



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/00AP/LBC/2017/0078**

Property : **Ground Floor Maisonette, 124
Hermitage Road, London N4 1NL**

Applicant : **Mr Trevor Phillip Murray**

Representative : **In person**

Respondent : **Mr Pankaj Patel**

Representative : **Mr Charnley of Cavendish Legal
Group**

Also in attendance : **Mr Morgan (friend of the
Applicant)**

Type of Application : **Application for a determination
UNDER Section 168 (4) of THE
COMMONHOLD AND LEASEHOLD
REFORM ACT 2002
in respect of whether the
Respondent has breached a
covenant in the lease**

Tribunal : **Judge Daley
Mr P Roberts DipArch RIBA**

Date of Hearing : **16 October 2017 at 10 Alfred Place,
London WC1E 7LR**

Date of Decision : **27 November 2017**

DECISION

Decisions of the Tribunal

(1) The tribunal makes the determinations as set out below.

The application

- a. On 15 August 2017 the Applicant made an Application for an order that a breach of covenant or condition in the lease had occurred pursuant to Section 168(4) of the Commonhold and Leasehold Reform Act 2002.
- b. The background to this matter was set out in the grounds of the Application which alleges that the Respondent had breached clause 2 (v) (ix) and (xxi) of the lease.
- c. The Respondent Mr Pankaj Patel did not accept that a breach of covenant had taken place.

(2) Directions were given on 25 August 2017.

(3) The directions stated at paragraph (2), that -: *"...The tribunal will reach its decision on the basis of the evidence produced to it. The burden of proof rests with the applicant. The Tribunal will need to be satisfied: (a) that the lease includes the covenants relied on by the applicant; and (b) that, if proved, the alleged facts constitute a breach of those covenants."*

(4) The Directions also provided that the Applicant should send the Tribunal and the Respondent copies of the hearing bundle by 18 September 2017, and thereafter that the matter be set down for hearing on 16 October 2017.

The Background

(5) The subject Premises, is a maisonette situated in a two storey, terraced property, comprising the maisonette and a two bedroom flat on the first floor. The Applicant who is also the leaseholder of the first floor flat and the freeholder of the building resides in the first floor flat. The Respondent purchased the premises on 28 June 2006.

(6) The Respondents hold a long lease of the ground floor maisonette, which requires the landlord to provide services and the Respondent leaseholder to observe specific covenants under the terms of the lease. The specific provisions of the lease will be referred to below, where appropriate. Prior to the hearing, the Tribunal had carried out an inspection of the premises. The Premises are a maisonette situated on the ground floor of a two storey premises comprising the maisonette and a first floor flat. In a converted Victorian terrace.

(7) The Tribunal inspected the premises on the morning of the hearing. The inspection was attended by Mr Murray and Mr Charnley of Cavendish Legal Group. On inspection the Tribunal noted:

External decorations to the upper floor were in a neglected state, window cills were eroded to the rear.

To the front elevation there was loose wiring hanging down from roof level. The front area was paved, which was sunken and uneven – gas meter boxes were fixed to the front bay, one of which had its door missing. Exposed and unsightly pipework (gas supply) and earth wiring ran at low level to the side of the bay. There was damage to the front step leading edge and to the coping on the side boundary wall.

Internally the GF flat had been extensively refurbished to a good standard with uPVC windows, a new reconfigured bathroom/WC and remodelling of the rear living/kitchen area, including installation of a new boiler and alterations to fenestration.

Externally to the rear the following items were noted: bricking up of old window openings, new windows to the bay with large opening lights encroaching into the side passage area, the new boiler flue position and alterations to waste pipework from the bathroom, these outlets were poorly finished.

The Hearing

(8) At the hearing the Applicant appeared in person, the respondent was not present and was represented by Mr Charnley of Cavendish Legal Group. Also in attendance was Mr Morgan, who attended in support of the Applicant.

