FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AQ/LBC/2018/0091**
Property	**:**	**Flat No 8, Maison Alfort, 251 High Road, Harrow Weald HA3 5EL**
Applicant	**:**	**Buttercup Building Ltd**
Representative	**:**	**Kamlesh Kumar Anand / KLPA**
Respondent	**:**	**Mr Premji Halai and Ms Saviteben Halai**
Representative	**:**	**David Moore, Solicitor, Rodgers & Burton**
Type of application	**:**	**For the determination of the an alleged breach of covenant**
Tribunal members	**:**	**Judge Carr** **Mr S Mason BSc FRICS FCIArb**
Date and venue of hearing	**:**	**27th February 2019** **Alfred Place, London WC1E 7LR**
Date of decision	**:**	**7th March 2019**

DECISION

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Decisions of the tribunal

(1) The tribunal determines that the Respondent is in breach of clause 2(17) of the lease.

(2) The tribunal makes the determinations as set out under the various headings in this Decision.

The application

1. The Applicant seeks a determination pursuant to s.168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")] as to whether the Respondent is in breach of various covenants contained in the lease.

2. The relevant legal provisions are set out in the Appendix to this decision.

The background

3. The property which is the subject of this application is a 2nd floor flat in the block of flats known as Maison Alfort.

4. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

5. The Applicant is the landlord and the Respondent holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The lease contains a number of obligations upon the lessees. The specific provisions of the lease and will be referred to below, where appropriate.

The hearing and preliminary issues

6. The Applicant was represented by Mr Kumar of the Applicant. The Respondent was represented by Mr David Moore Solicitor of Rodgers and Burton. The Respondent, Mr Halai was in attendance and gave evidence.

7. The Respondent raised, as a preliminary point, that the Applicant's name was incorrectly spelt on the Application form. He argued that in a forfeiture case it is crucial that the Applicant is properly identified. The Freeholder is named as Buttercup Buildings Limited on the

Proprietorship Register. On the Application the Freeholder is named as Buttercup Building Ltd.

8. The Applicant apologised for the typographical error and asked the Tribunal to correct it.

9. The Tribunal determined to amend the spelling of the Applicant, on the grounds that it is an appropriate and proportionate response to the problem of the misspelling. The Applicant in this matter is therefore determined to be Buttercup Buildings Limited.

10. The Respondent also raised an issue about the quality of the bundle provided by the Applicant. His first argument was that it was not until he received the bundle that he was given full details of the allegation of breach of the lease term that the Respondent had failed to give the Applicant access to the flat. The second argument was that the bundle contained two documents that the Respondent had not previously had sight of and that the Respondent objected to. The first of these documents is the Reply to the Respondent's Reply which he claims is unhelpful and confusing. The second is a document called Statement of Case which refers to additional issues of rent and service charges and contains some gratuitous insults of the Respondent's solicitor. For these reasons the Respondent argued that the bundle should be excluded and the Respondent's bundle should be used.

11. The Applicant resisted these arguments and asked the Tribunal to use his bundle.

12. The Tribunal determined to use both bundles and considered that it was able to ignore those parts of the Applicant's bundle that were superfluous to the issues in front of it.

The issues

13. At the start of the hearing the parties identified the relevant issues for determination as follows:

    (i) Whether the property has been used as something other than a single private dwelling – breach of clause 2(10) of the lease

    (ii) Whether notice had been given of any underletting or assignment and to pay the fee of £3.15 - breach of clause 2(17) of the lease

    (iii) Whether the Respondent has failed to allow the Applicant access to the property – breach of clause 2(7) of the lease.

14. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

The relevant clauses of the lease

15. The relevant clauses of the Lease are

(i) 2(10) To use and occupy the demised premises throughout the tenancy as a single private dwelling and for no other purpose whatsoever

(ii) 2(17) Within one month after any assignment underletting or charging of the demised premises or any devolution of the interest of the Tenant therein to give notice thereof in writing to the landlord and to produce to the solicitors for the time being of the landlord the assignment transfer counterpart underlease or other instrument under which such devolution shall have occurred and to pay to them a fee of three pounds fifteen pence for the registration of each instrument

(iii) 2(7) To permit the landlord and any persons authorised by it to enter upon the demised premises at all reasonable hours during the daytime to view the state and condition of the same and of all defects decays and wants of reparation there found to give notice in writing to the Tenant.

