12486

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AE/LBC/2017/0084** **LON/00AE/LSC/2017/0376**
Property	:	**64B Burrows Road, London, NW10 5SH**
Applicant	:	**Dr Afshan Navid Malik**
Representative	:	**Michael Corker**
Respondents	:	**Mr Charles McCadden**
Representative	:	**No appearance**
Type of application	:	**1. Breach of Covenant** **2. Determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	:	**Judge Robert Latham** **Mr Richard Shaw FRICS**
Date and Venue	:	**13 November 2017 at** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**20 November 2017**

DECISION

Decisions of the Tribunal

(1) The Tribunal determines that for the purposes of section 168(4) of the Commonhold and Leasehold Reform Act 2002, the following breaches have occurred (particulars of which are provided in our decision):

(i) The Respondent has repeatedly failed to grant the landlord access to inspect the demised flat;

(ii) the Respondent has carried out unauthorised structural alterations and removed landlord's fixtures without consent; and

(iii) The Respondent has caused a nuisance to the occupants of the ground floor flat.

These are serious breaches and the next step will be for the Applicant to apply to the County Court to forfeit the lease. The Respondent is advised to seek legal advice at the earliest opportunity.

(2) The Tribunal determines that service charges of £433.24 are payable for the service charge year 2016/7.

(3) The Tribunal determines that the Respondent shall pay the Applicant £300 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant.

The Applications

1. The Tribunal has been required to determine two applications issued by Dr Afshan Navid Malik on 21 September 2017:

(i) LON/00AE/LBC/2017/0084: Dr Malik seeks a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the Respondent tenant is in breach of his lease in respect of 64B Burrows Road, London NW10 5SH ("the Flat") in that he has (i) repeatedly failed to grant the landlord access to inspect the demised flat; (ii) carried out unauthorised structural alterations and removed landlord's fixtures without consent; and (iii) caused a nuisance to the occupants of the ground floor flat.

(ii) LON/00AE/LSC/2017/0376: Dr Malik seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Respondent in respect of the service charge years 2015/6, 2016/7 and 2017/8.

2. 64 Burrows Road ("the property") is a mid-terraced property that consists of two flats. On 28 October 1997, the Applicant acquired the freehold of the Building. On 21 February 1997, the Applicant had acquired the leasehold interest in Flat A, the ground floor flat. On 18 May 2016, the Respondent registered his leasehold interest in Flat B, the first floor flat.

3. On 29 September and 9 October 2017, the Tribunal gave Directions. Pursuant to these Directions, the Applicant has:

(i) provided official copies of the entries on the registers of the Respondent's title. It is apparent that there is no mortgagee and no sub-tenant. The Applicant understands that the Respondent occupies the Flat on his own.

(ii) filed a Statement of Case, dated 19 October 2017.This is attested by a Statement of Truth signed by Dr Malik.

(iii) filed witness statements from the Applicant, Ms Ayesha Malik (her daughter) and Chris Foley, Cleaner (all dated 19 October 2017).

(iv) filed a Bundle of documents.

4. The Directions advised the Respondent to seek legal advice as these proceedings could be a preliminary to court proceedings to forfeit his lease. The Respondent has not heeded this advice. Indeed, he has taken no steps to defend the application.

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

The Inspection

6. We inspected the property prior to the hearing. Dr Malik was present, together with her representative, Mr Michael Corker, who is a partner with Corker Clifford LLP (property managers).

7. The Respondent was not present. On 29 September, the Tribunal had sent the parties copies of the first set of Directions. These notified the parties of the time and date of the inspection. On 10 October, the Tribunal sent the parties copies of the second set of Directions. These also notified the parties of the time and date of the inspection. We rang the Respondent's doorbell and knocked on the door, but there was no response. We also telephoned two mobile numbers which were given to us by Dr Malik. Neither was answered, but we left a message on each. We reminded the Applicant that the hearing was listed for 13.30. We were therefore unable to gain access to the first floor flat.