(9) At the hearing the following additional documents were provided:-

(10) A copy of the applicant's reply

- (11) The Tribunal decided to accept the reply in accordance with the directions of the Tribunal. However, it decided that the Applicant could address the points of his reply as part of his evidence and submissions.
- (12) The Lease which is dated 14 August 1989 contained the following covenants-: clause 2 (v) of the lease, states-: “... (v) *From time to time and at all times during the said term well and substantially to repair uphold support maintain drain amend and keep the demised premises...*” (ix) *At the Lessees own expense to obtain all necessary permissions and approvals under the Town and Country Planning Act 1947 or otherwise for any additions or alterations to the demised premises that may be made from time to time during the said term and to produce to the Lessor or his Surveyor all such permissions and approval (xxi) Not to make any alterations to the demised premises without the approval in writing of the Lessor to the plans and specifications thereof and to make all such alterations in accordance with such plans and specifications...*”
- (13) The Applicant alleged that the respondent was in breach of the lease.
- (14) The Respondent did not attend the hearing as he had a prior commitment abroad. He was however represented by his solicitor, Mr Charnley.
- (15) The Tribunal decided that it would consider each of the alleged breaches as set out in point 5, of the application. It would hear from the Applicant and then give the Respondent’s representative the opportunity to respond. The Tribunal would then make its decision.
- (16) Mr Murray referred to the original plan of the building. His first alleged breach was that the toilet window was blocked (bricked up) and the Kitchen Window had also been blocked up. Mr Murray provided the Tribunal with photographs and also referred to the inspection. Mr Murray also referred to the re-routing of the waste pipe, (complaint no 3), and (complaint no 4). He stated that as the bathroom had been changed and a washing machine had been re located to the bathroom, as a result a new waste water pipe had been fitted.
- (17) At points 5 (complaint 5), he referred to the fact that the new windows had been fitted with a larger opening section and at point 6, that the bathroom window size had been reduced from the size in the plan, and that in its place, part of the original window frame had been blocked up and that the brick work was of poor quality and unsightly. Of the larger opening section of the window, he complained that this allowed noise ingression and reduced the amount of privacy that he enjoyed, in addition to causing an obstruction.

- (18) In replying to the allegations, Mr Charnley referred to his client's witness statement.
- (19) At paragraph 9-10 Mr Pankaj Patel stated as follows-: "*... It is obvious from the pictures contained in the Applicant's bundle... that he had constant access to the flat throughout the works. There was no murmur of discontent until I received an email dated 1 November 2015 and this was not a serious complaint rather a suggestion as to how a waste pipe might be better fitted... (10) (T)he works were completed in early December 2015. Everything had been carried out while the Applicant saw the works and visited the premises on a day-to-day basis. It was not until 16 December 2015 that any formal complaint was received...*"
- (20) At paragraph 15 of his statement he stated-: "*... I am now told that some, but by no means all, of the works that I carried out would have required the Landlord's written consent under the terms of the lease. I foolishly relied on the Applicant's oral assurances as to my ability to carry out the works as I was doing them...*" In paragraph 30, of his statement, he admitted that the toilet window was blocked (bricked up) and the kitchen window had also been blocked up. He further admitted that he had had the waste pipe re-routed.
- (21) Mr Charnley stated that Mr Murray had given implied consent as he had not objected when he visited the premises during the renovations and that Mr Patel had consulted with Mr Murray and that his client's only failure was to obtain written rather than oral consent. Accordingly his client admitted allegations, 1, 2, 5 and 6 of the alleged breaches.
- (22) However in respect of allegations 3 and 4 concerning the pipes, these allegations were not admitted, he referred to the lease at clause 1 (ii) which stated-: "*The right (in common with the Lessor and his successors in title the owners lessees or occupiers of the ground floor maisonette and the adjoining contiguous flats and all other persons having or to have the like right) the free passage and running of water and soil gas and electricity from and to the demised premises through all sewers drains watercourses water pipes electric wires and cables which now are or may hereafter serve the demise premise...*"
- (23) Mr Charnley stated that the case of *Wheeldon -v- Burrows (1879)* gave them a right of access by necessity. He stated that the repositioning of the pipe was necessary. He referred to paragraph 23 of the Respondent's witness statement in which he stated-: "*...it was the replacement for a pipe which exited the wall from a slightly different location prior to the refurbishment. We could not use that exit for the pipe as it would not have worked in that location...*"
- (24) Mr Charnley stated that it was apparent that Mr Murray must have had access to the premises, when the work was being undertaken, as he had

taken a considerable number of photographs which included photographs of the interior of the premises.

