to prevent it.

75. In the subject case we find there is no evidence before us on which we can rely to the effect that Mr Skeete positively authorised, permitted or gave leave to Mr Katsande to do the acts complained of by Mr McNamara. We accept Mr Skeete's evidence and find that Mr McNamara had not previously drawn these complaints to Mr Skeete's attention and that he had not been put on notice about them. Thus we find it cannot properly be said that Mr Skeete has abstained from taking reasonable steps to prevent the acts taking place, even if it were in his power to do so.

76. Finally and for the sake of good order we find that in the absence of any independent evidence to corroborate Mr McNamara's rather lurid and very generalised allegations the applicants have not persuaded us that matters complained of actually took place.

Causing or permitting frequent water ingress into the downstairs flat thereby causing a nuisance or annoyance

77. Mr McNamara complained that over the years there have been about six or eight leaks of water into the ground floor flat. He takes the view

that Mr Skeete owns the upstairs flat and is thus responsible for 'all the little accidents'.

78. Mr McNamara was a little vague on the dates of the leaks and/or the cause of them. He told us that the last occasions were 18 November 2014 when Mr Katsande drilled a hole in a wall. A further leak occurred on 31 December 2014 which resulted in Mr McNamara turning off the water supply about which the Katsandes got shirty.

79. Mr McNamara said that one of the leaks at the front was from an overflow pipe and that resulted in water ingress into the bay window of his front room. He provided photographs of the interior of the room showing water damage.

80. In part this issue is tied up with insurance effected by Mr Skeete and the failure of the insurers to pay claims made by Mr McNamara on the policy.

81. Mr Skeete told us that he was only aware of a few instances of water ingress into the ground floor flat. One was 5 June 2004 when Mr McNamara blocked up overflow pipes from 22B which caused flooding into that flat and hence from that flat down into the flat below. A further incident occurred in 2006/7 when a leak from a radiator caused water ingress into the flat below. This was reported to Mr Skeete at 3am in the morning had he had a plumber round the next day to replace a faulty valve.

82. Mr Skeete also told us that in 2009 he undertake a refurbishment of his flat which resulted in Mr McNamara blocking every single outlet from his flat. There was an altercation and Mr McNamara demanded £2,000, later reduced, to £400 to unblock the outlets. Mr Skeete said he refused to pay and the police were called but took no action deeming it to be a civil matter. Mr Skeete said it was this event which caused him to commence the court proceedings against Mr McNamara that we have referred to previously.

83. Mr Skeete told us that he had no knowledge of the alleged water leak on 18 November 2014. As to the event on 31 December 2014 Mr Skeete said that Mr Katsande reported to him that the overflow from the boiler was dripping. Mr Skeete said that he has a boiler contract with British Gas (BG). He reported the dripping to BG who attended site to fix the problem on 2 January 2015.

84. Mr McNamara again relied upon clause 2(3) of the lease. We have already explained that the obligation under that clause is not to do or permit to be done.

85. Mr McNamara has not presented any evidence upon which we can rely with any confidence that the respondents have caused or permitted any water leaks to occur in breach of the covenant. It is simply insufficient for the applicants to make generalised allegations of water leaks

without giving dates and causes. It is equally insufficient to assert that as Mr Skeete owns the upper flat he must be responsible for every water leak that may occur from time to time.

86. We find as a fact that the only water leaks which occurred were those described by Mr Skeete and that none of them were done or permitted by him.

87. It is an inevitable consequence that heating and plumbing systems and plant and machinery within domestic flats will fail from time to time and it is an inevitable consequence of gravity that any accidental escape of water or liquids will spread and travel downwards. When this occurs this will amount to a breach of covenant only in exceptional circumstances and no such circumstances have occurred in this case.

88. Accordingly we find that the applicants have not persuaded us that the breach alleged has occurred.

Failure to provide details of the buildings insurance effected on the upstairs flat by the respondents

89. The lease is a little unusual in that it requires the tenant of the upper flat to effect buildings insurance on that flat and then imposes an obligation on the tenant to provide to the landlord evidence that the policy has been effected. The full provisions of the lease have been set out above.