The arguments

Occupy as a single private dwelling

16. Whilst the Applicant knows that the Respondents do not reside at the property and it has been let out during the term of the lease, Mr Kumar argues that it has not been occupied as a single private dwelling because there have been other occupiers. His evidence for this are letters he found in the hallway of the property addressed to various occupiers of Flat 8 - Rebecca Wheeler, Bavis Xendidas and Kayleigh Harty.

17. The Respondent has not heard of Bavis Xendidas and Kayleigh Harty and gave evidence that the property has been let to a sole tenant, Rebecca Wheeler for the last four years. He produced the Assured Shorthold Tenancy for each of those years, and asked the tribunal to

note the clause that the tenant was not to sublet the property. He suggested the letters may have been misaddressed or sent to a previous occupier of the flat, an occupier which preceded his own ownership of the property.

18. He further argues that the Applicant has not produced sufficient evidence to discharge the burden of proof that the property has not been occupied as a single private residence.

Notice of underletting

19. The Respondent accepts that there has been a breach of the lease in connection with failing to give notice of underletting.

20. He further argues that he has not been given the name and address of the freeholder's solicitors on whom such notices should be served. He will raise this matter in any subsequent forfeiture proceedings.

Access to the property

21. The Applicant argues that the Respondent has failed to provide access to the flat when requested.

22. The Respondent says that he has provided access, however the Applicant has insisted that he will only access the flat if the Respondent is present.

23. He also provided evidence that someone from the Applicant has accessed the flat in the past.

24. The Applicant says he is entitled to insist on the Respondent's presence as the tenant may argue that she is being harassed.

The tribunal's decision

25. The tribunal determines that there is a breach of clause 2(17) of the lease.

26. The tribunal does not consider that there has been a breach of clause 2(7) or 2(10) of the lease.

Reasons for the tribunal's decision

27. The Respondent does not dispute that he has failed to provide notice of underlettings.

28. The tribunal does not consider that there is a breach of clause 2(10) The tribunal accepts the evidence of the Respondent that the property is let to a single assured shorthold tenant. Further there is insufficient evidence to discharge the burden of proof that the property is occupied as anything that as a single private residence.

29. The tribunal does not consider there is evidence to support the allegation that the Respondent has failed to provide the Applicant with access to the flat. Although there may be good reasons for the Applicant to want the Respondent to be present during his inspection of the property, the relevant term of the lease does not specify that the Respondent must be present. It is not open to the Applicant to argue that there is breach of a term of the lease because the Respondent has failed to comply with a condition that is not specified in the lease.

30. The tribunal accepts the evidence of the Respondent that he offered access, and that the Applicant refused that access.

Name: Judge Carr **Date:** 16th April 2019

Appendix of relevant legislation

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Commonhold and Leasehold Reform Act 2002

s.168 No forfeiture notice before determination of breach

(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2) This subsection is satisfied if—
(a) it has been finally determined on an application under subsection (4) that the breach has occurred,
(b) the tenant has admitted the breach, or
(c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

(3) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.
(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 a covenant or condition in the lease has occurred.
(5) But a landlord may not make an application under subsection (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.

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
 (a) "costs" includes overheads, and
 (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
 (a) only to the extent that they are reasonably incurred, and
 (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

 and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
 (a) the person by whom it is payable,
 (b) the person to whom it is payable,
 (c) the amount which is payable,
 (d) the date at or by which it is payable, and
 (e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
 (a) the person by whom it would be payable,
 (b) the person to whom it would be payable,

(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and

(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;
(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
  (a) the person by whom it is payable,
  (b) the person to whom it is payable,
  (c) the amount which is payable,
  (d) the date at or by which it is payable, and
  (e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
  (a) has been agreed or admitted by the tenant,
  (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
  (c) has been the subject of determination by a court, or
  (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
  (a) in a particular manner, or
  (b) on particular evidence,
  of any question which may be the subject matter of an application under sub-paragraph (1).