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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**BIR/OOCN/LBC/2017/0004** **BIR/OOCN/LBC/2017/0003**
Property	:	**98 and 98A Rupert Street, Birmingham B7 5DS**
Applicant	:	**Sycamore Management (Nechells) No.1 Limited** **Represented by Mr Mark Strangward**
Respondent	:	**Mr Paul Thomas (Lessee)** **Represented by Mr Lorick Winarskie of Duncan Lewis, solicitors**
Type of Application	:	**Under section 168(4) of the Commonhold and Leasehold Reform Act 2002, for an order that a breach of covenant or a condition in the lease has occurred**
Tribunal Members	:	**Judge Anthony Verduyn** **Mr Stephen Berg FRICS**
Date of Hearing	:	**17th May 2017**
Date of Decision	:	**26th June 2017**

DECISION

The Tribunal dismissed the Applicant's applications.

REASONS

1. Two applications dated 24th March 2017 were received by the Tribunal on 28th March 2017. They relate to adjacent long leasehold flats in the same block, namely 98 and 98A Rupert Street, Birmingham. Each is a single bedroom flat in a block of 13 such properties. Both applications were for a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 (the "2002 Act") whether a breach of covenant or condition in their common form leases had occurred. Landlord and tenant were the same parties in respect of each lease. By a direction dated 30th March 2017, the applications were linked to be heard together, and the hearing took place on 17th May 2017.

THE LAW

2. The relevant statutory provisions in the 2002 Act reads as follows:

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 the appropriate 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.

(6) For the purposes of subsection (4), "appropriate tribunal" means—

(a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) in relation to a dwelling in Wales, a leasehold valuation tribunal.

3. The current Application is under Section 168(4) above and is an essential preliminary to the issue of a notice under Section 146 of the Law of Property Act 1925. The breaches contended for by the Applicant are not admitted to be breaches at all by the Respondent and have not previously been finally determined or referred to arbitration.

THE STATEMENTS OF CASE

4. The Applicant, the management company for the block, asserts that the Lease of No.98 is broken in respect of two covenants, Clause 3(1)(f)(iii) and 3(1)(j), and the Lease of No.98A is broken in respect of two other covenants, Clause 3(1)(l)(i) and (ii):
"3. (1) The Lessee HEREBY COVENANTS with the lessors and as a separate covenant with the Management Company and with the lessees of the other apartments comprised in the Estate as follows:
(f)(iii) Not at any time to sub-let the whole of the demised premises without the consent in writing of the Management Company which consent shall not unreasonably be withheld [...]
(j) To keep the demised premises and all sewers drains pipes cables wires and appurtenances thereto belonging and exclusively serving the same in good and tenantable repair and condition and in particular (but without prejudice to the generality of the foregoing) so as to support shelter and protect the parts of the Estate other than the demised premises [...]
(l) To permit the Lessors and the Management Company and the lessees of any other apartment in the Estate and others authorised by any of them respectively with or without workmen and others at all reasonable times on notice (except in case of emergency) to enter into and upon the demised premises or nay part thereof for the following purposes namely:-
(i) to repair any part of the Estate or adjoining or contiguous premises and to make repair maintain re-build renew cleanse and keep in order and good condition all sewers drains pipes cables watercourses gutters wires party structures or other conveniences belonging to serving or used for the same and to lay down maintain repair and test drainage gas and water pipes electric and other wires and cables and for similar purposes the persons exercising such right doing no unnecessary damage and making good all damage occasioned thereby to the demised premises and
(ii) To examine the state and condition of the demised premises"

5. The Applicant's statements of case allege a breach of the lease of No.98 in that mould growth was found to be extensive in the flat on 31st January 2017. Mr Strangward of the Applicant and Mr Paul Tunley of 0121 Repairs had visited the flat preparatory to the replacement of the balcony door and window with uPVC units, and reported the problem to the Respondent the same day. Visits on 7th and 27th February 2017 by Mr Strangward, Mr Alan Clark of M&P Preservation and the Respondent were unsuccessful as the door was not answered. EnviroVent visited on 8th March 2017 and produced a short report recording 80% relative humidity during inspection, mould growth to kitchen and bathroom was photographed, and recommendation made for two extractor fans be installed to deal with this widespread problem. The report was sent to the Respondent as lessee and to his tenant, but 7 weeks later nothing had been done and the application to the Tribunal was made. It is

noted by the Applicant that severe mould can be a category one health hazard under housing health and safety rating system, and the tenant's five-year old daughter lives with him at the flat. Hence, a breach of Clause 3(1)(j) is alleged.

