FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AW/LBC/2020/0043**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**Flat 3, 54 Penywern Road, London, SW5 9SX**
Applicant	**:**	**54 Penywern Road Freehold Limited**
Representative	**:**	**Stuart Armstrong**
Respondent	**:**	**Liliya Angelova Popova**
Representative	**:**	**-**
Type of application	**:**	**Application for a determination as to breach.**
Tribunal members	**:**	**Judge Jim Shepherd** **Jane Mann MCIEH**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**1 February 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: SKYPEREMOTE. A face-to-face hearing was not held because it was not practicable it was not practicable and all issues could be determined in a remote hearing.. The documents that I was referred to are in a bundle, the contents of which I have noted. The order made is described at the end of these reasons.

Decisions of the tribunal

Decision

The Respondent breached clause 3D of her lease by refusing access on 12th May 2020.

Reasons

1. The Applicant freeholder is seeking a determination from the tribunal to the effect that the Respondent leaseholder has breached her lease. The application is brought pursuant to section 168 (4) of the Commonhold and Leasehold Reform Act 2002. The application is dated 5th August 2020 and was heard by the tribunal on 7th December 2020. In the application the applicant alleges that the respondent has breached Clause 3D of her lease which states that she will:

> *"Permit the landlord and his duly authorised surveyors or agents with or without workman and others upon giving three days previous notice in writing (except in an emergency) at all reasonable times to enter into and upon the flat or any part thereof for the purpose of viewing and examining the state and condition thereof and making good defects decays and wants of repair of which notice in writing shall be given by the landlord to the tenant and for which the tenant may be liable hereunder within two months after the giving of such notice".*

2. It is alleged that in breach of that clause the Respondent has refused to allow access to Steve Way a surveyor appointed by the Applicant for the

purpose of viewing and examining the condition of her flat as a result of works carried out by her .

Background to the application

3. The Respondent purchased her flat at 54 Penywern Road, London SW59SX ("The premises") in February 2020. Soon after purchase she informed Mark Goldberg a director and shareholder of the Applicant that she wanted to carry out works. Initially the works were believed to require a licence or permission from the Applicant. Thereafter the Respondent decided to limit the works to the following;

    A. Installing new pipes and a new boiler;

    B. Installing new electrics and a new fuse box;

    C. Levelling the wooden floors and installing a new wooden floor;

    D. Replastering walls;

    E. Installing a new kitchen; and

    F. Installing a new bathroom.

4. These works were detailed in an email to Mr Goldberg from the Respondent dated the 17th of February 2020. On the 19th of March 2020 the Respondent informed the Applicant that structural works would not be carried out. Previously on the 18th of February 2020 Mr Goldberg had indicated that no licence would be needed for the works outlined in the paragraph above.

5. The Respondent commenced work in March 2020. On the 18th of March 2020 the Respondent informed the lessee of the flat below hers that a

heavy object had fallen through her floor and pierced the plasterboard to his living room . There were then further emails exchanged relating to access by the Applicants surveyor, Steve Way.

6. Despite the fact that the Respondent had indicated that she no longer wanted to carry out works which required a licence Mr Goldberg emailed her and stated that Steve Way would be instructed to inspect her flat and also deal with the repairs to the flat below. In response the Respondent wrote that Steve Way could attend the property anytime subject to giving the required three days prior notice. Steve Way and the respondent then liaised about a time for inspection and agreed that an inspection would take place on the 24th of March 2020. Due to guidance issued by the government as a result of COVID-19 however Steve Way cancelled that appointment.

7. Further emails were exchanged relating to access during March and early April 2020. In early May 2020 the Applicant's agents informed the Respondent that Steve Way would be in Earls Court on the 15th of May and would like to inspect the flat and the damage to flat 2 at the same time.

8. On the 12th of May 2020 the Respondent replied stating there is no need for anyone to inspect the premises and that she would not be granting access. There followed further emails between the Respondent, Mr Goldberg and Doctor Britt Vardy another lessee and a director of the Applicant. Doctor Vardi sought to persuade the Respondent to agree to provide access to Steve Way.

9. It was the Applicant's case that the Respondent repeatedly refused access and as a result of this she was in breach of clause 3D of her lease as quoted above.

10. For her part the Respondent denied that she was in breach of her lease. She said that she bought the property in a dire state and intended to carry out a full refurbishment to improve its condition and to live in . She told the Applicant of her intentions. She said that she was threatened with litigation if she did not seek permission under the lease. She said that the Applicant altered their position and decided that she could carry out works providing they were not structural works. She said that she understood that any inspection required by the Applicant would take place once the works were complete not whilst they were ongoing. She also said that there was a loss of trust and a breakdown of communication between the parties . She said that she never disagreed that the Applicant had the right to inspect the refurbishment works once they had been carried out. She refers to a series of letters between the parties in support of this proposition. In particular she refers to a letter dated the 19th of March 2020 in which she stated that Steve Way can attend the property at anytime subject to giving the required three days notice .

