FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AC/LSC/2018/0182 and LON/00AC/LBC/2018/0035**
Property	**:**	**Ground Floor Flat, 21 Hoop Lane, London NW11 8JN**
Applicant	**:**	**L.A.G. ESTATES LIMITED**
Representative	**:**	**Mr G Mallet, Counsel**
Respondents	**:**	**Mohammed Ameer KHASRU**
Representatives	**:**	**Mr Talbot-Ponsonpy, Counsel**
Type of application	**:**	**Section 168 Commonhold and Leasehold Reform Act 2002 - breach of covenant and Section 27A Landlord and Tenant Act 1985 – reasonableness of service charges**
Tribunal members	**:**	**Judge T Cowen Mr T Sennett**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of hearing	**:**	**5 November 2018**

DECISION

© CROWN COPYRIGHT 2018

Decision of the tribunal

(1) The Tribunal determines that the following breaches have occurred:

a. In breach of paragraph 17.3 of Part A of the Eighth Schedule, the Respondent sublet the Property in January, July and October 2017 without the prior written consent of the Applicant.

b. In breach of paragraph 17.6 of Part A of the Eighth Schedule, the Respondent failed to insert into the said subletting agreements a direct covenant by the subtenant to the Applicant to observe and perform the contents of the Eighth Schedule.

c. In breach of paragraph 18 of Part A of the Eighth Schedule the Respondent failed to give notice in writing to the Applicant of each of the said sublettings and of their particulars and a copy of the tenancy agreement within one month of the date of each of the respective sublettings.

d. In breach of paragraph 4 of Part A of the Eighth Schedule to the Lease the Respondent in early 2017 made a breach in the structure of the Building without the previous consent in writing of the Applicant, made an opening therein and opened up a wall for the purposes of altering wires.

e. In breach of paragraph 2 of Part B of the Eighth Schedule to the Lease, the Respondent caused a nuisance by installing wires in the common parts of the Building and thereby encroaching into the Applicant's retained property.

(2) The Tribunal determines that the sum of £2,666.67 for the service charge year 2017, which sum is the subject of the Applicant's application, is not payable by the Respondent.

(3) The Tribunal orders under section 20C of the Landlord and Tenant Act 1985 that 25% of the costs of these 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 Respondent.

(4) The reasons for the orders made above are set out in the remainder of this decision.

The Background to the Applications

1. The Property is a one-bedroom flat on the ground floor of 21 Hoop Lane, London NW11 ("the Building") which contains a total of three flats. The Applicant is the freehold proprietor of the Building and has been since November 2014. The Respondent is the registered leasehold

proprietor of the Property under a peppercorn lease ("the Lease") with the following particulars:

Date of lease:	19 November 2004
Original landlord:	Sarid Dahar
Original tenants:	Ms Ismat Zarrin Keable and the Respondent
Term:	999 years from the date of the lease

2. The Applicant freehold company is owned and controlled by Joseph and Richard Dangoor, who is as an individual the leaseholder of the other two flats in the Building.

3. There are two substantive applications by the freeholder:

    a. An application under section 168 of the Commonhold and Leasehold Reform Act 2002 for a determination that breaches of covenant have occurred; and

    b. An application for a determination whether £2,666.67 of service charges for the year 2017 are payable under section 27A of the Landlord and Tenant Act 1985.

4. There is also the usual costs application by the leaseholder under section 20C of the 1985 Act which is dealt with at the end of this decision.

5. The s27A application is closely related to the s168 application because one of the breaches of covenant alleged is failure to pay service charges and the service charges in question are those which are the subject of the s27A application.

6. We were ably assisted by the submissions of counsel on both sides for which we are most grateful.

7. The service charges in issue were demanded on 13 March 2018 pursuant to a section 20 notice dated 13 May 2015 and related to work done by the freeholder in 2017 on the area in front of the Building. The works comprised of digging out and lowering the level of the front area and laying paving blocks for the purposes of converting the front garden into a car parking area. The works also involved creating new steps leading from the newly created car parking area up to the front door of the Building.