8. The property is a two storey mid-terraced house built pre-1900 of brick with a tiled roof. The windows were not original. The first floor bay windows at the front of the property, were covered in newspapers which had been put on the internal glazing. We also saw in the window above the front door what appeared to be a door and another piece of material board leaning against the wall. The front garden wall had been recently rendered. It had not been painted. At the rear, we were able to see a hole which we were told was the position of the original gas boiler flue serving the first floor flat. Below this there appeared to be a further alteration to the brickwork at first floor level.

9. To the side of the property we saw a new flue projecting from the wall immediately below the guttering. The proximity of the flue to the gutter was a matter of some concern as there was a risk of heat from the flue warping the gutter. There also seemed to be some other small pipe work points which were related to the boiler, but Dr Malik was not certain when these had first appeared.

10. We were then taken into the ground floor flat. In the main bedroom we saw some damage to the ceiling plaster in one corner. In the bathroom, there was a hairline fracture cack in the ceiling and what appeared to be a brown water stain adjacent to the ceiling lamp. In the kitchen, we saw the suspended ceiling which had been installed to permit the installation of spot lighting. Mr Corker removed one of the spot light fittings and was showered with fine dust which he surmised has been caused by building works in the first floor flat. It is apparent that this had fallen through the original ceiling and was lying on top of the suspended ceiling.

The Hearing

11. Dr Malik was represented by Mr Corker who adduced evidence from Dr Malik. We also had regard to the witness statements from Ms Malik and Chris Foley.

12. Mr McCadden did not appear. It seems that Mr McCadden is not currently living in the flat, albeit that he visits it on a regular basis and occasionally stays there. Dr Malik told us that Mr McCadden had visited the flat and removed a number of items about 1.5 hours after our inspection. She explained why she thought that this visit was in consequence of the ansaphone messages left by the Tribunal. On 1 November, the Applicant had informed the Tribunal that the Respondent was not collecting his mail. That morning, he had attended his flat with a builder. There was mail in the hallway which he had ignored. The Tribunal is satisfied that the Respondent has taken an informed decision not to engage with these proceedings.

13. We are grateful for the assistance that Mr Corker has provided the Tribunal and the realistic approach that he has adopted. The Tribunal accepts the evidence adduced by the Applicant. It is uncontradicted. We found Dr Malik to be a careful and truthful witness.

The Lease

14. The lease for the Flat is at p.28-50. The lease is dated 23 July 1988. This granted a term of 99 years. On 17 February 2011, it was extended by 90 years. The lease contains a number of covenants which we discuss when we consider the alleged breaches.

15. The leases demises to the tenant the first floor flat. The demise includes the floors of the flat and the joists on which the floors are laid; the ceilings, the internal walls and the plaster of the external walls. The lease does not demise either the front garden or the front wall. The tenant rather has a right at all times to use the pathways, passages, entrance hall, stairways and landings to gain access to the flat. There is a door on the ground floor at the bottom of the stairs which leads to the first floor flat.

16. The lease grants the tenant the right to place one dustbin in the bin store hatched yellow on the plan annexed to the lease. In practice, there is no such bin store.

17. There is a loft in the roof space. This is not demised to any tenant and is retained by the landlord. Access to the loft is gained through a hatch in the upstairs flat. The tenant of the first floor flat has no right to use or access this roof space. However, the landlord requires the permission of the tenant to access the roof space from his flat.

18. Clause 4(2) requires the tenant to pay a service charge, namely 50% of the costs (Clause 4(4)). The services to which the tenant is required to contribute are set out in the Fourth Schedule. This includes all costs and expenses incurred by the landlord in complying with, and in connection with, the fulfilment of its obligations under Clauses 5 (2), (4) and (5) of the lease. It does not extend to Clause 5(6) namely the landlord's obligation to repair, decorate and keep clean and lighted the hall, stairs and landing. This may be a drafting error. The adverse impact on the landlord is small given the limited extent of the ground floor communal hallway.

