FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**Lon/00AN/LBC/2017/0064**
Property	:	**58A Collingbourne Road, London W12 0JQ**
Applicant	:	**Shayne Trimnell-Ritchard**
Representative	:	**Self**
Respondent	:	**Melissa Tuffley**
Representative	:	**Nik Laming**
Type of application	:	**Alleged breach of covenants: s168 Commonhold and Leasehold Reform Act 2002**
Tribunal members	:	**Judge Hargreaves** **Peter Roberts DipArch RIBA**
Date and venue of hearing	:	**10 Alfred Place, London WC1E 7LR 2017**
Date of decision	:	**9th October 2017**

DECISION

The Tribunal finds as follows in relation to the alleged breaches of covenants by the Respondent contained in the lease dated 23rd July 1996:-

1. **Hanging out clothes or other articles:** breach of clause 2(E) and Schedule 3(F)
2. **Estate agent's board:** no breach of clause 2(E) and Schedule 3(F)
3. **Balcony light:** breach of clause 2(Q)
4. **Kitchen floor squeak:** (i) claim struck out; **further and in any event** (ii) no breach of clause 2(J);
5. **Leak from radiator pipe:** no breach of clause 2(J)
6. **Small bedroom floor squeak:** no breach of clause 2(J)

REASONS

1. This is the third set of proceedings brought by the Applicant landlord before this Tribunal this year based on *s168 Commonhold and Leasehold Reform Act 2002*. During the hearing we asked whether there were any other court proceedings between the parties. After the hearing the Respondent emailed copies of (i) a *s146* notice served by the Applicant on the Respondent dated and under cover of a letter dated 13th September 2017 and (ii) a copy of her solicitor's letter in reply dated 25th September, dealing with the alleged breaches and outlining various breaches of covenant said to have been committed by the Applicant herself.

2. References are to pages in the Applicant's or the Respondent's trial bundle (marked by A or R as appropriate).

3. As the history of the litigation is relevant to at least one of our determinations, it is necessary to recount the chronology. If we say that relations between the parties are poor and the Applicant determined to exploit every potential breach of covenant, we are only repeating what has already been said, probably to no effect. However we can put down a marker that any further applications in relation to this property will be considered carefully at the outset to avoid repetition of allegations which is time consuming for the Tribunal, as well as the Respondent. Further, it is necessary to put the dispute in the context of major building works undertaken by the Applicant to the ground floor and basement of the property (in which she lives) between November 2013-December 2014, and the knock on effect on the Respondent's property, including alterations carried out to the Respondent's flat, pursuant to various agreements and an agreement to vary the leases, yet to be implemented. These works and their aftermath have not contributed positively to the relations between the parties, the only two leaseholders in the property.

4. A copy of the agreement dated 19th March 2013 is contained in the court file for 0004 (see below). Schedule 3 contains the new lease which was to be granted but for reasons unknown to us, it does not appear to have been completed. The application was brought on the basis that the 1996 lease

applies and the Respondent did not suggest otherwise and there is nothing in the office copy entries to suggest a surrender of the 1996 lease and re-grant.

5. The Applicant issued a s168 application in 2012 (LON/00AN/LBC/2012/0111) but it was rejected on a jurisdiction point because it related to non-payment of service charges. Prior to that there was a two day hearing on 2nd and 3rd July 2012 in two connected applications[1]. The decision is dated 9th July 2012. The Tribunal rejected the Applicant's case on alleged breach of covenants and added (paragraph 19): *"This was a heavy handed and inappropriate use of legislation where any alleged breaches of the Lease were trivial and led to no loss or damage by the landlord."* The other application in that decision dealt with a *s27A* application in relation to service charges.

6. The Applicant issued further *s168* proceedings in 2013 which she notified the Tribunal on 24th September 2013 that it was unnecessary for her to continue[2] and two years later made and withdrew a similar application[3]. On each occasion the Respondent rectified or dealt with the alleged breach and the Applicant did not continue. The major works then occupied most of 2014 and 2015 so far as we can see.