8. The Respondent leaseholder challenged the service charges on the grounds that (a) the work did not fall within the definition of maintenance expenses which are recoverable under the Lease and (b)

the Applicant freeholder had not properly complied with the procedure under section 20 of the 1985 Act.

9. The other breaches of covenant alleged are unlawful alienation of the Property and unlawful alterations and disrepair.

10. There are therefore 3 substantive issues for the Tribunal to consider:

    a. Whether the conversion of the front area from a garden into a car parking area constituted works which are within the definition of maintenance expenses in Schedule 6 to the Lease such that they are recoverable as service charges for the year 2017.

    b. Whether the Respondent unlawfully sublet the Property.

    c. Whether the Respondent carried out unlawful alterations to the Property or carried out unlawful works in the common parts or has failed to comply with the covenant to repair.

11. Each of these issues will be considered separately as follows.

<u>The Evidence</u>

12. The Tribunal heard evidence from Richard Dangoor and Joseph Dangoor on behalf of the Applicant and from the Respondent himself.

<u>The section 27A application: Garden to car-parking conversion works</u>

13. This issue does not involve any significant factual dispute. It is common ground that works ("the External Works") were done to dig out the former front garden to a level close to the surface of the road and to lay paving for the purposes of creating access and spaces for car parking. It is also common ground that the spaces which were created were not made available for use by the Respondent leaseholder or his visitors. There is no dispute about the quantum of costs of the works.

14. Therefore the primary dispute on this issue concerns the correct interpretation of the lease. The only question is whether the cost of the works is recoverable at all as service charges under the lease. The Lease contains a covenant by the Respondent to pay "the Lessee's Proportion", which is defined by clause 1.11 and Schedule 7 to mean 33.3% of the "Maintenance Expenses". The "Maintenance Expenses" are defined by clause 1.10 as "monies actually expended…in carrying out the obligations specified in the Sixth Schedule hereto". The issue for

the Tribunal to resolve is there as follows: Are the External Works included within any of the obligations specified in the Sixth Schedule?

15. The relevant part of the area in front of the Building is included within the Lease's definition in clause 1.7 of "the Accessways" which includes "the accessways driveways footpaths and access areas forming part of the Development[1] (including all installations and constructions ancillary thereto drainage installations kerbs and verges)". "The Accessways" are also included within the definition of "the Maintained Property" by clause 1.9 and the Second Schedule.

16. The relevant landlord's obligations in the Sixth Schedule to the Lease are therefore as follows:

> "2. Keeping the Accessways in good repair and clean and tidy and renewed reinstated and resurfaced.
>
> 4. Maintaining repairing rebuilding repointing resurfacing redecorating or otherwise treating as necessary and keeping the Maintained Property and every part thereof in good and substantial repair order and condition and replacing all works and damaged parts thereof."

17. The Applicant landlord's explanation for why the works were carried out is as follows. The front garden was originally raised above pavement level. The refuse wheelie bins used by the occupiers of the Building were kept at garden level, but needed to be taken down some steps to pavement level for collection. This was particularly difficult for Ms Keable, an elderly lady who was (until her death) the Respondent's co-leaseholder. The Applicant's claim is that Ms Keable asked the Applicant to do these works. According to the Applicant, this explains the lowering of the level of the front garden to pavement level, which necessitated the creation of additional steps from the front door down to the new lower front area level. The explanation for the change from a lawned garden to a paved car parking area was that the grass was difficult to maintain and slippery to walk on. It is argued by the Applicant that the front area was in disrepair because the accessways were "dangerous".

18. Mr Richard Dangoor claimed in oral evidence that this meant that "the grass was in need of repair". He also gave evidence that the steps (leading down from the original lawn to the kerbside) were cracked, although this was denied by the Respondent. Mr Richard Dangoor further stated in oral evidence that once the level of the front had been dropped, the difference in cost between installing hardstanding and planting/turfing grass was very small.

---

[1] "Development" is not apparently defined by the Lease, but presumably is intended to refer to the Applicant's freehold land on which the Building is situated.

