404

HM Courts & Tribunals Service

Residential Property
TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL

Commonhold and Leasehold Reform Act 2002 – Section 168(4)

LON/00AZ/LBC/2011/0078

Property	:	**32 Henryson Road, Brockley** **London SE4 1HJ**	
Applicant	:	**Karen Sandra Evelyne Jackman**	**Landlord**
Represented by	:	**Mrs K S E Jackman**	**In Person**
		Mrs S Richards	**Assisting**
Respondent	:	**Stephen Nathaniel Corion**	
		Cloise Romono Albertha Corion	**Tenant**
Represented by	:	**Mr S N Corion**	**In Person**
Date of Application:		**20 August 2011**	
Date of Hearing	:	**4 November 2011**	
Date of Decision	:	**18 November 2011**	
Tribunal	:	**Mr John Hewitt**	**Chairman**
		Mr Michael Cartwright	**JP, FRICS**

Decision

1. The decision of the Tribunal is that the Applicant has not established that a breach of any of the covenants mentioned in the application has occurred.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Background

2. This application relates to a property at 32 Henryson Road. Evidently the property was originally built as a house and subsequently it has been converted into two self-contained flats, one on the ground floor and one on the second floor.

3. The application concerns the second floor flat. The Respondents (Mr & Mrs Corion) have owned this flat since 1996. They do not now live there and it comprises part of the investment portfolio. The flat has been sublet from time to time. Until about In December 2005 the flat was sub-let to a Mr & Mrs Mancinelli and they lived there with their daughter. They will feature in this Decision later. Their sub-tenancy came to end in November 2009.

4. In December 2005 the Applicant (Mrs Jackman) purchased the freehold interest and moved into the ground floor flat. Mrs Jackman thus became the Corions' landlord.

5. The relationship has evidently not been a happy one and Mrs Jackman has issued several claims against the Corions in the county court.

6. In August 2011 Mrs Jackman issued the present application pursuant to section 168(4) of the Act. Mrs Jackman seeks a determination that breaches of the Corions' lease have occurred. Such a determination is a prerequisite to the service of a notice pursuant to section 146 Law of the Property Act 1925 (s146 notice). One of Mrs Jackman's principal

complaints was that she considers the Corions to be slow in paying their insurance rent being a 50% contribution to the cost of insurance. Prior to the hearing it was clarified to Mrs Jackman that by section 169(7) of the Act, nothing in section 168 of the Act affects the service of a s146 notice in respect of a failure to pay a service charge within the meaning of section 18(1) of the Landlord and Tenant Act 1985. Section 146(11) Law of Property Act 1925 provides that the section does not affect the law relating to re-entry or forfeiture in case of non-payment of rent. The insurance rent is both a rent within the meaning of section 146(11) of the 1925 Act and a service charge within the meaning of section 18(1) of the 1985 Act. In consequence the Tribunal did not have jurisdiction to make any determination on the alleged breach of late payment of the insurance rent.

7. As a result of the above the remaining breaches alleged by Mr Jackman related to:

   7.1 Noise/music nuisance and disturbance;

   7.2 The keeping of two cats;

   7.3 The disrepair of a part of a garden fence;

   7.4 Disrepair causing frequent water leaks; and

   7.5 Conduct causing the cost of insurance to be increased.

   Below we will set out our findings in relation to each alleged breach. First it will be helpful to set out the relevant provisions of the lease.

The Lease

8. The subject lease is dated 10 August 1984. It granted a term of 99 years from 24 June 1984 at a ground rent starting at £30 per annum and rising to £120 per annum payable by equal half yearly payments on 24 June and 25 December in each year. As mentioned above an insurance rent of one half of the amount the landlord may expend on insurance against specified risks is payable on the half yearly day for payment of rent next ensuing after the expenditure of such premium.

9. The lease was varied by a deed dated 5 February 1996 entered into between Elsie Elizabeth Hinks, the then freeholder and the Corions. The term was varied to be 99 years from 5 February 1996. The original clause 5(4) was deleted and a new clause 5(4) substituted, there were consequential amendments and a new lease plan was annexed.

10. So far as material to the matters we have to determine the lease, as varied, provides as follows:

1. *"The property"* is defined as being the freehold property registered with Title Number SGL 152281.

