10163

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AH/LSC/2014/0061**
Property	:	**Flat 2, 180 Davidson Road, Croydon CR0 6DF**
Applicant	:	**Mr David Law**
Representative	:	**Pro-Leagle**
Respondent	:	**Ms Antonella Lenoci**
Representative	:	**Ms V Copeman – McMillan Williams Solicitors**
Type of Application	:	**Determination of alleged breach of covenants**
Tribunal Members	:	**Mr J P Donegan (Tribunal Judge)**
Date and venue of Hearing	:	**12 August 2014** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**18 August 2014**

DECISION

Decisions of the tribunal

(1) The whole of these proceedings are struck out pursuant to rule 9(3)(d) and (e) of the Tribunal (Procedure) (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules").

The background

1. The applicant is the freeholder of 180 Davidson Road, Croydon CR0 6DF ("the Block"), which consists of two flats. The respondent is the leaseholder of Flat 2 at the Block ("the Flat").

The applications

2. The applicant seeks a determination pursuant to 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the respondent is in breach of various covenants contained in her lease of the Flat. The application arises out of facts which are similar or substantially the same as those contained in earlier proceedings between the parties.

3. On 03 June 2014 the tribunal received an application in which the applicant sought a determination that the respondent was in breach of clauses 1(3) and (8)(d) and 2(3), (4)(d), (7), (10), (11), (14), (17), (18) and (19) of her lease ("the First Application").

4. The First Application was dealt with under case reference LON/00AH/LBC/2014/0043 and was listed for a case management hearing on 26 June 2014. At that hearing the parties, who were both represented by counsel, agreed settlement terms. These were embodied in a consent order, which was approved by the tribunal.

5. The consent order provided that the respondent would give the applicant's surveyor access to the Flat on 07 July 2014 and that if access was afforded then the First Application would be withdrawn on 21 July 2014. The consent order also provided that if access was not provided then the applicant would notify the tribunal and the respondent of his wish to proceed with the First Application and that the matter would proceed to a paper determination, excluding the allegations relating to clause 2(14) and (19) of the lease.

6. On 17 July 2014, the applicant's representative (Pro-Leagle) sent a facsimile letter to the tribunal in the following terms:

"We understand from our Client that access is provided and, therefore, under the terms of the Consent Order, the above action is discontinued".

The letter also stated that there were continuing breaches of the respondent's lease and that the applicant was *"..required to make a second application to the Tribunal, which shall be received shortly".*

7. On 17 July 2014 the tribunal consented to the withdrawal of the First Application in accordance with rule 22(3) of the 2013 Rules.

8. On 22 July 2014 the tribunal received a further application in which the applicant sought a determination that there were continuing breaches of clauses 2(4)(d), 14) and (19) of the Respondent's lease and historic breaches of clauses 1(3) and (8) and 2(3), (7), (10), (11), (14), (16) (17) and (18) of the lease ("the Second Application").

9. The matters complained of in the Second Application are substantially the same as those in the First Application. The only new complaints in the Second Application, which are said to be continuing breaches of the lease, are:

   (a) a failure by the respondent to pay a "reserve fund contribution" of £250, since the hearing on 26 June 2014 (clause 2(4)(d));

   (b) the respondent's solicitors wrote to the applicant on 03 July 2014, in connection with alleged breaches of the lease (clause 2(14)); and

   (c) a failure by the respondent to seek the applicant's consent to keep a cat at the Flat, since the hearing on 26 June 2014 (clause 2(19)).

10. On 23 July 2013 the tribunal issued notice that it was minded to strike out the Second Application pursuant to rule 9 of the 2013 Rules, upon the following grounds:

    (a) the proceedings are between the same parties and arise out of facts which are similar or substantially the same as those contained in proceedings which have been decided by the tribunal;

    (b) the proceedings (or part of them) are frivolous or vexatious or otherwise an abuse of the process of the tribunal; or

    (c) there is no reasonable prospect of the proceedings (or part of them) succeeding.

The notice stated that both parties could make representations on the question of whether the Second Application should be struck out and that this issue would be determined at a hearing on 12 August 2014. It also stated that both parties could attend the hearing and be heard on the question of striking out.