90. Mr McNamara alleged that the respondents have not insured the flat and have not supplied him with information about the policy. Mr McNamara was not able to provide any documented requests to the respondents about the policy effected which he says the respondents had failed to comply with. Mr McNamara suggested that whatever insurance may have been effected it was void because the respondents do not reside in the flat.

91. Mr Skeete told us that throughout the respondents' ownership of the flat buildings insurance has been effected, firstly with the Britannia and then the Co-op Insurance when that company acquired Britannia's insurance business. Mr Skeete also told us that the flat had been purchased as a buy-to-let investment and that both the mortgage lender and the insurers were aware of this and that the flat would be sublet.

92. Mr Skeete told us that he had provided details of the insurance to Mr McNamara whenever he asked for them. Mr Skeete said that he was aware that Mr McNamara had sought to make a claim on the policy but it was not progressed because Mr McNamara declined to provide details of the building insurance effected by him (Mr McNamara).

93. There has been produced to us copies of insurance documents issued by Britannia and then the Co-Op spanning the period 20 March 2003 through to 26 April 2014 (the renewal for the year 26 April 2014 to 26

April 2015) which appears to show and satisfies us that appropriate buildings insurance has been effected by the respondents over that period. We note that some of the documents record that the property insured is 22b Goodson Road and that the address of the respondents is 278 Watford Road, Harrow which we find corroborates Mr Skeete's oral evidence that the insurers have always been aware that the respondent's do not reside in the insured property.

94. Where there is a conflict of oral evidence on this issue we prefer that of Mr Skeete because we have seen some documentary evidence from insurers which corroborates some of what he said. We find that the applicants have failed to produce any or any compelling evidence to support the breach of covenant alleged.

95. Accordingly we find that the applicants have not persuaded us that the breach alleged has occurred.

Failure to ensure that the floors (other than the floors of a bathroom and a kitchen) are covered with good quality carpet laid over rubber felt or foam underlay

96. First we remind ourselves that the terms of the covenant are:

f) no floor (other than the floors of a bathroom and a kitchen) shall be left uncovered or covered other than with good quality carpet laid over rubber felt or foam underlay"

We find that reading the covenant in context and as properly construed it imposes an obligation to ensure that the relevant floors are covered with good quality carpet over felt or foam underlay at all times, unless, of course, the landlord expressly or impliedly waives the obligation on the tenant to comply with the covenant.

97. Mr Skeete told us that just after the purchase of the flat in 2002 he made contact with Mr McNamara primarily to negotiate an extension of the lease term. He said that terms were agreed at a price of £3,000 and this this included a release of the obligation to lay carpet and underlay. Mr Skeete said that he wished to lay wooden flooring on a suitable sound proofing system as this was a modern scheme of flooring and he felt it would enhance the prospects of achieving lettings.

98. Mr Skeete said that a deed of variation was drawn up by solicitors, but he had not brought a copy to the hearing.

99. Mr McNamara agreed a lease extension was negotiated and granted but he denied the deal included release from the obligation to carpet and/or permission to lay wooden flooring. Mr McNamara complained of noise transference from the upper flat.

100. There was a clear conflict of the oral evidence before us. It was unfortunate that Mr Skeete had not brought the deed with him to the

hearing because if it contained what he said it contained it would have been conclusive on this issue.

101. The fact of a deed was not in dispute and we know that it was dated 16 August 2002 and in consequence of it Land Registry cancelled the original title granted on registration of the 1992 lease and granted a new title number NGL832404. We were also shown a letter dated 12 July 2002 sent to Mr Skeete by his solicitors, Thorburn & Co concerning arrangements for execution of the deed, completion and registration of it but it does not give any clue as to the contents of the deed.

102. In the light of the conflicting evidence before us and having regard to the demeanour and conduct of Mr McNamara and Mr Skeete and the different approaches adopted by them to the giving of their oral evidence to us and the manner in which they answered questions put to them, we prefer the evidence of Mr Skeete which, to a limited extent, is corroborated by the fact and registration of a deed of variation.

103. Accordingly, we find as a fact, that the applicants expressly waived the obligation in the lease to lay carpet and underlay and gave permission to the respondents to lay wooden flooring.