19. The conversion to car-parking also required dropping the kerb outside the Property. The £3,698 cost of those works were paid by the Applicant and were not passed on through the service charges because, according to Mr Richard Dangoor, "I considered this to be an improvement"[2].

20. The questions for the Tribunal are (a) whether the external area in front of the Building was out of repair and if so, (b) whether the External Works were works to remedy any such disrepair. In our judgment, there was nothing which could be said to have been in disrepair other than the disputed cracked steps. The fact that grassed lawns are more slippery when wet than a hardstanding car-park area is not a question of repair. It is a choice of design. The same point can be made of the difference in level between the area where the wheelie bins were stored and the area where they need to be left for refuse collection. A difference in level which makes certain tasks more difficult is not a deterioration in the condition of the property. The works to lower the level of the front area and to lay hardstanding on the surface were not works of repair. If they have made the area safer, then that is an improvement, but it is not a repair required by the lease for which reimbursement can be sought under the service charges. If the steps were cracked, then works of repair would have been works to repair the steps. Instead, the steps have been demolished and replaced with a completely redesigned front area. Those are also not repair. Our answers to the questions are therefore: (a) the front area was not in disrepair and (b) even if there was any minor disrepair to the steps, the works carried out were not works to remedy that disrepair.

21. The Applicant's counsel relied in addition on the word "renew" in the relevant repair covenants for the accessways and maintained property. In our judgment, that does not assist the Applicant's section 27A application. The word "renew" in context means that the landlord's obligation to repair sometimes involves renewing or replacing something (like a roof) rather than simply repairing the existing item. This does not take away from the fact that there has to be some deterioration of condition first. The word "renew" in the covenant does not give the landlord the freedom to replace, renew and redesign aspects of the development when there is no disrepair of the area in question.

22. In the circumstances, we have decided that the service charges which are the subject of the section 27A application are not payable by the Respondent at all.

[2] Para 10 of his 1st witness statement

Section 20 issues

23. A section 20 notice of intention was sent to the tenants on 13 May 2015. A statement of estimates was sent on 10 August 2015, the cheaper of two quotes was chosen and the tenants were informed by letter dated 27 April 2017 that the works would be commencing soon. The works were carried out in May-June 2017. No responses to the notices were received from the leaseholders.

24. The delay between August 2015 and May 2017 was explained by the fact that the Respondent's co-leaseholder, Ms Keable, died in the meantime and that there were complications and uncertainties involving probate and title. Mr Richard Dangoor, for the Applicant, said that the Applicant was requested by Ms Keable's executors to delay the works until the probate and title issues were sorted out.

25. In the light of our decision on the interpretation issue, it is not necessary to decide the issues raised under section 20 of the 1985 Act for the following reason. If, as we have decided, the disputed sum of £2,666.67 does not fall within the definition of service charges at all, then the entire section 20 procedure does not apply.

26. Nevertheless, since we have heard the evidence on this matter and in case this matter is taken further, we express our view that the section 20 procedure was followed correctly and that there was a good reason for the delay which was requested by the personal representatives of the Respondent's co-tenant and which did not prejudice the Respondent in any way.

Section 168 application: Unlawful subletting

27. The Eighth Schedule of the Lease contains various covenants relevant to the issue of subletting as follows:

    a. An absolute covenant against subletting or otherwise alienating part only of the Property (Part A paras 17.1 and 17.3)

    b. A covenant against subletting the whole of the Property without the prior written consent of the landlord (Part A para 17.3)

    c. A requirement to insert into any subletting agreement a direct covenant by the subtenant to the landlord to observe and perform the contents of the Eighth Schedule (Part A para 17.6).

    d. A requirement to give notice in writing to the landlord of any subletting and of its particulars and a copy of the tenancy

agreement within one month of the date of the subletting, together with payment of a fee. (Part A para 18)

e. A covenant against use of the Property "for any purpose whatsoever other than as a private residence for occupation by a single family" and a covenant against business use (Part B para 1)

28. The Respondent in his Statement of Case admitted and averred that the whole of the Property was sublet to MJR Casas Services Ltd and that a copy of the tenancy agreement was sent to the Applicant in February 2017, one month and two days after the date of commencement of the subletting. The Respondent also admitted that he did not seek the Applicant's consent in advance of the subletting.

