FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AN/LBC/2016/0008**
Property	:	**74 Talgarth Mansions, Talgarth Road, London W14 9DP**
Applicant	:	**Brickfield Properties Ltd.**
Representative	:	**Mr S. McLoughlin, counsel, instructed by Irwin Mitchell LLP**
Respondent	:	**Mr Hirad Riazi**
Representative	:	**Mr R Cohen, counsel instructed by Rodgers and Burton Solicitors**
Type of Application	:	**Determination of an alleged breach of covenant**
Tribunal Members	:	**Judge Dickie** **Mr H Geddes, RIBA**
Date and venue of hearing	:	**20 May 2016, 10 Alfred Place, London WC1E 7LR**

DECISION

Summary

The Respondent has breached Clause 3.5.1 of the lease.

The Respondent has not breached Clauses 3.9.1 and 3.10.1 of the lease.

Introduction

1. The Applicant seeks a determination under s.168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") that the Respondent has breached covenants contained in the lease.

2. The Applicant is the head leaseholder of 73-80 Talgarth Mensions, Talgarth Road, London W14 9DF, a purpose built block of eight flats

registered under title BGL80960. The Respondent is the leaseholder of 74 Talgarth Road ("the subject premises") pursuant to a lease dated 27 October 1995 for a term of 99 years from 29 September 1984. The Respondent's registered title is number BGL15180.

3. The Applicant asserted in the application that the Respondents have breached the following covenants:

Breach of Clause 3.5.1

1. The Respondent covenants "to keep the Interior of the Flat in good repair (except damage caused by any Insured risks to the extent that the Lessor recovers the cost of making good such damage from its insurers) and to make good any damage caused to neighbouring flats caused by the exercise of the Lessee's right of access afforded by Clause 1 (v) of Part II of the First Schedule."

2. The Interior of the Flat is defined in 1.1.10(viii) to include: "all mechanical electrical and heating apparatus within the flat and all wires pipes drains conduits and flues exclusively serving the Flat."

3. The Applicant alleges that this convenant has been breached in relation to a persistent leak from the toilet overflow from about June 2015.

Breach of Clauses 3.9.1 and 3.10.1:

4. The Respondent covenants in 3.9.1 "Not to use the flat except as a self contained private residence in the occupation of a single household or family" and in Clause 3.10.1: "Not to assign underlet charge or part with possession of part only of the Flat."

5. The Applicant asserts that these covenants have been breached by the letting of the property to students.

4. The Applicant stated on the application form to the tribunal that the tenant had admitted the alleged breach, but this was not the case. Directions were issued on 17 February 2016 for the determination of the application on the papers, unless a hearing was requested. A hearing was requested but the one then listed for 13 April 2016 was adjourned on further directions, including for the instruction of a joint expert to inspect the cistern and overflow pipe and produce a written report as to the cause and remedy of the leak.

Evidence

5. The tribunal heard evidence on behalf of the Applicant from employees of Freshwater Property Management, the managing agent - Mr Lucky Ginigeme - Building Surveyor, Mr Cecil Daley - Deputy Manager at Freshwater, and Mr Amardeep Mhajan - Management Surveyor. The Respondent gave evidence, as did Ms Leila Sid on his behalf.

6. Chronologically, the outline of evidence before the tribunal was as follows:

December 2013 - The Applicant alleges it received complaints concerning loud music and noise from the subject premises during the night hours which caused a nuisance to neighbours, and wrote a letter to the Respondent warning of an application to the First Tier Tribunal (FTT) in respect of an alleged breach of covenant and forefeiture proceedings, including in respect of ground rent / service charge arrears if judgment was obtained for them in the County Court.

2014 - The Applicant alleged that the nuisance continued to March and the flat was being let to a number of students. In June the Applicant's solicitors wrote to the Respondent threatening an application to this tribunal in respect of alleged breaches of four covenants in the lease. A reply was sent by "Sarah (on behalf of the landlord)" confirming that the occupiers had left (but disputing the assertion that the property was let to five individuals).