- (25) Mr Murray did not accept this. He stated that he had been in the premises on two occasions only. That these inspections had been to do with obtaining a valuation in respect of a potential sale of the property from the leaseholder Mr Patel to Mr Murray, which had been the subject of negotiations between the parties, when the work was being undertaken. The negotiations had subsequently fallen through.
- (26) Mr Murray also stated that he had not given permission for the work to be undertaken and denied that there was any implied permission as a result of any conversations between himself and Mr Patel.
- (27) In respect of point 7 (complaint 7) of his alleged breaches, this related to the positioning of the extractor fan. He did not accept that there had previously been an extractor fan in that position and referred to the photograph which showed that the fan had been fitted in the blocked up window space.
- (28) Mr Murray then dealt with the alterations inside the premises in particular he referred to the removal of the wall between the separate toilet and bathroom so as to create a larger inclusive bathroom (complaint 8). He stated that as the plan showed two separate rooms this had altered the demise in breach of the terms of the lease.
- (29) In response to questions from the Tribunal, Mr Murray indicated that he would not have objected had he been asked for permission. He also referred to the reconfiguration of the rear rooms, by the removal of a wall so as to create a larger space (complaint 9). He repeated that had he been asked for permission as required under the lease, he would not have withheld consent.
- (30) At point 10 (complaint 10) he referred to the addition of an earth cable (to the front bay), whilst he accepted that this was possibly an easement of necessity, he stated that it could have gone straight into the gas box and that as such there was no reason for the cable to be at its current location and exposed.
- (31) Mr Charnley in reply, stated that there had been an extractor which had served the bathroom, accordingly there was a pre-existing fan at some place in the wall, it was possible that it was in the bathroom window and as such its current position was not in breach.
- (32) In his submission, the removal of the walls in the bathroom and kitchen did not amount to structural alterations, as both walls were stud partition walls and as such they had been removed to make the rooms larger. Mr Charnley also referred the Tribunal to the plan. He noted that the plan did

not show the stairs of the first floor flat and given this the plan could not be considered to be reliable.

(33) In respect of the earth cable (yellow and green) there had been one before, although it was the Respondent's case that the work did not amount to a breach, if it did, it could be remedied.

(34) He stated that Mr Patel's lease was a fully repairing and insuring lease. He stated that the addition of the "earthen works" had been carried out because they were works of necessity, and as such no permission was needed.

(35) In reply, the Applicant stated that he considered that the extractor fan had in fact been repositioned however he would not have objected if he had been consulted. He accepted that the earth cable was necessary. He stated that there had been no cables visible before and that the original cable had been removed and then replaced with the yellow and green one which was unsightly.

(36) Mr Murray referred to the relocation of the boiler (complaint 11) he stated that it had been moved to the other side of the bay window without his permission or consent. He stated that he had no information as to whether the work to the boiler complied with Gas Safety Regulations. He also noted that the respondent had used black and white pipes and that the waste pipes were unsightly.

(37) Mr Charnley stated that the boiler had been moved once the configuration of the rooms had changed and as a result it had been necessary to remove the boiler.

(38) In point 12 of his application, (complaint 12) Mr Murray referred to the fact that the dividing walls between the rooms he referred to as the kitchen and the morning room had been removed.

(39) Mr Charnley reminded the panel of his submissions, in relation to the bathroom wall, that is that Respondent had not interfered with the main load bearing walls and as such any removal of the walls did not amount to a substantial breach of the lease. He referred to clause 3 of the lease in support of his submission.

(40) He also noted that the lease plan did not show the staircase and as such it was inaccurate and could, and should not be relied upon by the Tribunal.