11. The notice was sent to both parties' representatives on 23 July 2014. In the case of the applicant, the notice and a short covering letter were sent to Pro-Leagle at Weatherhill House, New South Quarter, 23 Whitestone Way, Croydon CR0 4WF, being the address stated on the application.

12. The relevant legal provisions are set out in the Appendix to this decision.

The lease

13. The lease is dated 17 August 1988 and was granted by Daniel Jonathan Painter ("the Lessor") to Colin William Campbell and Yvonnne Deborah Doughty ("the Lessee") for a term of 99 years from 25 December 1987.

14. The applicant alleges continuing breaches of clauses 2(4)(d), (14) and (19) of the lease.

15. Clause 2(4) deals with the Lessee's liability to pay service charges and includes:

(c) As soon as convenient after the beginning of the each year the Lessor's Surveyor shall make an estimate (hereinafter called "the Surveyor's Estimate") of the said costs for each such yea and of the sum which should reasonably be set aside as a sinking fund for the future and the Lessor's Surveyors shall be entitled to take into account in making such estimate such matters as he shall in his absolute descretion (sic) deem fair and unreasonable and the Surveyor's estimate shall be conclusive and binding on the Lessor and the Lessee

(d) To the intent that the Lessor shall be fully and effectually indemnified in respect of the said costs the Lessee shall on being notified of the Surveyor's estimate forthwith pay to the Lessor in each year to the Thirty first day of December Fifty per cent of the amount of the Surveyor's estimate for such year. Pending the preparation of the Surveyor's estimate the Lessee shall pay to the Lessor in advance on the twenty fifth day of December of each year the sum of £250.00 on account of the amount payable when the Surveyor's Estimate has been prepared and shall pay the balance (if any) of the said estimate within one month of the presentation of the said estimate to the Lessee by the Surveyor

16. It appears to the tribunal that there is an error at the end of clause 2(4)(c), as this refers to the surveyor taking into account such matters as he deems "*fair and unreasonable*". Presumably this should read "*fair and reasonable*".

17. Clauses 2(14) and (19) are set out below:

(14) During the said term no trade or business shall be carried on or in or upon the Flat or any part thereof but the same shall be kept and used as and for a single private residence only and no act or deed of thing shall be suffered or permitted to be done in or about the Flat or any part of the Property which shall or may become a nuisance or which may grow or lead to the damage annoyance inconvenience or disturbance of the Lessor or the lessees or occupiers of the other flats in the Property or any of them or of any adjacent or neighbouring hereditaments and in particular shall not permit the unduly noisy playing of any musical instrument broadcats (sic) receiving apparatus or television set nor shall the Lessee permit or allow any washing to be displayed upon any part of the demised premises or any part of the Property and not to hold any sale by auction in or about the Flat or the Property or any part thereof

(19) not without the written consent of the Lessor (which may be revoked at any time) to keep any animal or bird in the Flat

The hearing

18. The applicant did not appear at the hearing and was not represented. The respondent was represented by her solicitor, Ms Copeman.

19. Ms Copeman advised the tribunal that she had not heard from Pro-Leagle regarding the Second Application but that she had sent them a statement of costs on 06 August 2014, setting out the costs that the respondent would be claiming at the hearing. A copy of the statement of costs was sent to the tribunal office on the same date and was headed "*Statement of Costs for the hearing on 12th August 2014*".

20. At the hearing Ms Copeman invited the tribunal to strike out the Second Application pursuant to rule 9(3)(c), (d) or (e) of the 2013 Rules. In relation to rule 9(3)(c), the tribunal pointed out that the First Application had not been decided by the tribunal. Rather it had been withdrawn, by consent. Ms Copeman acknowledged this and focussed her oral submissions on rule 9(3) (d) and (e).

21. Ms Copeman argued that the Second Application is frivolous, vexatious and an abuse of the process of the tribunal. She also contended that the Second Application had no reasonable prospects of success. The arguments that she put forward can be summarised as follows:

(a) The grounds of the Second Application were almost identical to the First Application. The new complaints followed the old complaints and the only change in circumstance being that the respondent had given access to the Flat, following the hearing on 26 June 2014.