June 2015 – Mr Daley left voicemail messages for the Respondent concerning the leak from the overflow. Mr Mhajan inspected externally on 25 June and took photographs which showed that some sort of makeshift plastic spout had been inserted into the overflow pipe, apparently to divert the water flowing from it away from the wall and stack pipe, which both showed signs of water staining. The stack was stained particularly around the collar. Mr Mhajan wrote to the Respondent to notify him of the water leaking from the overflow pipe and requesting a repair.

September 2015 – The Respondent's plumber apparently adjusted the cistern and diverted the overflow externally to an adjacent drain using a polypropylene pipe in case of further discharge. The Respondent denied that there had been any further leaks since then.

26 October 2015 - Mr Mhajan and Mr Daley inspected the property externally. Both said in oral evidence that they saw the leak was still continuing but only the latter said this in his witness statement. They did not take photographs. They gave evidence that an older Mr Riazi was at the flat but refused access. The Respondent disputed this was him or his father. Mr Mhajan in his witness statement (though not Mr Daley who was with him at the time) gave evidence that this man confirmed he had not been in the flat for 6 months and there were tenants residing there. In cross examination, Mr Mhajan said that when he wrote his witness statement in March he had remembered this conversation, but that he had since forgotten whether it had taken place or not.

9 November 2015 - Mr Mhajan inspected externally, allegedly saw the leak continuing but did not take photographs, and sent a further letter to the Respondent on 11 November.

8 December 2015 - Mr Mhajan and Mr Daley inspected the property and took a photograph of the bottom of the soil stack and of the toilet cistern (but not of the alleged leak). Access was given by a woman they said introduced herself as Miss Riazi, the Respondent's cousin, but Ms. Leila Sid for the Respondent (as well as the Respondent himself) gave evidence that it was she who had provided access, being a friend of the Respondent's friend and visiting from her home in Paris at the time. Mr Mhajan and Mr Daley reported that some internal rooms had individual locks and that the reception room off the kitchen was being used as a bedroom. However, they had different recollections of which rooms had locks. They said "Ms Riazi" told them she did not have keys and that students were occupying the flat, but Ms. Sid denied she had said this, or that she knew anything about how the flat was in use.

On 14 December 2015 the Applicant again wrote to the Respondent threatening proceedings in the FTT for breach of covenant. The Respondent replied on **11 January 2016** to advise he was out of the UK and would respond upon his return before 3 February. The response of the Applicant was to instruct solicitors to apply to the FTT.

20 January 2016 - The Respondent replied to advise that the overflow had been dealt with and there were no further leaks, but that replacing the "toilet tank" (cistern) was not an easy job owing to the age of the pipework and replacement of the overflow was a construction issue which would require the Applicant's permission. The email advised that if the managing agent did not accept that the leak had been stopped they could advise a third party plumber. The Applicant's solicitors responded by email that day that they were instructed to issue an application under s.168(4). The Respondent replied on **21 January** that there was no leak and referred to the need to replace the overflow pipe and communal water valves which are extremely old, and that his plumber could contact the managing agent to explain or be present for an inspection. By email of **26 January** the Respondent said that his plumber had tried to contact the local office to deal with the issue but no one was available, and referred to a request that the water be stopped so that repairs could be carried out.

7. It thus appears that the Respondent and/or his plumber lacked sufficient technical knowledge to carry out a proper repair by replacing the cistern (in misunderstanding that it could not be replaced other than by the landlord shutting off the water). It is not clear that the Applicant engaged with the Respondent to correct this misunderstanding before issuing this application.