19. The Fourth Schedule permits the landlord to engage managing agents and accountants. If the landlord decides to manage the block herself, she is entitled to charge a reasonable fee provided that this does not exceed what an independent managing agent would charge.

20. Clause 4(2) makes provision for the payment of the service charge. The accounting period is to be 24 June to 23 June. The landlord is entitled to demand an advance service charge on 24 June and 25 December, the advance service charge to be such sum as the landlord's agents determine to be fair and reasonable. The landlord may also establish a reserve fund. The amount of the service charge is to be certified by the landlord's auditors, accountants or managing agents.

The Background

21. In the early 1980s, Urbanmerge Property Management Limited, the then freeholder, converted the property into two flats. The lease for flat A is dated 1 August 1985; Flat B: 23 July 1988.

22. On 21 February 1997, the Applicant acquired the leasehold interest in Flat A. On 28 October 1997, she acquired the freehold of the Building. Dr Malik has occupied the ground floor flat with her daughter, Ayesha. Ayesha is currently studying in Oxford. Dr Malik works at King's College, London.

23. Dr Malik explained how she had an excellent relationship with the two previous upstairs tenants. Both landlord and tenant were fully engaged in the management of the Building. Bills were split equally. There was no need for the formality of service charge accounts.

24. On 18 May 2017, the Respondent registered his leasehold interest in Flat B, the first floor flat. It seems that he had acquired the leasehold interest on 25 April 2016 for £518,250.

25. Dr Malik describes how Mr McCadden immediately started extensive building works. He neither consulted nor informed his landlord of the plans. This building works have yet to be completed. Building rubbish has been left in the front garden. The building works have been noisy and executed outside normal working hours, sometimes as early as 04.00. These have been executed with no regard to the rights of the ground floor tenant. There has been a vast amount of dust which seems to have penetrated the ceiling above the ground floor flat and settled on the false ceiling below. He has damaged the ceiling plaster in the main bedroom of the ground floor flat. He has applied render to the front wall, even though this is not included in the demise.

LON/00AE/LBC/20175/0084: Breach of Covenant

Failure to afford the Applicant access to inspect the flat

26. By Clause 3(d) of the lease, the tenant covenants to:

> "Permit the Lessor and his duly authorised surveyors or agents with or without workmen and others upon giving three days' previous notice in writing at all reasonable times (except in case of emergency) to enter into and upon the Flat or any part thereof for the purpose of viewing and examining the state and condition thereof and making good any defects decays and want of repair of which notice in writing shall be given by the Lessor to the Lessee and for which the Lessee may be liable hereunder within three months after the giving of such notice."

27. We are satisfied that the Respondent has breached this covenant and has refused to afford his landlord access to view and examine the state and condition of the Flat. Any request must be in writing and give three days notice. We find that the Respondent has refused access despite receipt of the following letters from Corker Clifford:

(i) On 5 July 2017, Corker Clifford required access to inspect, the reason for the inspection being the belief that the tenant had executed unauthorised alterations. The letter did not specify the date and time when access would be required. The Respondent did not reply to this letter.

(ii) On 13 July, Corker Clifford requested access for an inspection which would last about one hour on 19 July between 09.00 and 17.00 or 20 July between 09.00 and 19.00. The Respondent did not afford access or reply to the letter.

(iii) On 17 July, Corker Clifford repeated their request for access on the above dates. The Respondent did not afford access or reply to the letter.

(iv) On 21 July, Corker Clifford requested access on 26 July between 11.00 and 19.00 or 2 August between 09.00 and 19.00. The Respondent did not afford access or reply to the letter.

(v) On 26 July, Corker Clifford sent a pre-action letter repeating the request for access. A response was requested within 14 days. The Respondent neither replied nor provided access.

(vi) The Respondent has still not afforded access. The Applicant has had no access to inspect the Flat since the Respondent started his building works some 18 months ago.