2. By clause 1 there is demised:

"ALL THAT flat (the flat) being the upper floors of the building erected on the property (the building) Together with the stairway leading to the first floor from the hall and stairway (if any) at the rear of the building leading to the first floor from the garden and including one-half part in depth of the structure between the floor of the flat and the ceiling of the flat below it and (subject to clause 6(ii) below) the internal and external walls above the same level and the roof of the building together with its structure (but excluding the roof to the front bay) AND TOGETHER ALSO with the rear garden land of which is shown edged red on the plan Together also with the easement rights and privileges mentioned in the Second Schedule".

3. By clause 2 a covenant on the part of the tenant:

"that the Tenant and the persons deriving title under him will at all times observe the restrictions set forth in the First Schedule below"

FIRST SCHEDULE

Restrictions imposed in respect of the flat

"1. ...

2. Not to do or permit to be done any act or thing which may render void or voidable any policy of insurance affecting the building or may cause an increased premium to be payable;

3. No musical instrument television radio loudspeaker or mechanical or other noise making instrument of any kind

shall be played or used nor shall any singing be practiced in the flat so as to cause annoyance to the owners lessees and occupiers of the lower flat or so as to be audible outside the flat between the hours of 11pm and 7am;

4. – 5. ...

6. No bird dog or other animal which may cause annoyance to any owner lessee or occupiers of the lower flat shall be kept in the flat";

7. ...

4. By clause 3 a series of covenants on the part of the tenant:

"(c) maintain uphold and keep the premises (other than the parts comprised and mentioned in paragraphs (4) and (6) of clause 5 of this Lease) and (subject to clause 6(ii) below all walls sewers drains pipes cables wires and appurtenances belonging to the property in good tenantable repair and condition damage by insured risks excepted"

5. By clause 4 a series of covenants on the part of the tenant:

"(1) so repair maintain uphold and keep the premises (other than the parts comprised and referred to in paragraphs (4) and (6) of clause 5 of this Lease) as to afford all necessary support shelter and protection to the parts of the building other than the flat ..."

6. A service charge regime is set out in clause 4(2) to (3) but we need not spell out the details.

7. By clause 5 a series of covenants on the part of the landlord which by clause 5(1) are subject to the tenant paying the rent reserved and performing and observing the tenant's covenants and the conditions set out in the lease. Clause 5(2) is a covenant to insure the building in the joint names of the landlord and the tenant.

By clause 5(4) a covenant:

"(4) The Lessor will maintain and keep in substantial repair and condition

(i) the foundations of the building

(ii) *the main structure (excluding foundations of the building) and exterior walls (but not the interior surfaces thereof within the flat) of the building excluding the roof of the building with its gutters and rainwater pipes*

(iii) *all such gas and water pipes drains and electric cables and wires in under and upon the building as are enjoyed or used by the Tenant in common with the owners or lessees or occupiers of the lower flat*

(iv) *the entrance hall and the pathway across the front garden leading to the building and to the boundary walls and fences of the building and of the property"*

It is to be noted that the above clause was substituted by the deed of variation but the exact terms of sub-clause (iv) appears in the lease as originally drawn albeit as sub-clause (iii) therein.

8. By clause a proviso for re-entry in broadly standard form for a residential lease.

11. Before leaving the lease it is to be noted that having defined 'the flat', that expression is not much used. Instead there is often used the expression 'the premises'. In applying the canons of construction we find that the expression 'the premises' properly construed means 'the demised premises' which in turn properly construed means the premises demised by the lease save for the garden land demised.

Legal points

12. Of the covenants in issue before us some are positive and some are negative. We must apply the correct law to our findings of fact. A helpful summary of the relevant law is set out in paragraphs 11.199 and 11.231 of *Woodfall: Landlord and Tenant.*

We note from paragraph 11.199 that a covenant not to do something will not generally be broken if the prohibited thing is not done by the covenantor, but by a third party. A covenant not to do or permit a prohibited thing will generally be broken if the thing is done by the covenator himself or if he has authorised another to do it or if he has abstained from taking reasonable steps to prevent the act where it is within man's power to prevent it. A nuisance is not 'permitted' where a person has done all that could reasonably be expected of them. In contrast a tenant permits or suffers a breach of covenant if he abstains from taking legal proceedings against his sub-tenant, when there could be no good defence to any such proceedings. A breach will also arise where a tenant deliberately closes his eyes to what was going on and fails to verify or dispel the allegations made about the conduct of his sub-tenant.