6. The Applicant says that it is unable to grant written permission to sublet No.98 in the circumstances, and the current tenancy agreement expired on 22nd March 2017. A draft application sent to the Respondent on 28th February 2017 has not been returned. The Applicant considers the Respondent to be in breach of the covenant of subletting without consent under clause 3(1)(f).

7. The Respondent had responded to the Applicant's communications by asserting that he had placed the matter of mould growth with builders, and it was for them to do the work necessary with specialist paint. He had not replied in respect of seeking consent to sublet as he knew it would be refused in the circumstances.

8. In respect of No.98A a visit for the Applicant on 7th February 2017 led to the discovery of mould growth in a corner of the lounge and behind a washing machine in the kitchen. Access was not gained on 27th February 2017, despite written request to the Respondent and the attendance of Mr Strangward, the Respondent and Mr Clark from M&P Preservation. The subtenant either did not answer the door or was absent. On 8th March 2017, another visit had been arranged with the Applicant and an EnviroVent representative attending. This time a key had been left in the front door, but there was no reply to the call and entry did not take place. Inspection was warranted by reason of the mould discovered in No.98, two babies living at the flat, the tenant Mr Ahmed Nuur being seen wiping away condensation from the windows (there is no bathroom window), and concern at inadequate ventilation. The Applicant considers the failure to be given access to be a breach of Clause 3(1)(l). The Respondent is also criticised for not attending in person on 8th March 2017, to which he responded at the time: "I didn't need to attend. Having attended several site meetings lately I am fully aware of the condensation problem caused by the tenants."

9. The Respondent's statements of case acknowledge the long lease in respect of each flat, and that the fixed term of the tenancy for No.98 ended on 22nd March 2017. This sublet, however, continues as a statutory periodic tenancy under Section 5(2) of the Housing Act 1988. Condensation at No.98 is noted to be reported as the result of poor air quality and lack of ventilation, but not disrepair. Latent or design defects are to blame, and works would be improvements. The cause is stated to be tenant lifestyle, and it is denied to represents a category 1 hazard. Even so, it is asserted that various steps have been taken to deal with condensation. It is denied that further consent to subletting is required for the current tenant.

10. The Respondent similar contests liability in respect of No.98A. Access has been requested from the subtenant, but has not been given. Hence a solicitors' letter dated 11th March 2017 was sent invoking the statutory right to inspect under Section 11(6) of the Landlord and Tenant Act 1985. Access was then given and anti-fungal paint applied to the affected walls. The Respondent denies responsibility for the failure to get access earlier and when requested by

the Applicant. An injunction forcing earlier access would have been disproportionate in the circumstances; especially, following access being obtained on 7th February 2017. Clause 3(l) of the Lease did not specify how quickly access was to be given in any event. Again, a category 1 hazard is denied.

11. The Tribunal arranged to inspect the flats before the hearing, but were not given access by the subtenants, neither of whom answered the door. It was not clear whether either was present, and very limited external inspection was possible.

THE ARGUMENTS AND THE TRIBUNAL'S RESOLUTION OF THEM

12. At the hearing, Mr Strangward for the Applicant enlarged on the statements of case. In respect of No.98 he explained that the visit arranged on 7th February 2017 had been informal. On 27th February 2017, the Respondent had attended for a second time, explained that he had written to the subtenants and had brought a key, but the lock had been changed. On 26th April 2017 Mr Strangward had seen that DJ Removals had attended the flats with antifungal paint, but he had not seen the paint applied. Indeed, no access had been achieved by the Applicant since 7th March 2017 (and then only to No.98). He pointed out that the state of the plasterwork was a matter for the Respondent under paragraph 3 of the sixth schedule to each lease (which details the demise includes plaster to walls). The Respondent had responsibilities for décor under Clause 3(1)(k) and responsibility for mould arose under Clause 3(1)(j), since this related to "condition" as well as repair (contrast clause 5(iii), where the Applicant was to keep the grounds "in good order and condition"). Mr Strangward contended that the evidence for the presence of mould was overwhelming. When he was asked about the installation of airbricks, he stated that he was no expert and really the tenant should open the balcony door when drying washing indoors. Mr Strangward knew the previous tenant had not had a problem; although there was a history of condensation issues at the block. He stated the building was old and that may have an impact, but 17 years of living in the block showed him that low level heat and ventilation meant no condensation. He accepted that tenants could fail to understand what was required. He noted that EnviroVent had proposed a solution, albeit not a cheap one. He was concerned, however, for the welfare of children living at the flats.