Unauthorised Works

28. By Clause 3(d) of the lease, the tenant covenants

> "Not to make any structural alterations or structural additions to the Flat or any part thereof or remove any of the Landlord's fixtures without the previous consent in writing of the Lessor."

29. The Tribunal is satisfied that the Respondent has carried out extensive works to the upstairs flat. These works have involved some structural alterations or additions. However, the extent of these structural works are unclear given the refusal of access. There is clear and cogent evidence that the Respondent has removed landlord's fixtures. The Respondent has not sought the Applicant's consent for these works.

30. The Tribunal makes the following findings:

(i) The Respondent has carried out major refurbishment works. On a balance of probabilities, these involve structural alterations and structural additions. There is clear and cogent evidence that the Respondent has removed landlord's fittings. Floor boards have been

removed. There has been extensive builder's rubble. Holes have been made through the external wall. A new bathroom, kitchen and central heating system have been installed. The layout of the Flat has been changed. Wood and plasterboard have been delivered to the Flat.

(ii) The Respondent has removed the existing boiler and installed a new boiler in a different location. This was apparent from our inspection and the new flue which has been cut through the side wall immediately below the gutter. The proximity of the flue to the gutter is a matter of concern due to the risk of heat from the flue warping the gutter. There are now redundant flue holes from the old boiler.

(iii) The Respondent has removed the fitted kitchen and installed a new one in an existing bedroom.

(iv) The Respondent has removed a toilet, radiators, floor boards, and pipe work. All of these were landlord's fixtures.

31. By Clause 3(d) of the lease, the tenant covenants

> "To keep the Flat throughout substantially covered with carpets and underlay for avoidance the transmission of noise save in the kitchen or bathroom where cork or similar should be used"

32. The Tribunal is satisfied that the Respondent has removed carpets from the Flat and has not replaced them. Mr Malik told us that she had seen the carpets which have been removed. Footfall in the Flat is now audible in ground floor flat.

33. The Tribunal further finds that the Respondent has rendered the front wall. This wall is not part of his demise. He had no right to do this.

Nuisance

34. By Clause 2 of the lease, the tenant covenants to observe the restrictions on the use of the flat set out in the First Schedule. Paragraph 1 of the Schedule specifies the following restriction:

> "Not to use the Flat nor permit the same to be used for any purpose whatsoever other than as a private dwelling house in the occupation of one family only, nor for any purpose from which a nuisance can arise to the owners lessees or occupiers of other flats in the Building or in the neighbourhood..."

35. The Tribunal makes the following findings of nuisance:

(i) The Respondent has caused damage to the ground floor flat. He has damaged the ceiling in the main bedroom. He has caused cracks to the bathroom ceiling. He has caused dust to penetrate the ceiling above the kitchen which has settled on the false ceiling below. This has caused damage to the spot lights in the kitchen.

(ii) The Respondent has left large quantities of building waste and rubble in the front garden. It has been left there for some months. The rubble has included a toilet.

(iii) The works have been executed without any regard to the impact on the ground floor flat. The Respondent has failed to liaise with the Applicant. The works have been noisy. They have been executed at unreasonable times, namely at night, early in the morning and at weekends. On occasions works, have been executed at 04.00. The works have been executed over a period of 18 months and have still not been completed. This is an unreasonable length of time. There has been excessive dust. Several builders have banged on the Applicant's door demanding payment, because the Respondent's door bell does not work.

Conclusions on Breach of Covenant

36. The Tribunal has found that the Respondent has breached a number of covenants in his lease. We are satisfied that since he acquired the leasehold interest in the Flat in April 2016, he has acted in flagrant disregard as to his obligations under the lease. His actions have made Dr Malik's life intolerable, both as his landlord and as his neighbour.

37. The Respondent has failed to respond to any of the letters sent by Corker Clifford. He has failed to engage with this application. The breaches which we have found are of the utmost seriousness. The next step will be for the Applicant to apply to the County Court to forfeit his lease. We advise the Respondent to seek legal advice at the earliest opportunity.

