



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **LON/00AW/LBC/2019/0019**

Property : **Flat 1, 15 Westgate Terrace London
SW10 9BT**

Applicant : **15 Westgate Terrace Ltd
(Landlord)**

Representative : **Mr R Bowker of Counsel**

Respondent : **Ms F Marchitelli (Tenant)**

Representative : **Mr A Hickey QC**

Type of Application : **Breach of covenant**

Tribunal Members : **Judge F J Silverman Dip Fr LLM
Mr S Mason BSc FRICS FCI Arb**

**Date and venue of
Hearing** : **10 Alfred Place, London WC1E 7LR
02 October 2019**

Date of Decision : **07 October 2019**

DECISION

Decision of the Tribunal

The Tribunal determines that the Respondent Tenant is in breach of covenant in relation to Clause 3 sub-clause (7)(b) and Regulations 1-3 and 12 of Schedule 4 of the lease.

Reasons

1. The Applicant landlord sought a determination from the Tribunal that the Respondent tenant was and remains in breach of covenants of her lease. Directions were issued by the Tribunal on 15 and 26 March 2019.
2. The matter was heard by a Tribunal sitting in London on 9 May and 02 October 2019 at which the Applicant was represented by Mr R Bowker of Counsel and the Respondent by Mr A Hickey QC. Page references below refer to pages in the Applicant's hearing bundle except those marked by an 'R' which refer to the Respondent's bundle.
3. The Applicant landlord is the freeholder of the building known as 15 Westgate Terrace London SW10 9BT (the building) of which the Flat 1 (the property) occupies the 3rd floor. The building contains five flats in total and unusually numbers the units from the top downwards so that Flat 4 is situated on the ground floor and Flat 6 (there is no flat numbered 5) occupies the basement.
4. The Respondent is the tenant of the property.
5. The lease under which the Respondent holds the property is dated 2 May 1975 (the lease) (page 30) as extended by a lease dated 16 April 2008 (page 24). The extended lease encompasses the covenants set out in the earlier lease.
6. The Tribunal was not invited to inspect the property and did not do so considering that an inspection was not needed in order properly to understand the issues in the case and that to do so would not be proportionate.
7. The Applicant made five substantive allegations of breach of covenant against the Respondent which are dealt with in turn below. The Respondent did not dispute the wording of the relevant clauses in her lease nor, in essence, the factual situations on which the Applicant relies. For that reason, it has not been considered necessary in this document to set out the full wording of each of the lease covenants in the 1975 lease. The relevant number of the lease clauses is referred to in the context of the discussion below of each of the breaches.

8. At the resumed hearing the Applicant confirmed that they were not pursuing allegations that the Respondent had failed to pay service charges nor that she had wrongfully refused the landlord to inspect the property. The three remaining allegations are discussed below.
9. The first allegation made by the Applicant was that the Respondent is in breach of Clause 3(7)(b) and Regulations 1-3 of the Fourth Schedule to the lease in that she had allowed the property to be used other than as a 'private residential flat in the occupation of one family their guests and staff only', had permitted the property to be used for business purposes and had suffered the property to be used for an illegal or immoral act which had become a nuisance or annoyance to the landlord and other occupiers of the building.
10. The Applicant asserted that during the period between October 2017 and October/November 2018 the property had been let to a tenant who used it for the purposes of a brothel.
11. The Tribunal heard evidence from Mr Hugelshofer (Flat 3), and Mr Foley (Flat 4). Mr Hugelshofer told the Tribunal that in about October 2017 he became aware of noise on the staircase passing his flat, usually between midnight and 04.00 am. That situation worsened during November and December of that year. He reported having seen male visitors to the flat during the early morning. The visitors did not have keys and needed to be let into the building. He became aware that the property (Flat 1) was being occupied by Natalie Ferraz who he described as a transvestite, saying that post was being delivered to a person of that name at that address (see page 75). On 16 December 2017 he had knocked on the door of the property which had been opened to him by someone who he believed to be Natalie Ferraz who had been dismissive when Mr Hugelshofer asked for the noise to be stopped. Mr Hugelshofer said that the lighting in the flat suggested it was being used as a brothel.
12. An internet search had produced advertisements which seemed to confirm Mr Hugelshofer's view (pages 56-8 and 76-80). He had also spoken to the tenants of the ground floor flat (Flat 4) who had said that they were regularly disturbed at night by visitors seeking entry to Flat 1 who knocked on their door mistakenly assuming the ground floor flat to be number 1. Both Mr Hugelshofer and Mr Foley (the owner of Flat 4) had contacted the Respondent and complained about the situation including noise and the use of illegal drugs at the property and asked her to remedy the situation and require the tenant of the property, a Mr Vito di Bari to vacate. Although Natalie Ferraz left the property in January 2018 Mr Hugelshofer said that he texted the Respondent on 29 April to tell her that the prostitutes had returned.
13. Another new tenant took up occupation of the property in May 2018 and in both May and June of that year Mr Hugelshofer complained to the Respondent about having suffered eight months 'of brothels and

drugs in the property'. By October of that year the problem had still not been resolved and Mr Foley, the tenant of Flat 4 was experiencing difficulty in letting his flat because the letting agents had withdrawn it from the market 'as a result of the illegal activity taking place in the top floor flat. The previous tenants were continuously disturbed ... as visitors would come and go throughout the night and often ringing their door bell' (page 127).

