12277

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**A LON/00AN/LSC/2017/0048** **B LON/00AN/LBC/2017/0036**
Property	:	**58A Collingbourne Road,** **Shepherds Bush, London, W12 0JQ**
Applicant	:	**Ms S Trimnell-Ritchard, in B** **Respondent in A**
Representative	:	**In person**
Respondent	:	**Ms M Tuffley, in B** **Applicant in A**
Representative	:	**In person**
Type of Application	:	**A Liability to pay service charges** **B Determination of an alleged breach of covenant**
Tribunal Members	:	**PMJ Casey MRICS** **P Roberts DipArch RIBA** **Mrs J Dalal**
Date and venue of Hearing	:	**22 May 2017** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**14 July 2017**

DECISION

Introduction

1. There are two separate applicants in respect of the same property and between the same parties which the Tribunal has directed be heard together.

2. The first application is for a determination of liability to pay and reasonableness of service charges under the provisions of Section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") made by Ms Melissa Tuffley on 6 February 2017. Ms Shayne Trimnell-Ritchard is the named Respondent.

3. The second application was made by the Respondent to the first application, on 29 March 2017, under section 168(4) of the Commonhold and Leasehold Reform Act 2002 (as amended) ("the 2002 Act") for a determination that the Respondent (and Applicant in the first application) has breached various covenants and/or conditions in her lease.

4. Ms Tuffley is the leaseholder of the property known as 58A Collingbourne Road, Shepherds Bush, London, W12 0JQ ("the property") pursuant to a lease dated 23 July 1996 granted by Caroline Sarah Lewis to Declan Gerard Ganefor a term of 999 years from 25 March 1996 ("the lease").

5. The property is one of 2 self-contained flats in a converted house and is located on the first floor. The property was being sub-let by Ms Tuffley. Ms Trimnell-Ritchard is the freehold owner of the building and lives in the ground floor flat.

6. The building had apparently been in poor condition and required extensive repair. The proposed works were the subject of reports by a Chartered Surveyor and, subsequently, a structural engineer, and estimated costs were produced which were consulted on as required by Section 20 of the 1985 Act. A disagreement as to some of the estimated

costs between the parties was resolved by a decision of the then Leasehold Valuation Tribunal (LON/00AN/LSC/2012/0266) and following the drawing up of specifications and the issue of invitations to tender contracts were entered into for carrying out the works.

7. On 17 September 2012 a service charge demand was sent by the Respondent to the Applicant for £22,480 being the tenant's 50% share of the total costs which was duly paid.

8. However the works were not carried out as planned because on 19 March 2013 the parties entered into an agreement whereby the Applicant would give up her rights of access to and use of the rear garden to allow the respondent to build an extension to the ground floor flat on the roof of part of which the applicant would be allowed to build a roof terrace. The agreement further provided that a refund would be payable to the Applicant by the Respondent against the sum referred to at 7 above. The copy of the agreement in the bundle is incomplete but seemingly any balance not used to cover service charge costs in the interim would be repaid on practical completion of the works.

9. Subsequent to this agreement the respondent decided to further extend the ground floor flat by excavating and building a basement under the extended rear part of the building. The Applicant did not agree to these further works which seem to have resulted in a breakdown of their relationship. The Applicant has an outstanding action in the County Court for damages caused to her flat by the works including loss of rent whilst it was allegedly rendered uninhabitable whilst the Respondent brought an action before the tribunal under Section 168(4) of the 2002 Act claiming various breaches of covenant. That case was heard on 30 March 2017 but the decision was not available at the time of this hearing. We have since seen the decision [LON/00AN/LBC/2017/0004]

10. In the meantime the Respondent has at various times dipped into this kitty to meet the cost of what she sees as the Applicant's share of service charge costs, sometimes with the Applicant's consent. As the Respondent already held the money she issued no further demands for payment after 2012 but simply sent the Applicant emails at various times stating the amount(s) she had deducted.

11. The relevant lessee's covenant in the lease is at 2(B) "To pay the Interim Charge and the Service Charge (as respectively defined in paragraphs 1(B) and 1(C) of the Fifth Schedule at the times and in the manner provided in the Fifth Schedule both such charges to be recoverable in default as rent in arrear.".