7. On 6th January 2017 the Applicant issued a further *s168* application ("0004")[4]. The hearing took place on 30th March 2017. The final decision is dated 21st May 2017. The 0004 application is closely connected to the second of the 2017 applications[5] which comprised two applications ("0036/0048"). Two days before the hearing on 30th March, the 0036 application was issued by the Applicant, the Respondent having issued service charge/*s27A* proceedings on 6th February ("0048")[6]. The applications do not appear to have been brought to the Tribunal's attention on 30th March. Directions were given on 10th April and the hearing was listed to take place on 22nd May, the day after the first decision is dated. That decision was not before the second Tribunal at the hearing on 22nd May but it was read by the time of their final decision which is dated 14th July 2017.

8. A week before the Tribunal issued its second decision for 2017, the Applicant issued the third application which is the one we are considering. Again it was issued before the second set of proceedings was determined: that is a repeat of what happened with the issue of the second application before the first set of proceedings was determined. On the face of it, this suggests a relentless approach to the use of *s168* by the Applicant, and one

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[1] 00/LON/00AN/LSC/2012/266 and LBC/2012/0044

[2] LON/00AN/LBC/2013/0069

[3] LON/00AN/LBC/2015/0109

[4] LON/00AN/LBC/2017/0004

[5] LON/00AN/LBC/2017/0036

[6] LON/00AN/LSC/2017/0048

which highlights an interesting dilemma for the Tribunal: as there are no apparent statutory restrictions on the issuing of multiple *s168* applications, what are the limits, if any of the Tribunal's response to them? The Applicant's position is succinctly put on p9 of her 28th March application: *"I have not seen the point to continue to negotiate to have these breaches fixed as the response by the leaseholder, if you want to go to the LVT that is your prerogative".*

9. In both of the first two 2017 decisions, the Tribunal referred to a potential abuse of process, also suggested in the directions made in this reference, but the Applicant has been undaunted by the implications of these suggestions. In order to understand finding 4(i) above we have to set out the relevant detail of the 0004 and 0036/0048 decisions.

10. The decision in 0004 is helpfully contained at p116A. Of relevance to the application before us is paragraph 6(c) of the decision. That deals with the Applicant's allegation that the Respondent breached paragraph 2(J) of the lease.

11. Clause 2(J) (p73) provides that the Respondent must *"... permit the Lessor and its agents and workmen after reasonable notice in writing at all reasonable times during the term to enter upon the demised premises to view the condition thereof and take any measurements plans or sections thereof or any part or arts thereof and to give or leave upon the demised premises for the Lessee notice in writing of all defects and wants of repair there found AND within two months next after every such notice well and sufficiently to repair and make good such defects and want of repair."*

12. In the 0004 application the Applicant alleged that the Respondent was in breach of clause 2(J) by failing to remedy squeaky flooring in the kitchen despite being notified of the problem. See paragraph 13b(i)-(vii) of the Applicant's statement of case. In paragraph 6(c) of the 0004 decision, the Tribunal record this: *"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 now to do so and this allegation remains withdrawn****" (our emphasis).*

13. In 0004 the Tribunal determined that the Respondent was in breach of covenant in installing balcony doors non-compliant with permission, and in respect of responsibility for a leak from her bathroom which caused damage to the Applicant's flat below. We are not concerned with that leak in this decision, though in litigating the issue of the balcony doors, we express regret (see below) that the Applicant did not, at the same time, allege a breach of covenant in relation to the light fitting then adjacent to them, as she has done in this application.

14. As indicated above, the Applicant issued the second application on 28th March 2017. She did not make any application in relation to the squeaky kitchen floor and clause 2(J). The second hearing took place on 22nd May

and Mr Roberts was a panel member. The Tribunal heard both the service charge (0048) and breach of covenant (0036) applications. The decision (from p141A) records that the Tribunal allowed the Applicant to bring a further claim in relation to the squeaky kitchen floor as the result of an email dated 2nd May 2017. The Tribunal decided that paragraph 6(c) of the first decision applied and in paragraph 36 stated *"It is not open to the Applicant to now seek to raise the same issue before us: it has been determined."*

15. So the situation before us is that two previous decisions of the Tribunal have held that the Applicant is not entitled to allege a breach of covenant in relation to the squeaky kitchen floor. As to other determinations on breaches of covenant, the Tribunal determined in the second decision there was no breach of clause 2(Q)(i) in relation to works carried out in relation to a WC waste pipe passing through an external wall but there was a breach in relation to *"a hole in the wall made to take the balanced flue of the repositioned boiler"*.