13. In respect of letting No.98 without written consent, Mr Strangward maintained that new consent was required at the expiry of the fixed term, as consent had been given for 6 months only. A new application would be refused on the basis of a category 1 hazard to health in respect of the mould. He produced a copy of the written consent given on 19th September 2016, which referred to the tenancy agreement "for six months" with copy appended, and that copy states the fixed term was from 23rd September 2016 to 22nd March 2017.

14. Turning to No.98A, Mr Strangward contended that the Applicant had been refused access when it wanted to inspect, and was entitled to pursue the application accordingly. He accepted that DJ Removals had gained access to both properties, but suggested the tenant of No.98A Mr Poitr Zak, had said the

mould was returning in the bathroom only a few days ago. The problem with opening his bathroom window, was that it opened on to a communal area next to his front door compromising security (which was confirmed at inspection), hence a fan was required.

15. The Respondent maintained his legal argument that lack of insulation and single glazing may contribute to condensation, but is no disrepair. The upgrading of the windows to uPVC was in the hands of the lessor under a planned programme. There were no structural issues, as such. Improved ventilation and insulation were not matters of repair at all and there was no duty to improve (Post Office v Aquarius Properties Ltd [1987] 1 All ER 1055). Reference to décor issues takes matters no further, as this is not the basis of the application before the Tribunal.

16. The Respondent, Mr Thomas, gave evidence that "DJ Removals" were two brothers, one dealing with redecoration and the other removals. They did various jobs for him, and had attended both flats to apply specialist paint. He considered that this discharged his obligations, which he took seriously as a parent himself and a landlord with 20 years of experience. He stated that two coats were applied to all affected areas. The complaint of a return in the bathroom at 98A was noted, but text questions to the subtenants had gone unanswered. Mr Thomas would be happy to put in a fan to the bathroom concerned. There was no need for plastering work. Generally, he accepted there could be a problem with condensation and he was not keen to retain the flats.

17. In respect of access, Mr Thomas insisted he had cooperated and some access had been achieved. He was reliant on his subtenants for this, and they had the benefit of a right of quiet enjoyment. He insisted he had tried to give access, but matters were beyond his control, and he had had to resort to a solicitors' letter to get the works done. He maintained that he had complied with the covenant to give access in a reasonable time in all the circumstances.

18. In respect of subletting, Mr Thomas maintained his argument that in law he did not require further consent. If a tenant's wife had moved in, that did not materially alter matters.

19. In reply, Mr Strangward asserted that the replacement windows would make little difference to condensation, and ventilation was the key. The new windows had open settings, but no trickle vents. He repeated his position that "condition" extended to mould and that décor was a matter for the Respondent. Finally, he observed that no correspondence between the Respondent and his subtenants had been disclosed, and no requests for access at specific dates and times. The tenancy agreements of the subtenants had similar rights in them to the leases, and meant there was a right of entry on reasonable notice. Too long a period was allowed to elapse and so there was a breach. He was worried that the work would not be done and passing matters to a builder was no sufficient answer.

20. Mr Thomas interjected during the reply that, since the subtenants did not respond to letters at all, he had not produced them. After conclusion of the

hearing, and at the request of the Tribunal, the letter sent to Mr Nur at No.98A was produced, dated 11th March 2017 threatening an injunction if access was not given. An invoice totalling £273.95 for materials, including "Glixtone Fungi-Shield Paint" and "Glixstone Sterilising Solution" was also produced dated 6th April 2017, and a manuscript invoice for £375 for labour for painting "condensation affected areas of both flats" from DJ Property Repairs dated 18th April 2017.