8. Mr K. Drury of NLG Associates Ltd, building services consultants, who was the jointly appointed expert instructed pursuant to a direction of the tribunal, inspected the property on 10 May and found that at that time the overflow was not discharging. He found that a repair of the ball valve had been carried out (in September 2015 according to the Respondent), which Mr Drury considered to be an ad hoc improvisation because:

1. The brass ball valve arm appeared to have been bent down to lower the level of the plastic ball and to lower the water level and shut off point of the inlet valve.

2. The plastic ball had been unscrewed on the end of the flushing arm to again assist with lowering the water level and shut off point of the inlet valve. It had been unscrewed to the point of approximately the last three threads of the arm, the required locking nut had not been replaced and as a consequence in Mr Drury's opinon was not sufficiently secure and under normal flushing operation the ball float could become unthreaded and dislodge causing an overflow situation.

3. It was evident that the main inlet valve brass body had not had the associated shut off washer replaced due to the amount of scale encrustation on the valve body and screwed cap end.

4. The water level shut off point although below the overflow outlet wasstill higher than normally expected and was directly beneath / partially submerging the underside and point of the water inlet.

9. Mr Drury recommended the following works:

"The ball float is to be securely fixed back to valve arm and associate locking nut reinstated.

The ball valve inlet valve washer should be replaced but it is recommended that a complete new inlet valve assembly be installed to ensure positive shut off conditions, comply with water regulation backflow requirements and for longevity of repair.

Due to age of flushing cistern and the internal fitments it will be beneficial to replace complete unit with new compatible cistern."

10. Thereafter there were some exchanges between Mr Drury and the Respondent regarding the necessary works, in which the Respondent said they had been unable to find the correct cistern and repeated his belief that the water for the whole building would need to be cut off in order to replace it. Mr Drury advised on a possible cistern, and on finding an isolation valve or freezing the water supply to install one. In possession of Mr Drury's advice, by the date of the hearing the cistern had been replaced according to the Respondent, and this was not disputed by the Applicant.

Decision and Reasons

Clause 3.9.1

11. The lease does not prohibit subletting. This clause prohibits the use of the premises except for the occupation of "a single household or family". The Respondent's pleaded case was that the 2013 letting was to two cousins, and Mr Riazi gave evidence that since they were

removed in 2014 the property had not been relet but had remained empty save for very intermittent occupation by himself.

12. The tribunal acknowledges that the property appears to have been managed by someone who purports to act on behalf of "the landlord". The tribunal finds the Applicant's evidence that this covenant has been breached is wholly insubstantial. It amounts to a disputed verbal comment by the woman who facilitiated access to the property on 8 December, which the tribunal does not accept was made, and suspicions as to the type of tenants to whom the property was previously let.

13. The tribunal is not satisfied that there have been individual locks on more than one room. No photographs of such locks were taken by the Applicant's representatives, and the Respondent produced photographs the tribunal is satisfied are of the internal doors in the subject property which show a lock on only one door. There is insufficient evidence that all of the rooms were being used as bedrooms. The tribunal is satisifed that Ms Sid attended the 8 December inspection and accepts her evidence as to what took place. The evidence of the Applicant's witnesses was inconsistent in a number of respects and the tribunal concludes it is less reliable.

14. The onus is on the Applicant to prove that the persons occupying the premises were not a single household or that the flat had been let in parts. The Applicant must produce some cogent evidence in support of its case that the tenants were not a single household or family but there is none. There was no documentary evidence, such as from the electoral roll or credit reference agencies (though that on its own would not necessarily have been persuasive). The landlord did not seek to conduct any occupancy visits. Counsel for the Respondent made submissions as to the meaning of "household", but given the almost complete absence of any evidence on the part of the Applicant to substantiate its case, it is not necessary to address these in this decision.

Clauses 3.5.1

15. On a strict interpretation of the lease, the tribunal finds that the Respondent has breached this covenant, though the Applicant's evidence in relation to this alleged breach left much to be desired. The tribunal is dissatisfied that its witnesses failed to take photographs (or video) of the leak on the October, November and December inspections. Bizarrely, therefore, the tribunal was asked to rely on the disputed oral evidence of one witness as to the existence of the leak on each occasion which was not corroborated in the statement of another of the Applicant's witnesses. Nobody who inspected recorded whether it was raining at the time. The Applicant did not give reasonable notice of inspection as required by the lease.