16. The Applicant is applying to the Upper Tribunal for permission to appeal the 0036/0048 decision. The application is outstanding.

17. We propose to take the alleged breaches in the order in which they appear in the third application (p53A).

Hanging out clothes or other articles

18. It is quite clear to us that despite the Respondent's best efforts to inform her tenants that hanging washing or other items on the balcony is not permitted, the photographic evidence taken by the Applicant (p14A) shows that on 26th May 2017 and 28th May 2017 (a few days after the first Tribunal decision and the second hearing) the Respondent's tenants breached of the provisions of clause 2(E) and Schedule 3(F) of the lease (p84A) (*"No clothes or other articles shall be hung or exposed outside the demised premises"*).

19. This is a minor breach of covenant. The Applicant has not alleged a breach caused by regularly hanging washing out to dry.

20. We reject the allegation that hanging a towel over the edge of a paddling pool erected on the balcony of the Respondent's flat as evidenced by the photograph taken by the Applicant on 18th June (p15A) is a breach of this covenant. This allegation demonstrates the extent of the Applicant's determination to exploit every potential breach of covenant. In our judgment this is tantamount to leaving a jumper on the back of a chair. It is not within the scope of the covenant.

Estate agent's board

21. The Applicant took photographs of the Respondent's agent's "To Let" sign in the front garden of the property between 7- 9th June 2017. She did not

ring the agents to ask them to remove it but pulled it down and it was removed by the agents on 27th June after the Respondent intervened. The Applicant alleges that this is also a breach of clause 2(E) and Schedule 3(F) of the lease.

22. The relevant part of Schedule 3(F) (p84A) states *"No name writing drawing signboard plate or placard of any kind shall be put on or in any window on the exterior of the demised premises or so as to be visible from outside the demised premises."* As a matter of construction of the clause, this does not apply to the sign erected in the front garden. It applies to items put *in* the exterior windows of the demised premises or to be visible from the outside of the demised premises.

23. Accordingly, there is no breach of covenant in respect of this allegation.

Balcony light

24. By clause 2(Q)(i) the Respondent covenanted not *"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 demised premises ..."*. There is a picture of the balcony light at p15A. The wires were drilled through the wall from the kitchen. Screws attach the fitting to the wall.

25. The Respondent did not ask for permission. We cannot find any trace of an outside light planned in any of the relevant plans. We agree with the Respondent that it was an obvious item to install and makes no difference to anyone.

26. This is a technical and minor breach. The Applicant does not allege light pollution or other inconvenience. As she accepted, she has also installed exterior lights in her rear garden.

27. We are troubled by the fact that when asked by Mr Laming if she would consent to the installation of the light, which so far as we can see is not objected to by the Applicant on any aesthetic grounds – it is a matter of breach pure and simple – the Applicant refused because of the outstanding forfeiture claim. We are troubled by the fact, also, that she did not seek to include this in the second application dealing with the balcony doors: the light is immediately adjacent to those doors and it is a waste of the Tribunal's time to have to deal with a similar point in different proceedings. But we can see no grounds on which to find she waived the right to allege the breach.

Kitchen floor squeak

28. In our judgment the Applicant should be debarred from raising this claim and we strike it out as an abuse of the process. See the previous decisions cited above. The Applicant says that it is not an abuse to bring a further allegation in relation to the kitchen floor squeak because her complaint is different: she now says the Respondent is in breach because she will not

allow the *Applicant* entry to carry out repairs. We are of the view that this makes little difference: the thrust of the dispute is the same. We rely on the provisions of Tribunal Rule 9(3)(c) which entitles the Tribunal to strike out part of a case if *"the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal"*. In addition we rely on the provisions of Rule 9(3)(d) which applies where *"the Tribunal considers the proceedings or case (or a part of them), or the manner in which they are being conducted, to be frivolous or vexatious or otherwise an abuse of the process of the Tribunal."*

29. As the Applicant has applied for permission to appeal both previous decisions, we consider it appropriate to set out, in the alternative, why her particular allegation in this application fails in any event as a matter of construction of clause 2(J) of the lease (p73A) set out in paragraph 11 above.