(41) Point 13 (complaint 13) of Mr Murray's alleged breaches, related to the addition of a second telephone cable. Mr Charnley did not deny this

allegation. He stated that this had been installed by the telephone company and as such could easily be repositioned or moved altogether.

(42) Mr Murray referred to Gas pipes (complaint 14) to the front area. He stated the pipes and cabling were new and in support of this; he referred the Tribunal to the photograph which showed the re-routed pipes. He stated that permission had not been sought or given for this work and that it was unsightly also damage had been caused to the adjacent paved area.

(43) Mr Murray also referred to the changing of the water pipes which he stated had interfered with his supply (complaint 15). He stated that he had needed to reconnect his supply so that the kitchen and bathroom now had one supply, rather than two separate supplies. He did this so that he could continue to receive water.

(44) This work had also caused damage to the paved area, which had not been reinstated and for a period of time a hole in the patio had been covered by an old door. Mr Murray stated that he did not consider the work to be covered by work of necessity neither had permission been sought or given for this work to be undertaken.

(45) Mr Charnley stated that these works were covered by an easement of necessity, and that as a result, permission was not needed. He referred to clause 1 (ii). This was dealt with in respondent's witness statement as paragraph 30.13. *In which he stated:- "At clause 19(ii) a right to "the free passage and running water and soil, gas and electricity from and to the demised premises to all sewers, drains, water courses, water pipes, cisterns, gutters, gas pipes electric wires and cables which now are or may hereafter serve the demised premises. I do not believe therefore that this constitutes a breach and the same would go to the alleged breach 3, 4 and 10 above..."* He further relied upon the Applicant having provided access for this work, in support of the Respondent's case that permission had been granted.

(46) The Applicant referred to the staircase and the plastering on the underside (complaint 16), in his view the work had not been carried out properly and the current arrangement could constitute a lack of fire protection as in his view the joints were not sufficiently sealed.

(47) In the Respondent's statement of case, Mr Pankaj Patel stated that -:
"The fire insulation between the two flats is no better and no worse than it was before the refurbishment works were undertaken. This was not the conversion of a house into a flat and therefore did not need planning permission or building control... The Applicant is not a builder nor is he a surveyor, nor any other kind of expert..."

(48) Mr Murray in his final alleged breach (complaint 17) referred to the removal of the existing water supply pipe within the ground floor demise to

the first floor demise. Mr Murray stated that prior to work being carried out in the Respondent's premises, a pipe led from the Respondent's property to the Applicants. This was disconnected and as a result the Applicant lost the water supply to his kitchen. As a result of this pipe being removed, the Applicant had to connect pipes from the bathroom to the kitchen in a make shift manner. This reconnection was carried out by the Respondent's builder.

(49) Mr Murray stated that he had not been informed about this work in advance, and had had no option but to submit to the make shift work otherwise he would be without water.

(50) In his statement Mr Patel stated that this work was carried out with the knowledge and consent of the Applicant, and that the splitting of the mains water into two separate supplies was in fact "at the insistence of the Applicant." In his statement he stated that "Workmen were allowed access to his flat to complete the new supply".

(51) In his closing submission, Mr Charnley stated that Mr Murray gave tacit approval, which amounted to permission. He also relied upon the fact that work undertaken was considered to be works of necessity and that much of the work complained of was carried out in the demise. He referred to the lease which defined the demise as-: "anything below the lintel of the first floor". This included all pipes which were part of the demise.

(52) Mr Charnley referred to the two lease plans. He stated that there was no current lease plan for his client's property, and the lease plan which existed, showed a shaded area, given this, it was possible that the front garden was part of his client's demise. Accordingly the re-routing of the pipework may not be a breach. He stated that his client admitted the removal of the walls however they were stud partition walls and he stated that his client was given tacit approval for the work as Mr Murray had prior knowledge of the work.

(53) Mr Murray did not accept this, he stated the work had not been necessary and he disputed having given permission for the work.