13. In general a tenant will not be liable for his sub-tenant's misconduct in respect of a negative covenant. The Court of Appeal has held that a tenant may be so liable in respect of a positive covenant. See, for example *Williamson v Issott* [1909] 25 TLR 514.

The alleged breaches

14. Oral evidence was given by Mrs Jackman and Mr Corion. Both were cross-examined by the other and both answered questions put to them by members of the Tribunal.

The noise and music disturbance

15. These may be taken together. When Mrs Jackman moved into the lower floor flat the Mancinelli family were already in occupation of the first floor flat. Evidently they are a musical family and the daughter was a music student with a keen interest in opera. Mrs Jackman complained that more or less from the outset a piano was played out side of the permitted hours of 11pm to 7am. This was throughout the period December 2005 to November 2009 when the Mancinellis left. Later a harp was also played outside or permitted

hours. Mrs Jackman did not keep a log of alleged incidents. The breach varied from perhaps once per week to once per month. Mrs Jackman said that she raised the piano playing with the Mancinellis and there was some improvement but that it was short lived. Mrs Jackman said that she also raised it with Mr Corion on 28 December 2005 in general terms. Mrs Jackman was not sure if she wrote to Mr Corion complaining about the piano or the harp, but no copy letters were produced by Mrs Jackman. In cross examination Mrs Jackman accepted that she did not see a piano in the first floor flat, but she only went into that flat on rare occasions. Mrs Jackman also said that she did not report the piano playing to the Lewisham Environmental Enforcement because they have to be called after 9pm and will not always come out. Further the piano playing was intermittent both in terms of frequency and duration.

16. Mrs Jackman also complained about operatic singing or practising of scales outside the permitted hours. She said this also spanned the period December 2005 to November 2009. She said that it was more severe than the piano playing and greater in its intensity. Often it occurred when the music student returned home from school and sometimes in the evenings up until 12 midnight and sometimes at weekends. Again Mrs Jackman did not keep a log of alleged infringements. Mrs Jackman said that she wrote letters of complaint to Mr Corion but she did not produce copies of them.

17. Mrs Jackman also had a complaint about the noise from what she regarded as a treadmill used for personal exercise which she said caused a nuisance over the period November 2007 to November 2009. Mrs Jackman accepted that she never saw a treadmill in the first floor flat but from the noise she assumed that is what it must have been. Mrs Jackman produced a letter from Lewisham Environment Enforcement dated 27 March 2008 which refers to a complaint made about rhythmical noises coming from the central heating system of the first floor flat. Officers attended at 22:45 on 26

March and evidently *'witnessed a constant banging/drumming noise'*. The letter records that the Jackmans stated *'the perpetrator has admitted to having a problem with his heating system but has yet to rectify this.'* At the hearing before us Mrs Jackman submitted that the noise referred to in the letter may have come from a treadmill. Mrs Jackman submitted that the treadmill was a *'mechanical or other noise making instrument of any kind'* within the meaning of paragraph 3 of the First Schedule to the lease.

18. Mr Corion told us that the Mancinellis made him aware of complaints about the piano playing. He discussed it with them and they assured him that music was not played after 11pm. Further he said that the Mancinellis did not have a piano but an electronic key board which did not involve any percussion, and that they agreed to use ear phones when playing so that music was not audible. Mr Corion told us that he also has an interest in music and would often discuss music when he visited the Mancinellis, which he said was every two to three months. At no time during his visits did he hear musical instruments being played or singing practice taking place. Mr Corion also said that he had never seen a treadmill or cross trainer in the flat. He said that such equipment was too big for the flat.

18. Mr Corion sought to assure us he was aware of his responsibilities as a landlord. When he heard of the complaints he discussed them with his tenants and obtained assurances from them. He did not subsequently receive complaints from Mrs Jackman whether orally or in writing and was not aware there was an alleged on-going problem.

19. The oral evidence is conflicting. There is no written supporting or corroborating evidence. It is clear from the trial bundle provided to us that Mrs Jackman is a prolific letter writer on a number of issues. There are no letters of complaint about this subject and we infer

none were sent. The burden of proof rests on Mrs Jackman. The burden is a heavy one in view of the seriousness of the potential for the forfeiture of a valuable lease, although the standard of proof is the civil standard of the balance of probabilities. We are not persuaded that there was a constant and regular series of occasions when music or other noise emanated from the first floor flat. We find that there were some occasions when this occurred but in the absence of a log kept by Mrs Jackman or supporting evidence from a third party such as Lewisham Environmental Enforcement we are unable to make any findings as to when such incidents occurred and for what duration.