16. Much tribunal time was wasted in examination and cross examination of several witnesses as to whether water was leaking from the overflow pipe on the various inspections or not. It would have been simple to have recorded this on camera if indeed there was a leak. Mr Mhajan said in evidence that it was reasonable to assume that if the overflow had been leaking he would have taken a photograph of it, as he had done in June 2015, and that he would have provided any such photographs to the Applicant's solicitors. On balance, the tribunal does not find the Applicant's disputed evidence persuasive, and concludes that there was no significant or abnormal leak from the overflow after September 2015. It is not clear that the water staining to the stack pipe was (or was entirely) the result of the overflow (the collar itself may have been leaking, and the Applicant painted it prior to January 2016).

17. However, the question for the tribunal is whether there has been a breach of the covenant to keep the Interior of the Flat in good repair. The Respondent admitted that he was notified of the overlow leak in June 2015. The failure of the cistern caused leaks through the overflow. The modifications to the cistern were carried out in September 2015, but though they stopped the leaks temporarily, the tribunal finds on the basis of the evidence of Mr Drury that this did not place the cistern in a state of good repair as required by the lease. This was an ad hoc solution which left the cistern vulnerable to further leaks.

18. The tribunal is satisfied that the components within the cistern are "mechanical apparatus" and "pipes", and thus are part of the Interior of the premises for the purpose of Clause 3.5.1, and that they were not in good repair from June 2015 until the replacement of the cistern. The white polypropylene pipe was used as a precaution against further leaks affecting the exterior fabric of the building, but served to demonstrate that the bending of the ballcock arm was understood to be not a full repair.

19. The lease itself provides an agreed mechanism whereby the landlord can require the leaseholder to comply with the repairing covenants, a mechanism, however, which the Applicant did not seek to use. The Respondent covenants:

"3.5.2 to permit the Lessor and its agents at reasonable times and upon reasonable notice to enter the Flat to inspect its condition and state of repair.

3.5.3 within 42 days after the service of a Schedule of Dilapidations to begin and to proceed speedily to comply with the same

3.5.4 if the Lessee does not within 42 days after the service of such Schedule (or immediately if necessary) begin and thereafter proceed speedily to comply with the same the Lessor may (without prejudice to its right to forfeit) enter the Flat and execute such works as may be necessary to comply with the Schedule and the cost thereof (including professional fees and VAT) shall be a debt payable by the

Lessee to the Lessor on demand together with interest at the Prescribed Rate from the date of demand until actual payment..."

20. The Applicant sought to establish a breach of covenanant as a preliminary to proceedings for forfeiture, yet the prospects of obtaining forefeiture for the breach proved in this case may be considered remote. Mr Mhajan said in evidence that his aim had been to get the leak fixed. However, he said he was unaware of the power of the landlord to compel repairs by serving a Schedule of Dilapidations. He thought that his manager Mr Ginigeme might have prepared one. Mr Ginigeme, on the other hand, said he was new to the job in October 2015 and that it would have been Mr Mhajan's job to serve a Schedule of Dilapidations.

21. The Applicant did not provide an adequate justification for the cost and time involved in choosing to take these proceedings before having followed the available mechanism in the lease for ensuring repairs are effected. However, Clause 3.5.3 forms a separate covenant and the failure to serve a Schedule of Dilapidations does not affect the question of whether the repairing covenants have been breached.

22. The Applicant's decision to issue this application was at best a questionable means of ensuring that the lease covenants were complied with, but on the available evidence the tribunal is compelled to find that the Respondent has breached Clause 3.5.1 of the lease.

Name: F. Dickie **Date:** 14 July 2016