12. The Fifth Schedule provides in its sub-paragraphs:-

"

3 If the Interim Charge paid by the Lessee in respect of any Accounting Period exceeds the Service Charge for that period the surplus of the Interim Charge so paid over and above the Service Charge shall be carried forward by the Lessor and credited to the account of the Lessee in computing the Service Charge in succeeding Accounting Periods as hereinafter provided.

5 As soon as practicable after the expiration of each Accounting Period there shall be served upon the Lessee by the Lessor a certificate containing the following information:

(A) the amount of the Total Expenditure for the Accounting Period;

(B) the amount of the Interim Charge paid by the Lessee in respect of the Accounting Period together with any surplus carried forward from the previous Accounting Period; and

(C) the amount of the Service Charge in respect of that Accounting Period and of any excess or deficiency of the Service Charge over the Interim Charge."

13. We were not told when the Accounting Period begins but no issue is taken by the Applicant on this or indeed any billing issues but the

Respondent acknowledged she does not provide the certificate require by paragraph 5. The Schedule does however provide for sums paid as Interim Charges in excess of the Service Charge are to be retained by the lessor but credited to the lessee against future Accounting Periods.

The Issues

14. On 1 March 2017 the Respondent sent an email to the applicant detailing the sums of money taken from the amount standing as credit to the Applicant's account covering the period December 2013 to September 2016 and amounting to £12,255.95.

15. The Applicant disputes four of these sums:

Floor repair	£1,650	03.12.15
Engineer roof report	£250	29.09.14
Roof repair	£6,792	January 16
Repointing	£1,800	December 13

and these are the issues in respect of which we are to determine the payability and reasonableness of service charges.

The Hearing

16. The Applicant's case in respect of the floor repair is that she should not have to contribute to the cost of these works as they were needed to make good the damage caused by the Respondent's building works. She called evidence from Mr Andrew Dewhurst BSc MRICS, a Charted Building Surveyor and partner in a firm of Chartered Surveyors named Congreve Horner. He has over 35 years' experience in defect identification and the specification of remedial repairs. He spoke to two reports dated 28 April 2017 which contained a statement of truth and the declarations required of a Chartered Surveyor acting as an expert witness in court proceedings. He had first inspected the property on 18 August 2011 in relation to the works required to repair the property (see 6 and 7 above) and on numerous occasions, as the Applicant's surveyor under the 2013 agreement, to view progress of the works and damage caused. He described the normal process of

supporting masonry when part of the wall beneath is removed but he did not believe this was done and as a consequence settlement had occurred to the floor of the first floor flat as a direct result of the works to create the basement and ground floor extension. He accepted that joists in the rear section of the kitchen which contained the hearth had shown signs of failure before the works but suggested that new joists could readily have been trimmed round the hearth if it were supported from below and it would not have required removal. He also expressed it as his opinion that whilst the method used by the Respondent's contractors to repair the floor subsequently could be acceptable in this instance it was poorly executed resulting in excessive flexing of the floor and the squeaks the Respondent complained of. The floor covering should be lifted and the work properly done.

17. The Respondent claims that the joists in the rear section of the floor containing the hearth had failed before any works commenced. This was revealed when her kitchen ceiling was removed and the original rear lean-to was demolished. The hearth was unsupported and dangerous. The Applicant had had a report from a Matthew Smith of BCS Consulting who inspected on 17 December 2013, whilst structural alterations were ongoing and reported significant sagging to this section. On 30 January 2014 a Norman Maddocks of Nash & Co Solicitors LLP, then acting on behalf of the Applicant, offered to meet half the cost of remedial works, then estimated at £1,900, which would have included hearth removal. The opening in the walls had been properly supported using "strong boys" and no further damage had been caused to the floor.

18. Mr Dewhurst gave it as his opinion that "strong boys" were OK to replace say a lintel but not to support the size of opening created here. Clearly movement caused by the works resulted in the floor damage. Without those works the section of floor including the hearth could have been re-trimmed with new joists leaving the hearth in place.

19. The Respondent included in her bundle the S20 consultation documents and that aspect of the Applicant's claim was not pursued.