29. It seems clear to the Tribunal after hearing all the evidence that the company to which the property was sublet was a company which sub-underlet the Property (or rooms in the Property) to individuals. It is also clear that the subletting continued in some form both (a) after the company was dissolved in October 2017 and (b) after the January 2017 tenancy expired in July 2017. We know this because the Respondent's evidence was that he continued to receive rent until a few weeks before the hearing. He also gave evidence that he did not actively renew the subtenancy nor did he grant a new subtenancy to anyone else. It seems that one of the occupiers, Mr Juliano, managed the occupation of the Property on some unknown basis and paid rent to the Respondent. For the purposes of this application, it is enough that we made a finding that there was a breach of the covenant against subletting without consent. It is not necessary for us to analyse the complex proprietary relationships which may have arisen as a result of the continuation of a letting to a dissolved company.

30. The Applicant invited us to find that a subtenancy by operation of law (such as by the acceptance of rent from a third party following the expiry/dissolution) was a technical breach of the covenant against subletting without prior consent. It is not correct to say as a matter of law that the acceptance of rent after the expiry of tenancy gives rise to a new tenancy "by operation of law". It is instead a question of whether a new agreement can be implied from the circumstances. The Respondent admits to having received rent after the date of the expiry of the subtenancy agreement in July 2017, which leads to the inescapable conclusion that he and the company MJR Casas Services Limited must have intended and created a new subtenancy. It is likely, on the balance of probabilities, that a new subtenancy was also created in October 2017 when the Respondent started receiving rent from another third party (probably Mr Juliano) after the dissolution of that company.

31. The Applicant's claim also relates to the use of the Property by subtenants. The Applicant claims that the Property has been let to

multiple occupiers in breach of HMO regulations and in breach of the user covenant at Part B para 1 of the 8th Schedule to the Lease (cited above). The Applicant's evidence includes complaints from other occupiers about the large quantity of refuse in the bins, information given by other occupiers (some of which was contained in witness statements) and signs (of which we have seen photographs) left in the common parts of the Building from a manager called Juliano addressed "to all tenants". Juliano is not the Applicant's manager and the inference we were invited to draw was that Juliano was therefore addressing his notice to multiple tenants of the Property.

32. The Applicant's evidence for multiple occupation included a witness statement from a Mr Fagner Almeida who claims to be a Mr Fernando who is mentioned and pictured in one of the signs. His statement says that he acted for the company to whom the Property was let and that he let the Property to "up to 6 individuals at a time". Mr Almeida did not attend the Tribunal to give evidence. His evidence was challenged by the Respondent, was highly controversial and begged a large number of questions. A large number of particulars were missing from his statement. In our judgment, we cannot safely rely on the truth of any of the contents of his statement without hearing him cross examined, nor would it be just for the Tribunal to do so.

33. The evidence seems to show that parts of the Property may have been let to separate individuals. However, we have no evidence of any particular such letting so as to be able to make a determination of a specific breach. More importantly, we have no evidence that any such subletting was done by the Respondent himself (or any agent of his on his behalf). If the Respondent had done so (with or without an agent) then it would have been a breach of the absolute covenant against subletting part and also a breach of the user covenant. However, it seems that any such multiple occupation was caused by the company to whom the Respondent sublet the Property and not by the Respondent himself. After the expiry/dissolution, the multiple occupation was arranged by Mr Juliano or others acting as autonomous subtenants of the Respondent and not as the Respondent's agents. It follows that the Respondent cannot be said to have breached the covenant against subletting part or the user covenant.

34. We have seen a copy of the subtenancy agreement dated 22 January 2017. It is clear from that document that the subtenancy agreement failed to comply with the requirement that it should contain similar covenants to those in the headlease, in breach of para 17 of the Eighth Schedule.