The decision of the Tribunal on the breach of clause 2(4) of the lease

(54) The Tribunal heard from the parties and considered the documentary evidence. Clause 2 (xxi) of the lease which states:- "Not to make any alterations to the demised premises without the approval in writing of the Lessor to the plans and specifications thereof and to make all such alterations in accordance with such plans and specifications..." This was the sole part of the clause within the lease relied upon by the Applicant, as no argument was advanced that the work carried out was in contravention of clause(ix) of the lease which related to the need to obtain planning permission.

(55) In reply, the Respondent sought to interpret clause 3 of the lease so as to provide the lessee Mr Patel with the right to make alterations as he considered that the work was within the demise. Clause 3 stated as follows-:*For the removal of doubt it is hereby declared and this Lease shall always be construed so that the foundation and all other the parts from below the ceiling joists upon which the floors of the upper maisonette rest are the property of the Lessee and shall be maintained and repaired by the Lessee and that the roof and all other the parts from and above the ceiling joists aforesaid are the property of the Lessee of the upper maisonette and shall be maintained and repaired by the Lessee of the upper maisonette...*"

(56) Mr Charnley, also sought to rely upon the necessity of various items of work, and further and in the alternative sought to raise the issue of whether the garden to the front area was demised to the Respondent.

(57) Mr Charnley, on behalf of the respondent further relied upon implied consent. This was denied by Mr Murray.

(58) The Tribunal determined that save where the work could be said to have been necessary, clause 3 did not provide a defence for any failure on the part of the Respondent to obtain consent as set out in the clause referred to above. The Tribunal accepts Mr Murray's evidence, that permission had not been granted either in writing, or by implication, save where set out below.

The Tribunal in reaching its decision also considered the burden of proof, that is, that it was for the Applicant to satisfy the Tribunal on a balance of probabilities that the works/alteration amount to a breach of the lease; where the Tribunal were not satisfied as to the required standard then the Tribunal found that no breach had occurred.

The Tribunal finds as follows:-

- The blocked up of the toilet window and the kitchen window
- Re-running /routing of the bathroom waste pipe

- fitting of new windows with larger opening sections and reducing the bathroom window size and the installation of a bathroom extractor fan
- The removal of the internal wall to create a larger bathroom/wet room and the removal of wall within the premises.

(59) In relation to these works, the Tribunal finds that consent was required under the terms of the lease and that as no written permission was sought or granted, then the failure to obtain permission is a breach of clause 2 of the lease.

(60) The Tribunal also finds that the failure to obtain permission for the following work amounts to a breach of the lease-: The repositioning of the boiler.

(61) In relation to the removal of the dividing wall, between the kitchen and morning room, on the basis of the plan, and the fact that it did not accurately show the position of the stairs, the Tribunal cannot be satisfied on a balance of probabilities as to whether or not there was a dividing wall as relied upon by the Applicant accordingly the Tribunal finds no breach. The Tribunal was also not satisfied on the evidence before it that the addition of the second telephone cable to the front elevation had been carried out by the Respondent and accordingly finds no breach.

(62) In relation to the addition of yellow and green earth cables to the front of the property, and the re- routing of the gas supply, the Applicant in his evidence appeared to accept that these items of work were necessary and as such was only concerned about the Respondent's failure to gain consent. The Respondent relied upon clause 1(ii). It is unclear whether this front area lay within the GF demise. As the Applicant accepted that this work was necessary the Tribunal finds no breach of the terms of the lease.

(63) In relation to the works of replacing the water supply as alleged in point 15, and point 17, the Tribunal cannot be satisfied to the required standard of proof on the evidence before it that a breach had occurred.

(64) The Tribunal are also not satisfied that the allegations relating to the insufficient fire separation amounts to a breach as there was no expert evidence before the Tribunal, neither was there evidence as to what had been in place prior to the work being undertaken.

(65) Accordingly the Tribunal finds that the Respondent is in breach of the lease as set out above.

Appendix of relevant legislation

A summary of the legislation is set out below

The Law

Appendix

Section 168 (2) of Commonhold and Leasehold Reform Act 2002

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

(5) But a landlord may not make an application under (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.

ANNEX - RIGHTS OF APPEAL

1. 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.
2. 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.
3. 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.

4. 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.