FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AX/LBC/2016/0062**
Property	:	**Flat 3, 111 Tolworth Rise North, Tolworth, Surrey, KT5 9EP**
Applicant	:	**Ms V J Holiday**
Representative	:	**Ms Cantlie**
Respondent	:	**Ms N Berglund**
Representative	:	**Ms Robinson of Counsel**
Type of Application	:	**Determination of an alleged breach of covenant**
Tribunal Members	:	**Judge I Mohabir** **Mr M C Taylor FRICS** **Mr A Ring**
Date and venue of Hearing	:	**4 November 2016** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**3 January 2017**

DECISION

Introduction

1. This is an application made by the Applicant under section 168(4) of the Commonhold and Leasehold Reform Act 2002 (as amended) ("the Act") for a determination that the Respondent has breached various covenants and/or conditions in her lease.

2. The Respondent is the leaseholder of the property known as Flat 3, 111 Tolworth Rise North, Tolworth, Surrey, KT6 9EP ("the property") pursuant to a lease dated 16 August 2002 granted by the Applicant to Matthew Slade for a term of 125 years from 24 June 1998 ("the lease").

3. The property is one of 3 self-contained flats in a converted house. The Applicant is the freehold owner of the building and lives in the ground floor flat. The Respondent is the leasehold owner of the property, which is a first floor studio flat. It is located above a garage conversion, which is part of the Applicant's flat.

4. The Respondent purchased the lease of the property on 10 September 2013 at an auction. It is common ground that the flat was in disrepair at the time and the Respondent carried out extensive refurbishment work to the flat that commenced in January 2014. The works were completed in or around April 2014. It is also common ground that the Respondent subsequently sub-let the property.

5. By an application made on 16 September 2016, the Applicant applied to the Tribunal seeking a determination that the Respondent had variously breached one or more of the covenants in the lease.

6. The application raised a number of other issues that fell outside the scope of the Tribunal's jurisdiction in these proceedings. However, in Directions dated 18 August 2016, the issues identified for the Tribunal to determine are:

(a) whether the Respondent disconnected the fire safety systems from the communal hallway and staircase in breach of clauses 3(4), (5) and paragraph 3 of the Fourth Schedule of the lease;

(b) whether the Respondent sub-let the property without the Applicant's written consent in breach of clause 3(7)(b) and paragraphs 1 and 2 of the Fourth Schedule of the lease;

(c) whether the Respondent made structural changes to the bathroom of the property without the Applicant's consent in breach of clauses 3(4) and (5) of the lease;

(d) whether the Respondent caused a nuisance and/or damage to the Applicant in breach of the second paragraph of the Fourth Schedule of the lease.

7. The Tribunal, therefore, limits this decision to the above-mentioned issues, which are dealt with in turn below.

Decision

8. The hearing in this case took place on 4 November 2016. The Applicant was represented by Ms Cantlie, a lay representative. The Respondent was represented by Ms Robinson of Counsel.

Disconnection of Fire Safety Systems

9. Clause 3(4) of the lease provides:

> *"In accordance with the Tenant's covenants in that behalf hereinafter contained to decorate and make good all defects in the repair decoration and condition of the Demised Premises of which notice in writing shall be given by the Lessor to the Tenant within two calendar months next after the giving of such notice".*

10. Clause 3(5) of the lease provides:

Not at any time during the said term to make alterations in or additions to the Demised Premises or any part thereof or to cut maim alter or injure any of the walls or timbers thereof or to alter the landlord's fixtures and fittings therein without first having made a written application...in respect thereof to the Lessor and secondly having received the written consent of the Lessor...".

11. Paragraph 3 of the Fourth Schedule provides:

"Not to permit to be done any act or thing which may render void or voidable any policy of insurance maintained in respect of the Building or may cause an increased premium to be payable in respect thereof...".

12. A fire risk assessment report was obtained by the Applicant on 10 November 2015, as a consequence of a request made by a purchaser of the Respondent's flat. It is not entirely clear, but it seems that the report commented on the fire safety systems in the communal hallway and staircase had been disconnected. The Applicant made a general assertion that this had been done by the Respondent, possibly during the course of the refurbishment works to the property, in breach of the above lease terms.

13. In cross-examination, the Applicant said that she was not alleging that the Respondent had removed the smoke alarms in the communal hallway and staircase. All she was saying was that *"the Respondent was responsible for her flat".*

14. The Tribunal found that there was no evidence at all that the Respondent had disconnected the fire alarm systems in the communal hallway and staircase. Indeed, it accepted her evidence that she or her workmen had never done so. It is clear from clause 5(4)(a)(iii) of the lease that the responsibility to repair and maintain these systems in the communal parts of the building falls on the Applicant. Accordingly, the Tribunal concluded that the Respondent had not breached clauses 3(4), (5) and paragraph 3 of the Fourth Schedule of the lease.

Sub-Letting

15. By clause 3(7) of the lease, the Tenant covenanted with the Lessor as follows:

> *"Not at any time to assign sublet or part with possession of the whole of the Demised Premises or permit the same to be done unless there shall previously have been executed at the expense of the Tenant and delivered to the Lessor for the retention by it a Deed expressed to be made by the Lessor of the first part and the Tenant of the second part and the person or persons to whom it is proposed to assign sublet or part with possession as aforesaid of the third part whereby such person or persons shall have covenanted directly with the Lessor to observe and perform throughout the said terms the covenants on the part of the Tenant...".*

16. Paragraph 1 of the Fourth Schedule of the lease provides:

> *"Not at any time to use or occupy or permit the Demised premises to be used or occupied or occupied except as a private residential flat only...".*

17. Paragraph 2 of the Fourth Schedule of the lease provides:

> *"Not to do or permit or suffer in or upon the Demised Premises or any part thereof any sale by auction or any illegal or immoral act or any thing which may be or become a nuisance or annoyance or cause damage to the Lessor...".*

18. As stated earlier, the Respondent conceded that the property had been sublet and prior to this had not executed the deed required by clause 3(7) of the lease.