(b) The applicant has acted unreasonably in submitting the Second Application shortly after the First Applicant was settled and only a few days after the First Application was formally withdrawn. The respondent will incur substantial, unnecessary costs in contesting the Second Application, which is ill-founded.

(c) The "reserve fund contribution" had been demanded in February 2014 and formed part of the First Application. The respondent has not paid the contribution, as the respondent has failed to produce service charge accounts for several years. Further the respondent has a potential set-off in relation to her claims for breach of covenant.

(d) The respondent's solicitors have written to the applicant on several occasions regarding alleged breaches of her lease, with the most recent letter being sent on 03 July 2014 (shortly after the First Application was settled). This does not amount to nuisance or a breach of clause 2(14) of the lease. The respondent is contemplating a claim in the County Court, arising from the alleged breaches of the lease.

(e) The respondent has kept a cat at the flat for several years and this issue formed part of the First Application.

(f) At the hearing on 26 June 2014 the parties specifically agreed that the allegations relating to clauses 2(14) and (19) of the lease would not be the subject of a paper determination, if the respondent failed to give access to the applicant's surveyor. This was because the applicant did not wish to pursue these complaints.

(g) The applicant had failed to appear and was not represented at the hearing. He had been given ample opportunity to make representations on the question of striking out but had failed to do so.

22. Having heard submissions from Ms Copeman and considered all of the documents provided, including the tribunal's file relating to the First Application, the tribunal has made the decision set out below. The tribunal informed Ms Copeman of its decision at the hearing.

Decision

23. The whole of the Second Application is struck out pursuant to rule 9(3) (d) and (e) of the 2013 Rules.

Reasons for the tribunal's decision

24. The applicant failed to make any representations as to why the Second Application should not be struck out, either before or at the hearing and failed to appear at the hearing.

25. The Second Application is frivolous, vexatious and an abuse of the process of the tribunal. It is substantially the same as the First Application, which was withdrawn by consent. The applicant is estopped from pursuing the complaints raised in the First Application, by virtue of the settlement.

26. The "new" complaints relate to issues raised in the First Application and could have been dealt with as part of the consent order, if the applicant and his representatives felt they were significant.

27. The "reserve fund contribution" is actually a fixed, advance service charge contribution. This was demanded in February 2014, long before the First Application was issued.

28. The original letter of claim from the respondent's solicitors to the applicant, alleging breaches of covenant, was sent on 21 February 2014. Again this was long before the First Application was issued. Further the letters from the respondent's solicitors clearly do not amount to nuisance or a breach of clause 2(14) of her lease. It cannot be the case that a leaseholder commits an act of nuisance by complaining to her freeholder of alleged breaches of her lease.

29. The First Application referred to the respondent keeping a cat at the Flat and an alleged failure to obtain consent for the cat. It is implicit in the terms of the consent order that the applicant consented to the respondent keeping a cat.

30. The Second Application was received by the tribunal less than two months after the First Application. Further it was received less than one month after the parties settled the First Application and only 6 days after the First Application was formally withdrawn.

31. The applicant should not be allowed a "second bite at the cherry", having withdrawn the First Application. There can be no justification for the Second Application.

32. If the Second Application were to proceed then the proceedings would be pointless, wasteful and an abuse of process. It is clear from the consent order that the applicant did not wish to pursue the complaints regarding alleged nuisance (clause 2(14)) and the cat (clause 2(19)). The amount of the interim service charge contribution is only £250 and is subject to a set-off claim. Further the applicant withdrew his claim for this contribution when he withdrew the First Application.

33. In addition and for the reasons outlined above, the Second Application has no reasonable prospects of success.

Letter from Pro-Leagle dated 14 August 2014.

34. Following the hearing, the tribunal office received a letter from Pro-Leagle dated 14 August 2014 in which they stated that they had only received the hearing notification letter on 13 August 2014. Within the letter Pro-Leagle made brief written submissions in support of the Second Application.