30. The clause can be split into various parts: (i) the Respondent is obliged to permit the Applicant (and her agents etc) after the Applicant has given *reasonable* notice in writing to enter her flat (ii) to view the condition (etc) and to leave a notice in writing of all defects and wants of repair there found (iii) which the Respondent tenant must comply with by *"well and sufficiently repairing and making good such defects and wants of repair"* within 2 months after receipt of the Applicant's notice.

31. The Applicant's case is summarised in paragraphs 15-23 of her statement of case (p4A) under the heading "The lessee refused entry for the lessor and the workmen to enter the flat to fix the squeak in the floor of the upstairs property". She argues that she is entitled to go into the Respondent's flat because there is reserved to her the right set out under the Second Schedule paragraph A(ii) (p82A) as follows: *"The right .... at all reasonable times on notice (except in the case of emergency) to enter the demised premises for the purpose of carrying out repairs to the Maisonettes or other buildings all damage caused thereby being made good without delay"*. The reference to *"maisonettes or other buildings"* contrasts with the specific reference to *"demised premises"* in clause 2(J). But even assuming the Applicant has the right to enter the Respondent's property to carry out repairs this is not a right which is mirrored by the obligations in clause 2(J) which are specific so far as it outlines the Respondent's obligations (not the Applicant's rights). What she wants access for is to repair the squeak to the kitchen floor which she now accepts is her responsibility because it was caused (in brief) by the major works she carried out downstairs. The problem started as the result of works required to level the Respondent's kitchen floor after damage caused by the Applicant's contractors in late 2015.

32. The Respondent's case is set out with somewhat more brevity and clarity at p10R.

33. To minimise confusion we set out the factual situation as follows so far as it relates to evidence before us in this hearing. The Respondent's surveyor attended her flat on 22nd February 2017. He reported on proposals to cure the squeak in a letter dated 23rd February 2017 which is at p28R. Not surprisingly, the Respondent wants her surveyor to be involved in any works to correct the squeak. That is, in the light of the dire relations between the parties, eminently sensible. The repairs and their complex history which relate to the effect of the major works justify professional advice and intervention.

34. On 4th May 2017 the Respondent wrote a lengthy letter to the Applicant in a somewhat doomed effort to reduce outstanding issues: the letter is at p22R and the particular reference to the kitchen squeak is at p23R. Again, not surprisingly, the Respondent set out three conditions to be met in relation to the works. The Applicant says the Respondent is not entitled to impose conditions. We consider these conditions, as a matter of fact, to be eminently sensible.

35. The first Tribunal decision is dated 21st May, the second hearing took place on 22nd May. The unfolding kitchen floor squeak dispute is nevertheless continuing.

36. The Applicant's response to the letter of 4th May 2017 dated 8th June (so not particularly prompt but notably *after* the events of 21st and 22nd May) is at p20A. She says this is her reasonable notice for the purpose of clause 2(J), which is why this alleged breach is different to those referred to in the other proceedings. She gives 18 days notice of her need for access with her builder to carry out works she identifies as required, estimated to take a day. She says the Respondent is in breach by refusing access in response to this notice.

37. The Respondent's surveyor[7] wrote to her about the Applicant's proposals on 14th June: p27R, ending with the words *"It would be wise to clarify exactly what works she intends to undertake before you agree to the works starting, as this may cause problems with your tenant"*. On 15th June the Respondent wrote to the Applicant setting out her concerns: see p25R. She wrote again to the same effect on 16th June 2017 at p22A. The Applicant wrote on 19th June (p28A) requesting access in either the week commencing 29th June or 3rd July. The Respondent wrote again on 20th June at p26R. The Applicant's surveyor wrote to the Applicant on 27th June 20-17: p23A.