20. The covenant is a negative one. It was not suggested by Mr Jackman that the breach was effected by the Corions; indeed she accepted that it was the Mancinellis to blame. We find that Mrs Jackman did not formally put the Corions on notice of an alleged breach; at best on her evidence Mrs Jackman raised the matter with Mr Corion orally and in general terms in December 2005.
We are satisfied that when he heard of the complaints Mr Corion discussed the matter with his tenants, sought and obtained assurances from them and he heard no more of the matter from Mrs Jackman. In these circumstances we find that Mr Corion acted properly doing all that could reasonably be expected of him. Further, in a situation such as this Mrs Jackman could not reasonably expect Mr Corion to take effective steps to deal with the problem unless she put him on notice that there was a problem and unless she provided some evidence to support it such that Mr Corion might have been able to use if proceedings against the Mancinellis were to be successful.

21. Mrs Jackman was unable to adduce any convincing evidence that a treadmill or cross trainer was in the first floor flat. We accept that such a piece of kit might well amount to a *'mechanical or other noise making instrument of any kind'* within the meaning of

paragraph 3 of the First Schedule to the lease. Mrs Jackman did not put the Corions on notice of an alleged annoyance about this issue and has not discharged the burden of proof that such equipment was in the flat and was used outside the permitted hours.

22. In these circumstances we find that Mrs Jackman has not shown or established that a breach of the covenant in clause 2 and paragraph 3 of the First Schedule to the lease has occurred.

The two cats

23. Mrs Jackman said that in about 2007 or 2008 the Mancinelli family acquired two cats. She said she was allergic to cats. She was concerned that on three or four occasions one or other of the cats entered her flat, she assumed either through an open window or door. Mrs Jackman was unable to say when these events occurred. Mrs Jackman said that she wrote to Mr Corion about it but she did not produce a copy of it.

24. Mr Corion said that he was notified about an allegation or complaint that the cats had messed in the garden. He did not take it too seriously. He said there several cats in the vicinity and he had no reason to believe that the problem was due to the Mancinellis cats. He said that he saw a cat litter tray in their flat and he assumed that they were well trained and were not the culprits. Mr Corion said that it had never been reported to him that the cats had entered Mrs Jackman's flat.

25. We prefer and accept Mr Corion's evidence on this issue. We find he was never put on notice that the cats had entered Mrs Jackman's flat and that he had never been informed that the cats were thereby causing an annoyance to her. We also find that he was never requested by Mrs Jackman to deal with this an issue.

26. Paragraph 6 of the First Schedule does not prohibit the keeping of pets. Only birds, dogs or other animals which may cause annoyance are prohibited. It follows that a breach cannot arise unless and until the tenant is put on notice that an animal is being kept which is causing an annoyance. We find that the Corions were never put on such notice by Mrs Jackman. In these circumstances we find that Mrs Jackman has not shown or established that a breach of the covenant in clause 2 and paragraph 6 of the First Schedule to the lease has occurred.

The fence

27. Mrs Jackman complained that a small section of garden fence was in disrepair. Photographs were produced. Technically there might have been a disrepair to the fence but very modest verging on de minimis. Mrs Jackman had an assumption that the Corions were responsible for the subject fence because she tended the fence on the other side of the garden, which her solicitor told her was her fence when she purchased the property. Mrs Jackman accepted that she had never complained to Mr Corion directly about the fence repair but she thought she had done so indirectly via her neighbour whom, she thought was to raise it with him.

Mr Corion did not accept that the fence was his responsibility and he denied that the neighbour had ever complained to him about the fence.

28. Mr Corion drew our attention to the landlord's repairing obligations in the lease as set out in clause 5(4). Both the original version and the version substituted by the deed of variation make plain that included are *'...the boundary walls and fences of the building and of the property'*

29. Mrs Jackman was unable to persuade us that the subject fence was the responsibility of the Corions. Mrs Jackman relied upon the repairing covenants in clauses 3(c) and 4(1) of the lease. As to

clause 3(c) the obligation is to keep the premises (which construe to mean the demised premises or the flat) and 'all walls ... belonging to the property' in good and tenantable repair. No mention is made of fences. As to clause 4(1) that again refers to the 'premises' and the obligation to keep them in repair so as to afford support, shelter and protection of the building. We find that this provision properly construed cannot have any reference to the garden fences.