35. The Applicant claimed that the nature of the subletting was also in breach of the covenant against vitiating the Applicant's building insurance policy. The Applicant was however unable to specify any

particular feature of the insurance policy terms and conditions which would have supported this claim.

36. The Respondent's defence is that the subletting breach has been waived or that the Applicant is estopped from pursuing it. In support of that defence, he claimed that he had met with Joseph Dangoor of the Applicant company on site on 6 April 2017 on which occasion Mr Dangoor tacitly accepted the Respondent's apology for failing to seek consent before subletting. The Respondent's evidence in paragraph 16 of his witness statement was that "Mr Dangoor seemed happy with the situation" and on the basis of that, the Respondent claims that the alleged breach was waived and that the Applicant is estopped from claiming that there was a breach of covenant. The issue of waiver is considered in detail in a separate section below.

37. Allegations were made by the Applicant about the conduct of and alleged illegal activity by the subtenants, but these were not the subject of any breach alleged in the section 168 application form. Those allegations therefore form no part of our deliberations.

Section 168 application: Unlawful alterations and disrepair

38. Paragraph 4 of Part A of the Eighth Schedule to the Lease contains a covenant relating to alterations as follows:

> "Not to cut maim or injure nor to make any breach in any part of the structure of the Building nor without the previous consent in writing of the lessor or its agents to make any alteration whatsoever to the plan design or elevation of the Demised Premises nor to make any openings therein nor to open up any floors walls or ceilings for the purposes of altering or renewing any pipes wires ducts or conduits nor to alter any of the Lessor's fixtures or appliances therein and not in any case to commit any waste or spoil on or about the Demised Premises."

39. The Lease also contains the usual tenant's internal repair covenant. The Applicant alleges that the Respondent has failed to keep the Property in repair in breach of that covenant. The specific disrepair alleged is that the rewiring works are "dangerous".

40. The Applicant asserted that the layout of the property has been reconfigured to add at least one bedroom. The Applicant has not inspected nor even seen any photographs of the interior of the Property but claims that change of layout must be inferred from its other allegation (see above) that the Property has housed up to 6 individual subtenants and that this could not be done without adding a bedroom. The Applicant's additional source for this assertion is the witness

statement of Mr Almeida (mentioned above) which says: "The Property was altered to accommodate up to 6 tenants at any one time". We have already given our decision about the lack of weight and particularity of Mr Almeida's statement and our assessment applies here with as much force.

41. The Respondent denies having made any alterations to the layout of the property since he gained access to the Property in about 2016. He claimed that even though he was a leaseholder jointly with Ismat Keable prior to 2016, she was the only one with access to the Property until her death and the Respondent acted only as a trustee without any day to day involvement on site. He admits to having carries out works of repair and redecoration after October 2016 following Ms Keable's death, but denies that these works involved any unlawful alterations. The Respondent confirmed in oral evidence that if the Tribunal were to inspect the Property, we would find that the layout had not been altered. We believe the Respondent and decided that there was no need for us to inspect, because the Respondent was unlikely to have lied in those circumstances (verification being easy) and because the Applicant could not offer any evidence of actual alterations. The Applicant's claim in this respect was essentially a fishing exercise based on no more than supposition.

42. The Respondent does however admit to having made changes to the electrical wiring in the Property part of which involved making a hole in the wall between the Property and the common parts of the Building in order to run a cable between the two. The Respondent explained in evidence why he felt he had to route the cable this way. He also claims that the hole in the wall is de minimis and is therefore not a breach of covenant.

43. In our judgment, this constitutes a breach of the covenant against alterations without prior consent. The Respondent made a hole in the wall large enough to pass a cable through. It also constituted a breach of the covenant against nuisance by way of trespass on the Applicant's common parts. It was not de minimis so as not to have been a breach at all. It was a hole passing all the way through the hole wide enough for a cable. It is a matter for the county court how serious a breach it is and what the consequences (if any) should be. Our jurisdiction concerns only determining that it was a breach of covenant.