20. The second item the Applicant took issue with was the £250 charged to her for a report commissioned by the Respondent from Green Structural Engineering Co dated 6 June 2014 and signed by a Michael Egan. She says this was to assess damage caused by the works and to recommend temporary propping to make the roof safe. It was not a service charge item and the temporary works were not carried out.

21. The Respondent in reply said the report actually cost £648 but as no S20 consultation took place she was limited to recovery of £250. She had the report done as the Applicant was questioning the soundness of the roof. She felt justified in charging this to the service charge.

22. Item 3 of the challenge relates to the roof itself. In mid-2015 the Respondent entered into a S20 consultation in respect of proposed roof works which entailed works to the main roof as well as rebuilding the rear extension roof. The Applicant agreed to the main roof works being carried out as well and does not dispute them being service charge costs and not a result of damage caused by the extension works. She claims however that the work to the rear extension was necessary to repair damage caused by the extension works and that she should not have to pay for this. The tender accepted from the contractor who did the work was for £14,760 of which £7,080 was said to be for the rear extension only.

23. Mr Dewhurst again gave evidence, based on his written reports and again gave it as his expert opinion that the rear roof works were required because of damage caused by the basement excavations and the insufficiently supported opening up of the rear extension wall at ground level. He acknowledged that there was evidence of historic movement to the rear part of the property and that this would have affected the roof to some extent but said the major damage was of recent origin. This was evidenced by the fact that the gap visible in the

roof structure had not given rise to any dampness which it would have done had it been there the previous winter and the brick corbels supporting the timber wall plates had clean cracks in them which would have rapidly been discoloured by dust and debris if they had cracked any time ago.

24. The Respondent relied on the Green Structural Engineering report which suggested that timber rafters had sagged because purlins were insufficiently supported by props installed as part of a historic repair.

25. The final item disputed was repointing work. The Applicant says the claim was unsupported by any S20 consultation documents or invoices. She had paid for some repointing which she had agreed should be done but had no idea what this item related to. This was apparently done in December 2013 but the only repointing referred to in an email from the Respondent in February 2014 was the £750 which she had agreed to.

26. The Respondent whilst claiming the repointing was done could not provide any evidence of S20 consultation invoices or describe where the work had taken place, other than to the front and rear of the building.

Decisions

27. The only expert evidence before us was that of Mr Dewhurst who came across as an honest, experienced and competent Chartered Building Surveyor. Whilst the Respondent referred to other reports by experts to support her arguments they did not appear before us to speak to and be questioned on those reports.

28. With regard to the floor works however we take the view that the rear section of the kitchen floor containing the hearth would have needed repair whether or not the extension works took place and as part of those repairs the hearth would have been removed. The rest of the floor works were however in our view a repair of the damage caused by the Respondent's extension works. Mr Dewhurst's evidence was that the basement excavation works and the removal of the lower part of the

wall at the rear without adequate support had caused widespread cracking damage in the flat and had distorted windows. We accept his view that it also caused the settlement to the kitchen floor. We also accept his opinion that the remedial works were poorly executed and need redoing. The total cost was £3,500 of which some £1,900 is attributable to the hearth section. The applicant's liability for this item is thus £950.

29. Mr Dewhurst, in his report, says that he advised the Respondent that he thought the roof dangerous and in need of remedial action following his inspection in June 2014. The report the Respondent seeks to charge for is dated 6 June 2014 though it is not clear which came first. If the report was a consequence of Mr Dewhurst's warning it was a reasonable response from the Respondent as landlord to take advice despite no actual works resulting, indeed eventually being overtaken by the rebuild of the rear roof. We accordingly allow the £250 sought as a service charge item.

30. We accept Mr Dewhurst's evidence in respect of the roof and the Applicant should not be required to contribute through the service charge to the cost of the works to the rear roof, these clearly being required to repair damage caused by the Respondent's extension works. Her service charge liability in respect of roof works is thus limited to 50% of £14,760 - £7,080 or which amounts to £3,840.

31. The Respondent, as landlord, has been unable to justify the £1,800 claimed from the Applicant for repointing work in December 2013. We accordingly disallow this item as being charged to the Applicant's service charge account in its entirety.