19. Dealing firstly with paragraphs 1 and 2 of the Fourth Schedule, the Applicant did not at any stage assert that the property was being used as anything other than a private residential dwelling through the subletting. Therefore, the Tribunal concluded that the Respondent had not breached paragraph 1.

20. As to paragraph 2, the Applicant contended that the property was an HMO (House of Multiple Occupation) and because the subletting was a *"breach of the HOM requirements"* it amounted to a breach of paragraph 2 of the Fourth Schedule although she accepted in cross-

examination that there was no evidence that the property was in fact an HMO.

21. The Tribunal found that there was no evidence that the property was an HMO and/or what breach of the HMO requirements had occurred by reason of the subletting and/or how this may have, as a matter of causation, amounted to a nuisance or annoyance within the meaning of paragraph 2 of the Fourth Schedule. Accordingly, the Tribunal found that the paragraph had not been breached by the Respondent.

22. Turning to the subletting of the property and the Respondent's failure to execute a deed in accordance with clause 3(7), the Tribunal accepted the submission made by the Respondent that the Applicant's consent to sublet the property was not required and to that extent clause 3(7) had not been breached.

23. However, the failure to execute a deed by the Respondent prior to the subletting of the property did amount to a breach *per se* of clause 3(7). The only issue for the Tribunal to consider was whether this was an actionable breach[1].

24. On balance, the Tribunal accepted the evidence of the Respondent that at all material times the Applicant was aware that the property had been sublet through the erection of 'To Let' signs outside the property, the delivery of correspondence to the property addressed to the sub-tenants and their entry and exit to the flat. This evidence was not challenged by the Applicant in cross-examination of the Respondent. Moreover, in cross-examination, the Applicant materially conceded that she knew someone else (other than the Respondent) was living in the property at the relevant time.

25. The Tribunal, therefore, concluded that because the Applicant was aware at the relevant time that the property was being sublet and had

[1] see ***Swanston Grange (Luton) Management Ltd v Langley-Essen*** (LRX/12/2007)

taken no action in relation to the Respondent's failure to execute a deed as required by clause 3(7), through her silence or acquiescence, an estoppel by representation had arisen. In other words, it is now not open to the Applicant to assert or rely on the Respondent's breach of clause 3(7) of the lease by failing to execute a deed.

Structural Changes to Bathroom

26. As part of the refurbishment works to the bathroom in the property, the Respondent installed a wet room in January 2014. Previously there had been a shower tray in the corner under a showerhead. Apparently, no pipes or drains were moved and the shower, toilet, bathroom, sink and radiator remained in the same place. Following completion of the works in or around April 2014, the Applicant inspected the property and expressed her approval of the changes that had been made including the creation of the wet room.

27. The Tribunal accepted the submission made by the Respondent that the creation of the wet room did not fall within the ambit of clause 3(4) of the lease above and she had not, in any event served the requisite notice required by the clause. Accordingly, the Respondent had not breached clause 3(4).

28. As to clause 3(5) above, the Respondent admitted that she had not applied for or had been granted the Applicant's written consent when refurbishing the bathroom and the creation of a wet room. However, the Tribunal accepted the Respondent's submission that an estoppel by representation had occurred by the fact that the Applicant not only inspected the works carried out to the bathroom but expressly approved them. Indeed, in cross-examination, the Applicant said she knew the shower and bath had to be replaced and when she inspected the works it looked like a good job and the Respondent proceeded on this reliance.

29. Therefore, the Tribunal concluded that the Applicant was no longer entitled to rely on the Respondent's breach of clause 3(5) in relation to

the failure to obtain consent to the works. Furthermore, and for the avoidance of doubt, the Tribunal was satisfied that the creation of a wet room did not amount to a structural alteration within the meaning of clause 3(5) because in the Tribunal's judgement this was no more than a cosmetic change to the bathroom and did not, strictly, speaking, require the Applicant's consent. Accordingly, no (further) breach of clause 3(5) had occurred in this regard.

Nuisance and/or Damage

30. The Applicant's allegation of breach of paragraph 2 of the Fourth Schedule above is base don two incidents. These are:

    (a) a leak in or around January 2014; and
    (b) a leak in or around August 2014.

31. The Tribunal accepted the submission made by the Respondent that these leaks, as a matter of construction, fell outside the scope of paragraph 2 of the Fourth Schedule for the following reasons:

    (i) they did not arise from things done, permitted or suffered by the Respondent. They were simply 'one off' incidents that were in fact rectified by her as soon as she became aware of them. The nuisance or damage envisaged by this clause was of a deliberate nature.
    (ii) the leaks do not fall within the legal definition of what amounts to a nuisance[2]. In the Tribunal's judgement, nuisance and damage have to be given their tortious meaning and apply the relevant duty of care when considering if a breach has occurred. To the extent that a duty of care may have arisen, the Tribunal was satisfied that it had not been breached by the Respondent.

32. For the reasons given above, it was not necessary for the Tribunal to go on to consider any arguments about waiver or estoppel. It should be

[2] see Clerk and Lindsell on Torts (21 ed)

noted that, in any event, the damage to the Applicant's premises caused by the leaks had, on her own case, been satisfactorily remedied by the Respondent and no further leaks had occurred at the time of the hearing. It appears, therefore, that had such a breach occurred, it had been promptly remedied by the Respondent.

33. Accordingly, the Tribunal finds that no actionable breaches have been committed by the Respondent as alleged and the application is dismissed.

Judge I Mohabir
3 January 2017