44. We have however seen no evidence that the wiring works constitute disrepair.

45. As mentioned above in connection with the subletting issue, the Respondent claimed that Mr Joseph Dangoor visited the site on 6 April 2017, saw the works which had been carried out in the Property and expressly approved them, save for requesting that a covering strip be placed over a cable near the ceiling, which the Respondent did. Mr

Joseph Dangoor's evidence was that he did meet the Respondent at the Property in April 2017, but that they met on the front area of the Building and did not enter the Property. We now turn to the issue of waiver which this (and the Respondent's defence to the subletting issue) raises.

Waiver

46. In order to consider the Respondent's defence of waiver in relation to the alleged breaches involving subletting and alterations, it is necessary to be clear about the different types of waiver which may be relevant here:

    a. Waiver of the right to forfeit the lease for a particular breach is an election made by the landlord when it communicates to the tenant that the lease is continuing notwithstanding the landlord's knowledge of the breach. That form of waiver is alleged here by the Respondent, but it is not relevant for this application. The Tribunal's jurisdiction under section 168 of the 2002 Act is only to determine whether there has been a breach of covenant, **not** to determine whether there is a subsisting right to forfeit for any such breach. IN the circumstances, the Tribunal has no jurisdiction to consider whether the right to forfeit has been waived and we therefore make no finding on that allegation.

    b. Waiver of the breach in respect of remedies at law (such as a claim for damages) occurs when the tenant gives consideration for the waiver or if the breach is waived by deed. Waiver of the breach in respect of equitable remedies (such as injunctive relief) occurs when the conduct of the landlord disentitles him from relief, such as by acquiescence or delay. As with the last category, this form of waiver is particular to the remedy sought by the landlord. As stated above, the Tribunal's jurisdiction is only to determine whether a breach has occurred, not to determine whether the landlord is entitled to any particular remedy.

    c. Waiver of the entire covenant occurs when the conduct or omissions of the landlord have put him in such an altered relation to the tenant as, makes it manifestly unjust for the court to grant him the relief he asks for[3]. This is akin to the modern law of estoppel, whereby it would be unconscionable the circumstances for the landlord to enforce the covenant. This form of waiver is relevant to consider for this application, in our judgment, because if the entire covenant had been waived before the date of the alleged breach, then there would not have been a breach at all.

[3] *Sayers v Collyer* (1884) 28 ChD 103, 106 per Baggalley LJ

47. Having considered all the evidence, we do not think that the test for waiver of any of the relevant covenants has been satisfied. The highest the case is put by the Respondent is that the landlord saw the evidence of the breach in April 2017 and did not immediately complain. In respect of the unlawful alterations, the landlord denies having done so. In respect of the unlawful subletting, the landlord's solicitors wrote a letter objecting to the breach on 28 April 2017. There is no evidence that the tenant has changed his position or done anything to his detriment in reliance on the alleged consent. In our judgment, there is no evidence of waiver which would prevent us from reaching the conclusion that there have been breaches of covenant against subletting and alteration without consent.

48. The waiver point was put slightly differently by the Respondent's counsel in his closing submissions. He said that the need to comply with the requirement for prior written consent (for subletting and alterations) was waived by the subsequent oral consent which ratified the subletting and the wiring works retrospectively. We are not aware of any authority in support of this idea of ratifying a breach and the Respondent's counsel did not cite any. The only recognisable legal doctrine which relates to this idea is that of estoppel which we have discussed above. It seems that this therefore does not take the matter any further.

Costs

49. In the circumstances, the Respondent should be prevented from including its costs of the section 27A application in future service charge bills, if permitted by the Lease. Since all the applications wee prepares and heard together, it would not be possible to separate out the costs of each element. We have therefore decided to make an order under section 20C of the 1985 Act that 25% of the costs of these 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 Respondent.

Conclusion

50. For all the above reasons, the Tribunal made the order set out above.

Name: Judge T Cowen **Date:** 16 January 2019

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).