The alleged breaches relied upon by the Applicants

11. Both parties attended a virtual hearing on January 2021.The Applicants were represented by Stewart Armstrong of Counsel and the Respondent represented herself. At the hearing Mr Armstrong was asked to clarify exactly which breaches the Applicants relied upon. These and other potential breaches are outlined below :

    - 12 May 2020 - email from Martina at Astberrys Property Services Ltd (page 137) with attached covid 19 form asking for access on 15 May 2020. Respondent replied by email on the same day "There is no need for anyone to be inspecting my property so I will not be granting no access"

- 4 June 2020 email from Dr Vardy asking for access by Steve Way (142). Asking for response in 7 days. On 12 June 2020 the Respondent replied " There is no reported issue in the property that requires the freeholder inspection , hence a visit is not appropriate"

- 23 June 2020 Dr Vardy e mail (153) "please confirm you will allow Steve Way access within 7 days" On 28 June 2020 the Respondent stated " it is obvious that none of the contemplated alterations have been done so sending a structural engineer to inspect my property without a real reason for that is an unjustified expense which I will not pay for as a shareholder in the Freehold company"

- 10 July 2020 Dr Vardy e mail (161-162) last paragraph "please reconsider and allow access. If you don't agree within 7 days then I am afraid we will proceed to issue an application in the FTT" In response on 20 July 2020 the Respondent stated: " as I've said before there are no reported issues in my property that require the urgent inspection of Steve Way/the freehold company so I suggest we pause and take time to rebuild our relationship and regain trust. The granting access and paying my share of the cost of a surveyor will not be a problem for me"

- 30 July 2020 (168) Martina (Astberrys) e mail requesting access 2 pm on 5th August. Response requested by 4th August. There was no response . At the hearing the Respondent said she was not happy that they were coming so didn't respond. However she did state that if Mr Way had turned up she would have allowed access.

12. The Tribunal is grateful to both parties for producing bundles which were very clear and addressed the specific issues in the case. The tribunal is also grateful for the way in which the parties acquitted themselves at the hearing . Although it was clear that there was a division in opinion

the Applicants witnesses and the Respondent behaved in a professional and courteous manner at all times.

13. During the hearing the Respondent produced a case on which she relied in relation to the central question of access clauses in lease agreements. The case is *New Crane Wharf Freehold limited v Jonathan Mark Dovener*, a decision of the Upper Tribunal Land Chamber HHJ Behrens , 2nd April 2019 (2019 UKUT 98 (LC)).

14. The New Crane Wharf case was based on a covenant in the lease requiring the tenant to permit the lessor and its agents and workmen at all reasonable times on giving not less than 48 hours notice (except in the case of emergency) to enter the demised premises. In that case the landlord solicitor wrote to the tenant on two occasions requiring access. On the 1st occasion access was required on a particular date namely the 29th of September 2017 at 10:30 AM. The solicitor stated *we therefore await hearing from you by close of business on the 18th of September 2017 … with your confirmation that access will be given on the 29th of September 2017*. There was no reply to that letter by the tenant but it was referred to in later correspondence by the tenant on the 17th of January 2018 stating: *why does your client require access to my flat this is innovation of privacy and prevents my quiet enjoyment of my property*. On the 18th of January 2018 the landlord's solicitor made the second request they stated: *you should be aware that clause 3.08 of the lease clearly entitled our client to access upon giving 48 hours notice. Notice was given to you as far back as 11th of September 2017 but you failed and refused to afford our client or its agents access to inspect the property. In the circumstances we will await hearing from you by close of business on Friday the 19th of January 2018 with a copy of the plans and or your confirmation that access will be given to your property by 5:00 PM on Tuesday the 23rd of January 2018. If we do not by close of business on Friday the 19th of January 2018, received the plans and or your confirmation that access will be given by 5:00 PM on Tuesday the*

23rd of January 2018 then we will proceed with our clients application to the first tier tribunal.

15. There was no reply to that letter and there was no evidence before the First Tier Tribunal that the landlord or its agents or workmen attended on either of the two days specified in letters the inference being that there was no actual attempt to gain access on either occasion. The landlord argued that the tenants failure to respond to the two letters amounted to a breach of covenant. The First Tier Tribunal held that there was no breach of covenant . Permission to appeal was granted however.

16. In discussing the case HHJ Behrens identified the crucial question which was the time when the tenant is required to give permission . He said that there was nothing in the wording of clause 3.08 which required the tenant to grant permission before the time and date specified in the notice. He said that the natural and ordinary meaning of that clause was that permission would be granted at that date and time. He said that whilst he considered that it would be commercially convenient to require permission to be granted earlier than the time and date of the notice he did not consider it was necessary to give business efficacy to the lease. The Judge went on to uphold the decision of the First Tier Tribunal and found that there was no breach in that case.