38. All the Respondent's correspondence is measured and sensible.

39. The Applicant wrote to the Respondent on 29th June (p25A) giving further notice of her intention to enter her flat from 10th July for the purpose of

[7] Who gave evidence at the second hearing which was accepted by the Tribunal: see that decision for their impression of him

viewing the problem and *"carrying out the above repairs*[8] *..... Please be aware that my entitlement to access is not conditional on you agreeing to the works and, in any case, I have taken advice as to what the works should be, which I intend to follow"*. As we suggested to the Applicant, she perceives the problem as capable of resolution by her preferred method, and cannot conceive that any alternative might be feasible or preferable. She ended the letter by referring to forfeiture of the lease and indicating that no further correspondence would be entertained, any response containing a negative reply to her suggestion being a breach of covenant.

40. The Respondent wrote further on 30th June at p27A (a week before this third set of proceedings is issued). The nub of the response is this: *"In order to proceed Andrew [Respondent's surveyor] needs to be comfortable that your [new] surveyor is properly briefed and the surveyors need to resolve the dispute regarding the cause of the squeak and the required repair works"*.

41. The Applicant carried out her threat to make a third application to the Tribunal *before* 10th July.

42. The letter of 8th June is not *"reasonable notice"* either in content or time. It arrogates to the Applicant a time and method which is not justified by the background to which we refer above. This matter is crying out for resolution by an agreed method statement worked out between surveyors. As Mr Laming says, the Applicant's new surveyor has not even visited the property. It is not clear whether agreed works would take one day or one week or two weeks. It was wholly unreasonable to write as she did. The Respondent is clearly (desperately?) offering to provide access to the Applicant's surveyor to agree a schedule of works which she refuses.

43. Not only is there no reasonable notice, there is no notice of works setting out what is required to be done. There is intemperate correspondence from the Applicant summarising what she has been advised she intends, through her unnamed builder, to do.

44. But the main problem with the construction of clause 2(J) is that is does *not* require the Respondent to allow the Applicant into her property on the Applicant's terms to carry out repairs to the demised premises by the Applicant for which the Applicant is responsible. The clause is targeted at requiring the *Respondent* to carry out the repairs required to remedy the defects and want of repairs to her premises. We accept that the Applicant has the reserved right set out in the Second Schedule Paragraph A(ii) to enter to carry out repairs but that has to be *"at all reasonable times on notice"*. Nothing in the Applicant's time frame allows for any *"reasonable time"* because the matter plainly requires to be agreed by surveyors before works can begin.

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[8] Listed in the same letter but not specified as required by the Respondent

45. The Applicant accepted, when asked by the Tribunal, that it is reasonable for the surveyors to talk on site, but added "if necessary".

46. To summarise, the Applicant's case as presented to the Tribunal in these proceedings fails because (i) it is an abuse of the process and/or (ii) on the facts and on the construction of clause 2(J).

Repairs to Applicant's flat due to damage caused by leaking radiator pipe

47. The factual background is set out in the Applicant's statement of case paragraph 26a at p7A. The Respondent's case is set out at p13R. There is no dispute that there was a leak which emanated from a pipe servicing the Respondent's water/heating system in April 2017, which caused damage to the Applicant's flat below. There is no dispute that the Applicant had access for an emergency plumber to fix the leak which was caused by that familiar irritation, a screw through the pipe, which eventually worked loose to create a leak. There is a dispute about who is responsible for the screw in the pipe, whether the Applicant's builders, or the Respondent's.

48. The allegation is that the Respondent has refused to make good the damage to the Applicant's flat within 2 months of being required to do so. The notice was given by email from the Applicant on 14th May: see p35A. The Respondent says she pays half the insurance premiums on the property and that the Applicant should make an insurance claim. The Applicant refuses to do so: her evidence on this was not particularly clear.

49. We are fortunate in being able to put the factual disputes to one side, though obviously we regret the fact that it might inevitably rumble on. The leak upstairs is fixed. Clause 2(J) refers to works to the demised premises: the Applicant's flat is not included in the ambit of clause 2(J) and the Respondent is not in breach of clause 2(J) in relation to non-repair of the Applicant's flat consequent on the leak. The purported notice is of no effect.