21. By email, Mr Strangward commented that the solicitors letter was dated 3 days after the visit by EnviroVent, and the invoice for painting does not mention treatment for black spot mould. He repeated that the subtenant of No.98A complained that mould was re-emerging in the bathroom. Hence there was continued refusal to consent to subletting that flat.

22. The Tribunal considered all the materials placed before it and rejects the Applicant's applications.

23. In respect of mould growth at both flats, but pursued before the Tribunal only in respect of No.98, this was not a disrepair within the meaning of Clause 3(1)(j). There is simply no evidence that the plaster is not "in good and tenantable repair and condition", and surface mould growth does not render it so. Furthermore, the balance of the evidence is clearly in favour of the condensation being caused by the tenants' lifestyle and no evidence was introduced to suggest any physical disrepair to the walls. Adequate heating and ventilation can be achieved in the flats as they are now, and as demonstrated by the mould being a recent development. Whereas installation of fans (by the Respondent) and airbricks (by the lessor) would be appropriate, these are not matters of repair but improvement. Whilst the Tribunal would urge the Respondent to make such improvements, he cannot be found to be in breach of covenant by not doing so. Further, whereas there is inconclusive evidence that mould may have returned to the bathroom of No.98 (but not evidence of a quality sufficient to discharge the burden of proof, namely the balance of probabilities, given it is hearsay of a vague remark), the Tribunal finds that the Respondent has treated the mould with specialist products and paints. In these circumstances, the Tribunal does not find there is or was a breach of covenant or condition in the respective leases.

24. In respect of the allegation of subletting without consent in writing, the Applicant's case is misconceived. The tenancy agreement is a conventional Assured Shorthold Tenancy ("AST") with a fixed term of 6 months, but then followed by a statutory periodic tenancy until the agreement is brought to an end. That both the fixed term and the periodic tenancy arise under the same agreement is made plain in the terms of Clause 6 of the AST, which deals with termination, and sets out the differing rules between the fixed term and the periodic term. No new permission is required at the end of the fixed term, as the sublet is a continuing one and consent was given to the specific agreement, which was attached to the form of consent. The consent states that the "tenancy agreement is for six months", but that phrasing is inadequate to demonstrate an intention that the continuation of the same tenancy would require a further permission at the end of the six-month period. The phrasing clearly relates to the fixed term, but the agreement then becomes periodic and,

absent clear words to the contrary, the permission continues during that periodic tenancy. There is no express power under the lease to withdraw consent once given, nor has the Applicant contended that one is implied, and the Respondent is not in breach accordingly.

25. In respect of No.98A, the alleged breach relates to the failure to permit the Applicant entry into the flat for the purposes of examining its state and condition. The Tribunal notes that access was obtained on 7th February 2017, but was not actively given by the subtenant, Mr Nuur, on 27th February 2017 and on 8th March 2017. On the latter occasion, it seems that Mr Nuur left a key in the door to facilitate access, but perhaps understandably the Applicant in the person of Mr Strangward did not avail himself of this opportunity. When threatened with proceedings for an injunction, Mr Nuur did allow access to workmen of the Respondent to deal with the mould that had been detected earlier, and so probably would have allowed access to the Applicant if again requested. The Tribunal considers that the fault in failing to give access on 27th February 2017 was not that of the Respondent, who was himself inconvenienced by his subtenant when he then attended and later. In the context of a key being left on the next occasion access was sought, 8th March 2017, and the sub-tenant giving full access to the workmen when in receipt of a solicitors' letter, the Tribunal finds that the inconvenience of failure to gain access on 27th February 2017 is, in context, so trivial as not to warrant a finding that a breach of covenant or condition has arisen. Access was impliedly offered by the subtenant on 8th March 2017 and not taken up. Again, this appears insufficient to justify a finding that a breach of covenant or condition has arisen. The Tribunal bears in mind that the purpose of Section 168(4) as set out above is to facilitate the issue of a Section 146 Notice under Section 168(1), but there is no point in the issue of such a notice in these circumstances. Matters may have been different, if further demands for justified access had been made and access not given.

Judge Dr Anthony Verduyn

Dated 26th June 2017