30. Looking at the lease as a whole we find that the responsibility for the garden fences lies with the landlord as part of the repairing obligation set out in clause 5(4).

31. So far as may be relevant we record that we accept Mrs Jackman's evidence that she did not complain to or put Mr Corion on notice of the disrepair of the fence and we accept Mr Corion's evidence that the neighbour never raised the issue with him.

32. In these circumstances we find that Mrs Jackman has not shown or established that a breach of the covenant in clause 3(c) or clause 4(1) as regards disrepair to the garden fence has occurred.

The water leaks

33. It was not in dispute that over the recent years there has been water ingress into the lower flat and damp patches appear on the ceiling from time to time. Mrs Jackman took us through three or four examples which occurred on or about:

    13.10.2007
    10.09.2008
    20.01.2009
    ??.01.2011

    The first two incidents were the subject of insurance claims. The latter two were not either by reason of the excess or the fear of increased insurance premiums.

34. Mrs Jackman was unable to say what caused the water ingresses or where the water came from. She surmised it was connected with an upstairs en suite shower room.

35. Mr Corion did not deny that the leaks had occurred. He was unable to say why or from where the leaks had originated. He said, and we accept, that whenever a leak was reported to him he arranged for a trusted contractor to go through the flat to trace and remedy and deal with any leaks of defects found and to check that all was well. Mr Corion said that all necessary repairs had been carried
He also said that over the years the en suite bathroom to the main bedroom had been replaced completely, including pipework, grouting, waste pipe and plumbing. He also accepted that at one time there was a problem with the sealant in the shower tray in the main bathroom but this had been attended to. He said he had receipts and reports to prove it but they were not disclosed to the Tribunal.

36. There was a disagreement between the parties as to whether Mr Corion would permit Mrs Jackman to inspect the first floor flat with her contractor. This is not a matter for us to rule upon. However it seems to us that a cursory inspection is unlikely to reveal much. If the problem is below the flooring nothing will be seen unless opening up works are carried out and the cost of doing so and making good would fall on Mrs Jackman, at least in the first instance.

37. Whilst we have sympathy with the difficulty in which Mrs Jackman finds herself we have to find that Mrs Jackman was unable to show what it was that had caused the leaks, or what, if anything that was in disrepair. In these circumstances we find that Mrs Jackman has not shown or established that a breach of the covenant in clause 3(c) as regards alleged disrepair has occurred.

The insurance premiums

38. Allied to the water leaks and claims made on the insurance policy was the allegation that the Corions had thereby caused an increased premium to be payable.

It was not in dispute that the insurance premiums were as follows:

Date	Sum Insured	Premium	Cost per £1,000 Sum Insured
01.12.07	£208,100	£788.04	£3.78
01.12.08	£221,600	£860.88	£3.88
01.12.09	£215,600	£837.48	£3.88
01.12.10	£218,100	£935.16	£4.28
01.12.11	£229,400	£992.88	£4.32

39. Mrs Jackman was unable to explain how the premiums had been arrived at or what increase was due to what factor. Mr Corion was unable to assist us because he said he had nothing to do with the insurance, he simply paid his half share.

40. Evidently there has bee been some increase in the excess deducted on each claim due the claims history but that is not a breach of paragraph 2 of the First Schedule which is concerned solely with an increase in premium.

41. Drawing on the accumulated experience and expertise of the members of the Tribunal we conclude that the modest increase in the cost per £1,000 of sum assured may have been due to the claims history, the general market for insurance generally which can be volatile or adjustments to the rate per £1,000 sum assured for other reasons.

42. The burden of proof rests with Mrs Jackman to establish that conduct on the part of the Corions has caused an increase in the premiums. We bear in mind that again this a negative covenant.

Mrs Jackman has not discharged the burden upon her. In these circumstances we find that Mrs Jackman has not shown or established that a breach of the covenant in clause 2 and paragraph 2 of the First Schedule to the lease has occurred.

.....

John Hewitt

Chairman

18 November 2011