17. In order to be fair to the parties the decision in the New Crane Wharf case was sent out inviting representations after the application was heard. Unsurprisingly perhaps the parties had different interpretations of the relevance of the case.

18. Mr Armstrong distinguished the case on the basis that in that case, the tenant never actually refused to grant access: he merely failed to respond to the landlord's two letters. The landlord could not, therefore, allege that the tenant had breached the clause by positively refusing to grant

access: that is why it had to argue that a mere failure to respond was in itself a breach. Therefore he said that the present case was different because the Respondent repeatedly refused to grant access. He highlighted the fact that Judge Behrens was asked to express a view on whether the landlord would still need to attend at the time specified in its notice if there had been an express refusal. HHJ Behrens dealt with this at paragraph 24 (partly cited by Mr Armstrong) were he stated:

> *24. Since sending out this judgment in draft Mr Brown has asked me to express a view on whether the Landlord need attend if the Tenant refuses permission in advance. There is no suggestion that Mr Dovener did in fact refuse so the question is hypothetical and my views would necessarily not be part of the decision. If the refusal was said to be oral this could give rise to disputed questions of fact. In the case where there is a clear refusal it would normally be reasonable for the Landlord to rely on the refusal. In those circumstances the Landlord would not need to attend. I can, however, conceive of circumstances where it would not be reasonable to rely on the refusal. The nature of the refusal may not be sufficiently clear. The Tenant may change his mind before the time when access is to be exercised. If, after a refusal he recants and informs the Landlord that he will allow access the Landlord will have to attend. The crucial time is the time when the access is to be exercised. There may be other circumstances where it would not be reasonable for the Landlord to rely on the refusal. I am not attempting to give an exhaustive list.*

19. Mr Armstrong stated that the Respondent expressly refused to allow access on several occasions and submitted that those are clear breaches. He also submitted that the failure to respond to the email of 30 July 2020 (at [168] of the Applicant's Bundle) also amounted to an implied refusal, in the context of the previous refusals, the attempts to persuade her to allow an inspection, and the wording of the email.

20. The Respondent stated that the New Crane Wharf case supported her position for several reasons: As in that case the access covenant in her lease agreement did not require prior consent by the tenant. The Applicant did not exercise their right in the present case as in the New Crane Wharf case. There was no evidence that she failed to grant entry at the specified time.

Decision

21. As already indicated the Tribunal finds that both parties acquitted themselves well in these proceedings. It is a shame that they have reached an impasse and that the Applicants have felt it necessary to pursue the allegations of breach. The tribunal did not consider that either party had any malicious intent. For whatever reason the landlord and tenant relationship has broken down. It is a shame that mediation was not pursued. It is hoped that aside of the decision made by the Tribunal below the parties will seek in the future to rebuild an amicable and professional relationship .

22. The New Crane Wharf decision is undoubtedly relevant to this case. The clause in that case is very similar to the clause relied on in the present case. A breach under one would be a under the other. In the present case the clause required the tenant to allow the landlord and his operatives access providing three days previous notice is given in writing (except in an emergency) for the purpose of viewing and examining the state and condition thereof etc. The crucial time for assessing whether there has been a breach is the date when access is due to be exercised ([24] of New Crane Wharf). This must be right because the clause required three days previous notice to the date of the visit. Accordingly in order for the clause to be engaged it is necessary for a specific appointment date to be given so that the three day notice period can be assessed.

23. Taking each of the alleged breaches in the present case in turn:

12 May 2020 . The Applicant asked for access on a particular date. No time was given yet it was clear that there was an appointed date. Notwithstanding this the Respondent refused access before the appointed date. This was a breach.

4 June 2020. The email from Dr Vardy asking for access required a response in 7 days. The Respondent replied saying that it was not appropriate. However there was no appointed date. The request was a general one. Accordingly the clause is not engaged and there was no breach.

23 June 2020. The email from Dr Vardy asking for access required a response in 7 days. There was no appointed date and the request from Dr Vardy was a general one . The clause is not engaged even though the Respondent refused to cooperate.

10 July 2020. Dr Vardy e mail asking the Respondent to agree that she will give access. There was no appointed date. The clause is not engaged. In addition the Respondent's response on 20th July 2020 suggested she would give access.

30 July 2020. The email from Martina (Astberrys) sought access at 2 pm on 5th August. A response was requested by 4th August. There was no response . At the hearing the Respondent said she was not happy that they were coming so didn't respond. However she did state that if Mr Way had turned up she would have allowed access. This is not a breach.

24. The tribunal is grateful to both parties for producing bundles which were very clear and addressed the specific issues in the case.

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have. 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. 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.

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. 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. If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).