Small bedroom floor squeak

50. This is a "new" squeak for the Tribunal. It is not to be confused with the kitchen floor squeak. Factually speaking, it could be said on the facts we heard that there was a squeak, it was cured, but there is now another squeak. Bearing in mind this is a 1908 building which has undergone major works, we are concerned that the Applicant might chase squeaks emanating from the Respondent's flat forever. In blunt terms, is a squeak evidence of a want of repair or a defect? This is relevant because again the Applicant alleges a breach of clause 2(J) and she has yet to prove that this is the case.

51. Her case is pleaded at paragraph 26b of her statement of case at p10A. On 8th June (at the same time that the kitchen squeak correspondence was triggered) (p36A) the Applicant emailed the Respondent "*Please note this is notification as required under clause [2](J) of the lease to repair, within*

2 months, the squeak that had become prevalent occurring from the floor of the single bed room and/or the bathroom, there is a significant squeak, causing a noise nuisance, coming from that area, please ensure this is corrected within the time frame required as defined in the lease".

52. The Applicant says the Respondent's tenant gets up early and the squeak wakes her up at about 5am.

53. Mr Laming replied on 18th July (p37A, p36R), saying the squeak was fixed but the joists are the Applicant's responsibility. That is an issue (see below). The Applicant's surveyor later expressed his opinion on 10th August (p44A) but that has not formed part of a notice served on the Respondent and it was written after the third application was issued. The Applicant said the squeak was not fixed and correspondence ensued: p38A, 39A, 40A, 41A, 43A, 44A, 45A, 46A. We have not downloaded the video link supplied by the Applicant. The Respondent's case is at p15R. Her evidence continues from July to September 2017, which contains a quote from the Respondent's builder for over £1600 for removing the old bedroom hearth and installing new joists: see p36-41R.

54. The question whether the existing joists are part of the demised premises could have been dealt with rather more simply in the lease than it is. By paragraph (D) of the First Schedule the demised premises include *"the surfaces of the floors including the whole of the floorboards supporting joists"*. Should this be read as *"the whole of the floorboards' supporting joists"* or *"the whole of the floorboards **[and their]** supporting joists"* to make grammatical sense? Probably. On the face of it, the joists supporting the floorboards are included.

55. But the matter is complicated by paragraph 2(F)(ii) which then excludes *"Any of the main timbers and joists of the demised premises .... except such of the ....floors and joists thereof ...as are expressly included in this demise."* The responsibility for stone or concrete hearths is debatable, but not expressly included or excluded. However they are *part* and parcel of the floor because (in simple terms) you stand on them. By 10th August the Respondent had accepted that the joists and floorboards and *"probably the hearth as well"* are her responsibility, rather than a service charge issue: p44A.

56. When the Applicant issued the third application on 7th July, she was relying on her notice of 8th June. She did not actually inspect and then leave a notice of works as required by clause 2(J). She merely required a squeak to be repaired. She has still not issued a notice of the works she requires to be carried out and there appears to be a genuine debate about what to do next. It is not clear to the Tribunal what the Applicant asserts is the relevant *"want of repair"* or *"defect"* in the demised premises – certainly not prior to the issue of the third application. The Respondent has now obtained a very expensive quote and is reluctant to accept it if it is not going to solve the problem. We appreciate that dilemma. The onus is however on the Applicant to prove her case.

57. If the Applicant wishes to rely on clause 2(J) she has to prove (i) that she has given reasonable notice of her intention to inspect (ii) carried out an inspection (iii) identified all *defects* and *wants of repair of the demised premises* which are required to be repaired by the Respondent (iv) set those out in a notice and proved (v) that the Respondent has failed to carry out the repairs within the following 2 months of service of the said notice. The procedure is clear and has not been observed.

58. It follows that the Respondent is not in breach of clause 2(J) in relation to the small bedroom floor squeak.

Judge Hargreaves
Peter Roberts Dip Arch RIBA
9th October 2017