32. The Applicant had also sought repayment of the remaining balance of the £22,480 she had paid the Respondent in September 2012 as an interim service charge payment. The tribunal has no powers to make such an order and in any event the lease allows the lessor to hold surplus sums paid to the account of the lessee. The March 2013

agreement does provide for repayment of the balance but only upon the completion of that agreement.

The Section 168(4) Application

33. In this matter Ms Trimnel-Ritchard is the Applicant, Ms Tuffley the Respondent. The application was made two days before a differently constituted tribunal heard her previous S168(4) application. She told us it related to different breaches of the lease and we did not, at the time, have a copy of the decision though we have now seen it.

34. In fact the Applicant alleges further breaches of two of the covenants already considered and determined by the previous Tribunal. Given the timing of the application this could amount to an abuse of the tribunal process. The rule, as expressed in Henderson v Henderson (1843) 3 Hare 100 is that a party to litigation puts all of their cards on the table in one go. However the circumstances at the hearing were such that we were unable to put this to the parties for comment or to investigate why the allegations now made were not included in those proceedings. Giving the benefit of the doubt to the Applicant that she was unaware at the time of these additional allegations we will determine the issues. However it should be said that the manner in which she had made these applications could be construed as harassing the Respondent.

35. The Applicant was also allowed to bring a further allegation into the proceedings after she had emailed the tribunal on 2 May 2017 claiming a further denial of access to do works. This again was before the previous tribunal's decision was issued.

36. This final allegation relates to the squeaky kitchen floor in the respondent's flat. In its decision dated 21 May 2017 the previous tribunal recorded the then alleged breach at paragraph 6(c)

> "failing to comply with the repairing obligation in breach of clause 2(J) her lease in relation to a water leak to the bedroom in the

Applicant's flat and squeaking flooring in the kitchen area of the property by either refusing to give access and/or failing to carry out the required remedial work for the leak.

It was agreed that this issue regarding the leak should be stayed for 6 months pending further investigation as to the cause of the leak and if not restored it would be automatically struck out. However, in subsequent correspondence received from the Applicant this issue was restored and is dealt with below

The Applicant agreed to withdraw the allegation in relation to the squeaking flooring. However, in correspondence received subsequently by the Tribunal, the Applicant sought to resile from this agreement. It is not open to her to now do so and this allegation remains withdrawn."

It is not open to the Applicant to now seek to raise the same issue before us; it has been determined.

37. The Applicant also repeated her allegations in respect of the water leak to the bedroom. The previous tribunal determined this at paragraphs 16–21 of its decision and decided there had been a breach of clause 2(J) of the lease and no further determination is required from us. In any event, as the previous tribunal records access was subsequently given and there was no continuing breach in this regard at the date of this hearing.

38. The two further breaches alleged relate to Clause 2(Q) of the lease which is the lessee's covenant "Not during the said term:

(i) Without the consent in writing of the Lessor such consent not to be unreasonably withheld to alter cut or maim any of the walls ... of the Maisonettes".

39. Mr Dewhurst again gave expert evidence for the Respondent though only after the Applicant had queried his right to do so. She accepted he had been given leave by the tribunal to give expert evidence in the S27A application but the directions for this application made no mention of expert witnesses. Those directions were made in the knowledge the cases were to be heard together and should be read in conjunction with the original ones so in our view Mr Dewhurst could give expert evidence on both applications.

40. The allegation is that the hole in the wall where the Respondent's soil waste pipe passes through to connect to the external stack/vent pipe has been enlarged by the Respondent's plumber. That the damage was so caused was initially accepted by the Respondent who offered to put it right or pay to have it done but does not now accept any liability.

41. Apparently the WC had to be moved and then refitted as a consequence of the extension works. This was originally done by the Applicant's contractor but the Respondent's plumber did further work to remedy claimed defects.

42. The external stack/vent pipe has been enclosed where it passes through the ground floor extension and only limited access to view the area was given to Mr Dewhurst and the Applicant's surveyor by removing small sections of plasterboard when they inspected to investigate the water leak. Photographs taken at the time and prior to the works were in evidence.