14. Mr Foley's witness statement (page 69) records a history of complaints to him from the tenants of his flat which are contemporaneous with and corroborate those cited by Mr Hugelshofer.
15. For her part, the Respondent stated that for a large part of the period under discussion she had been seriously ill and unable to deal with her affairs. She maintained that, on the recommendation of a friend, she had appointed Mr Flavio Torino to manage the property for her and that a Mr Vito de Bari was the tenant. She stated that during the summer of 2017 the flat had been occupied by her cousin's boyfriend while he was studying in London who had a fellow student (who she was unable to name) staying with him. Her memory of the dates of his/their occupation appeared to be vague and she gave no precise details of subsequent occupiers other than saying that she had left the matter to Mr Torino who she described as a professional agent.
16. She maintained in cross-examination that she had visited the flat on several occasions during this period but had seen no evidence of prostitution. She had let herself in with her own key and had not seen anything which suggested that the flat was being used for immoral purposes. Her recollection of the dates of her inspection(s) was unclear, as was her description of the interior of the flat. She said she would have had to text or give notice before entering but did not say that she had done so on any occasion. She thought she might have seen bank statements that identified the tenant and might have taken as photograph but produced no further details. She said that she had visited every two or three months between her hospital treatments, some visits were unannounced, others would have been notified to Mr Torino. They would have been at various times of day but not in the early morning.
17. The Respondent challenged the accuracy of Mr Foley's record of telephone conversation between them (page 89) on 23 October 2017 but had not kept a note of the call herself. Mr Foley's note states that the Respondent had told him that her cousin had allowed a Spanish student to live in the Flat and that she was embarrassed to learn that a prostitute was in the building. According to the note she had acknowledged that if the flat was not back in her control soon she would need to instruct solicitors to take other action. She had therefore been aware of the situation and the complaints relating to it since the end of October 2017.

18. The Respondent maintained that she had been shocked to learn of the suggestion that her flat was being used for prostitution and had done all she could to resolve the situation. Apart from contacting Mr Torino it appears however, that she had taken few active steps to resolve the situation or to rid the property of its difficult sub-tenant.
19. Although there is no direct evidence before the Tribunal of any act of flagrante delicto, the circumstantial evidence that the property was being used as a brothel or for business purposes or an immoral purpose is considerable and comprises:
- evidence of numerous male visitors during the night;
 - complaints of noise and nuisance from other occupiers;
 - the identification of the occupier as Natalie Ferraz;
 - a parcel being addressed to Natalie Ferraz at Flat 1;
 - internet advertisements for Natalie Ferraz, a transvestite, offering services of a sexual nature to men.
20. From the above the Tribunal considers that it is entitled to conclude that immoral activities in breach of Clause 2(7)(b) and Regulations 1-3 of the Fourth Schedule of the lease were being carried on in Flat 1. The fact that no criminal proceedings have been instituted is irrelevant.
21. It is common ground that the previous occupier of Flat 1 has now vacated and that the property is now being managed and let by experienced agents. That is, the problem complained of has now ceased. However, that does not prevent the Tribunal from finding that the breach of a covenant has occurred and making a determination to that effect. Arguments relating to waiver are not relevant to the present jurisdiction.
22. The second alleged breach by the Respondent relates to a water leak in September 2018 said to be emanating from her flat which had caused damage to other flats and the common parts of the building. The Tribunal heard evidence from Mr True who had been instructed by the Applicant to inspect the property to identify the source of the leak. Mr True gave evidence as an expert witness, his report contained an expert's statement in compliance with the RICS code. He had inspected the property and had carried out a water test through which he diagnosed a fault in the tiled recess area at the head of the bath. He had also seen Mr Skierkowski's email dated 24 April 2019 which suggested that there was a faulty waste pipe running between the flats in the building and although he did not rule out the possible existence of a second cause of the leak from a communal source (ie the landlord's

responsibility) he maintained that faulty tiling within the property was a primary cause of the leak. Mr Rossi, for the Respondent (page R44) who had visited the premises in 2018 had not carried out a water test but had found a partly blocked communal soil pipe which he had unblocked and the connection into the soil pipe had been poorly made. In her defence the Respondent said that she engaged a plumber each year between tenants to inspect and replace silicon in the bathroom and kitchen but gave no details as to when this was last done. The Tribunal finds the Respondent's evidence about replacement of the silicon not credible. This would be a very unusual precautionary step for a landlord to take and not one which would be expected or necessary in a situation, where, as here, managing agents were engaged to look after the property. On balance the Tribunal prefers the evidence given by Mr True and finds that there was a leak emanating from the property which caused damage to the building and constituted a breach of the Respondent's repairing obligations under the lease.

23. The Applicant's third allegation concerned a breach by the Respondent of the requirement to keep the floors of her flat covered by carpet. She acknowledges that the floors of the property are covered with wood laminate and maintains that they were in this state when she purchased the flat. She agreed that the living flooring had recently been replaced with new noise insulated laminate but said that she did not need to ask the Applicant for their consent to this alteration because she was merely replacing like with like. She also asserted that other flats in the building also had wood laminate floors. This breach is clearly admitted by the Respondent. The fact that other flats in the building may also have laminate flooring is not relevant to this case and arguments about waiver are only relevant to enforcement and not to the fact of the breach.
24. The Tribunal understands that the Respondent is a lawyer and but was no longer on the Roll as an English solicitor. It therefore considers that she would understand the seriousness of the assertions being made by the Applicant and the need to give accurate substantiated evidence. Even giving considerable leeway for the fact that during part of the period under discussion the Respondent had been undergoing medical treatment (of which no evidence was supplied) the Tribunal found her evidence to be vague, unsubstantiated and unconvincing.
25. In the light of the above, the Tribunal has little option but to find that the Respondent's breaches of covenant are breaches of her lease.
26. This does not however preclude her from seeking relief against forfeiture in the event of such action being taken against her by the Applicant.

The Law

Commonhold and Leasehold Reform Act 2002 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.

Name: Judge F Silverman

Dated: 7 October 2019

Note:

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying

with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.