35. Pro-Leagle's letter was received by e-mail on 14 August 2014, after the tribunal had made its decision. The tribunal find it very hard to believe that its letter of 23 July 2014, enclosing the minded to notice, was only received on 13 August 2014. This was 3 weeks after it was sent. The letter was correctly addressed and should have been received by Pro-Leagle within two working days (25 July 2014), at the latest. Further the respondent's solicitors had effectively reminded Pro-Leagle of the hearing when sending them their statement of costs on 06 August 2014. Their covering letter was also correctly addressed.

36. The tribunal's decision was made prior to receipt of Pro-Leagle's letter of 14 August 2014. It is open to the applicant to make an application to set aside the decision under rule 51 of the 2013. Any such application must be received by the tribunal within 28 days after the date on which this decision is sent to the parties.

Application for costs

37. At the end of the hearing, Ms Copeman applied for an order costs under rule 13 of the 2013 Rules, upon the basis that the applicant had acted unreasonably in bringing and conducting the proceedings. The costs claimed in the respondent's statement of costs total £3,807.80, including VAT. The tribunal explained that it could not make an order for costs, without first giving the applicant an opportunity to make representations by virtue of rule 13(6).

38. The tribunal suggested to Ms Copeman that she make a written application for costs, to be accompanied by an updated statement of costs, by 26 August 2014. In fact the deadline for making such

application under rule 13(5) is 28 days after the date on which the tribunal sends out this decision.

39. If the respondent wishes to apply for an order under section 20c of the 1985 Act then this should be made at the same time as the application under rule 13.

Name: J P Donegan **Date:** 18 August 2014

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

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 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
   (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
   (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
   (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
   (c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Section 168 No forfeiture notice before determination of breach

(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2) This subsection is satisfied if—

(a) it has been finally determined on an application under subsection (4) that the breach has occurred,

(b) the tenant has admitted the breach, or

(c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

(3) But a notice may not be served by virtue of subsection (2) (a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

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

(5) But a landlord may not make an application under subsection (4) in respect of a matter which—

(a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(b) has been the subject of determination by a court, or

(c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(6) For the purposes of subsection (4), "appropriate tribunal" means –

(a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) in relation to a dwelling in Wales, a leasehold valuation tribunal.

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

Rule 9

(3) The Tribunal must strike out the whole or part of the proceedings or case if -

....

(c) the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal;

(d) the Tribunal considers the proceedings or case (or part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal; or

(e) The Tribunal considers there is no reasonable prospect of the applicant's proceedings or case, or part of it, succeeding

Rule 13

(1) The Tribunal may make an order in respect of costs only –

(a) under section 29 (4) of the 2007 Act (wasted costs) and the costs incurred in applying for such costs;

(b) if a person has acted unreasonably in bringing, defending or conducting proceedings in –

(i) an agricultural and land drainage case,

(ii) a residential property case, or

(iii) a leasehold case; or

(c) in a land registration case.

...

(5) An application for an order for costs may be made at any time during the proceedings but must be made within 28 days after the date on which the tribunal sends –

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) a notice of consent to a withdrawal under rule 22 (withdrawal) which ends the proceedings.

(6) The Tribunal may not make an order for costs against a person (the "paying person") without first giving that person an opportunity to make representations.

(7) The amount of costs to be paid under an order under this rule may be determined by –

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs ("the receiving person");

(c) detailed assessment of the whole or a specified part of the costs (including the costs of the assessment) incurred by the receiving person by the Tribunal or, if it so directs, on an application to a county court; and such assessment is to be on the standard basis or, if specified in the costs order, on the indemnity basis.

Rule 51

(1) The Tribunal may set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if -

(a) the Tribunal considers that it is in the interests of justice to do so; and
(b) one or more of the conditions in paragraph (2) are satisfied.

(2) The conditions are –
(a) a document relating to the proceedings was not sent to, or was not received at any appropriate time by, a party or a party's representative;
(b) a document relating to the proceedings was not sent to or was not received by the Tribunal at an appropriate time;
(c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
(d) there has been some other procedural irregularity in the proceedings.

(3) A party applying for a decision, or part of a decision, to be set aside under paragraph (1) must make a written application to the Tribunal so that it is received –
(a) within 28 days after the date on which the Tribunal sent notice of the decision to the party; or
(b) if later, within 28 days after the date on which the Tribunal sent notice of the reasons for the decision to the party.