43. The parties take a very different view of the cause of debris visible by the connecting point on the inner face of the wall. We will not record the conflicting evidence we heard because all we can say is the Applicant failed to provide convincing and conclusive evidence of the kind we would expect to see when something as serious as a breach of covenant is alleged. There has been no breach of clause 2(Q)(i) in this regard.

44. The second allegation in respect of this clause relates to the hole in the wall made to take the balanced flue of the repositioned boiler in the kitchen of the first floor flat. The Respondent said that the Applicant knew she was rearranging and refitting the kitchen after the extension works had taken place (the parties are not agreed as to whether these have been completed) and the boiler had been above the stairs giving access to the garden, now removed. She claimed there was an implied consent as part of the 2013 agreement. She accepted however that she had not sought or received written consent to make the opening for the boiler flue.

45. The wording of the clause is clear and without the lessor's written consent the Respondent has breached this covenant in her lease.

Name: P M J CASEY **Date:** 14 July 2017

First-tier Tribunal, Property Chamber
Residential Property

GUIDANCE ON APPEAL

1) An appeal to the Upper Tribunal against a decision of a First-tier Tribunal (Property Chamber) can be pursued only if **permission to appeal** has been given. Permission must initially be sought from the First-tier Tribunal. If you are refused permission to appeal by the First-tier Tribunal then you may go on to ask for permission from the Upper Tribunal (Lands Chamber).

2) An application to the First-Tier Tribunal for permission to appeal must be made **so that it is received by the Tribunal within 28 days after the date on which the Tribunal sends its reasons for the decision.**

3) If made after the 28 days, the application for permission may include a request for an extension of time with the reason why it was not made within time. Unless the application is made in time or within granted extended time, the tribunal must reject the application and refuse permission.

4) You must apply for the permission **in writing**, and you must:
   - identify the case by giving the address of the property concerned and the Tribunal's reference number;
   - give the name and address of the applicant and any representative;
   - give the name and address of every respondent and any representative
   - identify the decision or the part of the decision that you want to appeal;
   - state the grounds of appeal and state the result that you are seeking;
   - sign and date the application
   - send a copy of the application to the other party/parties and in the application record that this has been done

The tribunal may give permission on limited grounds.

5) When the tribunal receives the application for permission, the tribunal will first consider whether to review the decision. In doing so, it will take into account the overriding objective of dealing with cases fairly and justly; but it cannot review the decision unless it is satisfied that a ground of appeal is likely to be successful.

6) On a review the tribunal can
   - correct accidental errors in the decision or in a record of the decision;
   - amend the reasons given for the decision;
   - set aside and re-decide the decision or refer the matter to the Upper Tribunal;
   - decide to take no action in relation to the decision.

If it decides not to review the decision or, upon review, to take no action, the tribunal will then decide whether to give permission to appeal.

7) The Tribunal will give the parties written notification of its decision. **If permission to appeal to the Upper Tribunal (Lands Chamber) is granted**, the applicant's notice of intention to appeal must be sent to the registrar of the Upper Tribunal (Lands Chamber) so that it is received by the registrar within **28 days** of the date on which notice of the grant of permission was sent to the parties.

8) **If the application to the Property Chamber for permission to appeal is refused**, an application for permission to appeal may be made to the Upper Tribunal. An application to the Upper Tribunal (Lands Chamber) for permission must be made within **14 days** of the date on which you were sent the refusal of permission by the First-tier Tribunal.

9) The tribunal can **suspend the effect of its own decision**. If you want to apply for a stay of the implementation of the whole or part of a decision pending the outcome of an appeal, you must make the application for the stay at the same time as applying for permission to appeal and must include reasons for the stay. You must give notice of the application to stay to the other parties.

These notes are for guidance only. Full details of the relevant procedural provisions are mainly in:

- the Tribunals, Courts and Enforcement Act 2007;
- the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013;
- The Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010.

You can get these from the Property Chamber or Lands Chamber web pages or from the Government's official website for legislation or you can buy them from HMSO.

The Upper Tribunal (Lands Chamber) may be contacted at:

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The Upper Tribunal (Lands Camber) form (T601 or T602), Explanatory leaflet and information regarding fees can be found on www.justice.gov.uk/trbunals/lands.