104. In these circumstances we find that the applicants have not made out their case that a breach of the subject covenant has occurred.

Costs – Rule 13

105. Mr Skeete made an application for costs under rule 13. He said that in the light of the applicants' failure to serve their evidence in accordance with directions he consulted Burrows Solicitors and sought advice as to what he should do. On 14 January 2015 Burrows wrote to the tribunal making a number of submissions on behalf of the respondents and sent in a number of documents in support of the respondents' case that they had effected buildings insurance. Mr Skeete submitted that he would not have incurred the expense had the applicants complied with directions and he complained that Mr McNamara's conduct and failure to comply with directions was vexatious, frivolous and an abuse of the system.

106. Mr Skeete did not know the amount of costs he had incurred because he not yet received the bill. He said that he had incurred photocopying costs of £21 incurred during the course of the hearing.

107. The application was opposed by Mr McNamara and he asserted that he was the victim.

108. We are conscious that in general this tribunal operates in a no costs jurisdiction. However section 29 (4) Tribunals, Courts and Enforcement Act 2007 and rule 13 empower the tribunal to make orders for costs in limited circumstances.

109. Rule 13(1)(b) enables the tribunal to make an order for costs where a party has acted unreasonably in bringing, defending or conducting proceedings. We consider that the expression 'acted unreasonably' should be construed as being broadly similar to the provisions of paragraph 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 which applied to leasehold valuation tribunals, which were also a no costs jurisdiction in general terms. Guidance on the application of paragraph 10 was given by HHJ Huskinson sitting in the Lands Tribunal in *Halliard Property Company Limited v Belmont Hall and Elm Court RTM Company Limited* who adopted, in broad terms, dicta of Sir Thomas Bingham MR in *Ridehalgh v Horsfield* [1994] 3 AER 848 regarding provisions of the Supreme Court Act 1981 concerning a wasted costs order.

110. In the light of this guidance we find that a costs order under rule 13 should only be made in exceptional circumstances and where unreasonable conduct has caused a party to incur more costs that he would otherwise have incurred had it not been for the unreasonable conduct.

111. In the context of the current case we have sympathy with the respondents. We find that the applicants were in blatant disregard of directions and their failure to file and serve evidence in accordance with directions amounts to unreasonable conduct. Even if it be right that the applicants did not learn of the directions until 5 January 2015, a matter about which we have reservations, there was no excuse for the applicants failing to notify the tribunal and the respondents of that and seeking an extension of time to serve their evidence.

112. We are satisfied that the unreasonable conduct of the applicants in this regard caused the respondents to incur more costs than would otherwise have been the case.

113. At the hearing Mr Skeete was unable to tell us the amount of costs incurred but drawing on the accumulated experience of the members of the tribunal as regards such costs we are satisfied that they would have been not less than £500. We come to this conclusion having regard to the amount of work necessarily undertaken to appreciate the current position, the nature and extent of the issues, the directions issued and the most appropriate way forward for Mr Skeete.

Thus we consider it to be fair and just to make an award of costs in the sum of £500 plus VAT, a total of £600.00.

114. Subsequent to the hearing and after we have arrived at our decision on 11 February 2015 the tribunal received a letter from Mr Skeete. It is dated 9 February 2015. The letter enclosed a copy of a bill issued to Mr Skeete by Burrows in the sum of £1,500 + VAT of £300, a total of £1,800. The covering letter made further representation by Mr on his application for costs. It is not clear why Mr Skeete wrote to the tribunal and we did not invite any further representations on any of the

matters we were required to determine. Further it is not obvious that the letter was copied to the applicants. For these reasons we have not taken the matters set out in the letter into account in arriving at our decision. We observe, in case it is of assistance to the parties, that the bill from Burrows indicates that advice was given to Mr Skeete in relation to the application generally. Such costs would normally be borne the party incurring them. Costs payable under rule 13 are limited to those additional costs incurred as a result of unreasonable conduct. We are therefore reinforced in our conclusion that an award of costs of £600 was a fair and just outcome.

Judge John Hewitt
19 February 2015