LON/00AE/LSC/2017/0376: Service Charge Demands

38. For eight years, the Applicant had an informal arrangement with her tenants and bills were split equally as they were paid. This arrangement worked well for a terraced property with just two flats and limited common parts. Since April 2016, when the Respondent acquired his leasehold interest in the Flat, it has been necessary for the Applicant to rely on the contractual framework stipulated in the lease. On 3 July 2017, Corker Clifford issued a service charge demand. It was accompanied by the requisite Summary of Rights and obligations.

Service Charges for 2015/6

39. The service charge year runs from 24 June to 23 June. The Respondent acquired his leasehold interest on 25 April 2016. Up until 24 April 2016, all bills had been split on an equal basis. The building had been insured on 24 September 2015 at a cost of £187.62. There had been no onerous management duties and Dr Malik did not charge a management fee.

40. The Applicant claims service charges for a five month period. The relevant period is only two months. We disallow the sums claimed for the following reasons:

(i) Electricity and Cleaning: The lease does not permit the landlord to collect these as a service charge.

(ii) Building Insurance: Dr Malik accepted that the insurance had been renewed in September 2015 and that the previous tenant would have paid 50% of the bill.

(iii) Management: The landlord had not previously charged a management fee and the Tribunal does not consider that one would be justified for the final two months of this financial year.

Service Charges for 2016/7

41. The Applicant claims service charges totalling £643.24, 50% of which is charged to the Respondent (£3421.62). The make the following findings:

(i) Electricity (£30) and Cleaning (£180): We disallow these items as the lease does not permit the landlord to collect these as a service charge. The sums claimed are modest.

(ii) Building Insurance: We allow the sum of £233.24. This was renewed on 30 September 2017. The sum sought is reasonable. The premium increased from £187.62, but it seems that the insurers had not previously been aware that the property was divided into two flats.

(iii) Management: We are satisfied that the management charge of £200 is reasonable for the two flats. This is permitted by the lease. Indeed, the charge seems modest given the difficulties that the Applicant now faces in managing this property.

42. We therefore allow £433.24, in respect of which the Respondent is liable for £216.62 (50%).

Advance Service Charges for 2017/87

43. The Applicant claims service charges totalling £1,905, 50% of which is charged to the Respondent (£952.50). This included the following:

(i) Electricity (£45) and Cleaning (£180): We have already indicated that the lease does not permit the landlord to collect these as a service charge.

(ii) Building Insurance: £180. This seems unduly low. On 30 September 2017, the insurance was renewed in the sum of £361.76. In 2016/7, the premium was £233.24. The latest increase in premium is due the structural works which are being executed to the first floor flat. This was a matter which the Applicant was obliged to disclose. The increase would have been less had the Respondent sought consent for the works.

(iii) Management: £1,000. Whilst £200 for 2016/7 seemed modest, we suggested that the increase seemed excessive. A managing agent would charge no more than £300 to £400 per flat.

(iv) General maintenance: £500. We were unsure what costs this is intended to cover.

44. In the light of our comments, Mr Corker agreed to withdraw this demand for an advance service charge and to reissue it having reviewed the sums sought. In the circumstances, it is not necessary for us to make any formal findings on this.

Refund of Fees

45. At the end of the hearing, the Applicant made an application for a refund of the fees that he had paid in respect of the application hearing pursuant to Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules"). The Applicant has paid a total of £300. Having regard to our findings, the Tribunal orders the Respondent to refund the tribunal fees of £300, which have been paid by the Applicant, within 28 days of the date of this decision.

46. This is normally a no costs jurisdiction. We are therefore unable to consider the costs that the Applicant has incurred in engaging the services of Corker Clifford. However, it may be possible for her to recover these costs pursuant to the terms of the lease.

Judge Robert Latham

20 November 2017

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Commonhold and Leasehold Reform Act 2002

Section 168

(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.

Landlord and Tenant Act 1985

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -

(a) "costs" includes overheads, and
(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -

(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

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

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 ... a residential property case.....

(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.