



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

Case Reference : CHI/00ML/LBC/2019/0052

Property : Flat 11 Rochester Mansions, 7-9 Church Road,
Hove, East Sussex, BN3 2HA

Applicant : Rochester Mansions Residents Association
Limited

Representative : Dean Wilson LLP

Respondent : Ms Fiona Koderisch

Representative :

Type of Application : **For the determination of an alleged
breach of covenant- section 168(4) of
the Commonhold and Leasehold
Reform Act 2002**

**Tribunal
Member(s)** : Judge Dobson

Date of Decision : 6th March 2020

DECISION

Summary of the Decisions of the Tribunal

1. The Tribunal determines that the Respondent has breached the covenants in the lease (“the Lease”) by letting her flat (“the Property”) by way of short-term holiday lets.
2. The Tribunal determines that the Respondent has further breached the covenants in the Lease by failing to cover floors as required.
3. The Tribunal determines that the Respondent has also breached the covenants in the Lease by causing or permitting, in one manner or another, nuisance and annoyance to other owners or occupiers of flats within the building at 11 Rochester Mansions, 7-9 Church Road, Hove, BN3 2HA (“the Building”).

Application

4. The Applicant made an application to the Tribunal pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002, received on 9th December 2019, for a determination that the Respondent has breached covenants in the Lease of the Property.

Directions made/ history of the case

5. On 11th December 2019, a Directions Order was made, identifying that issues arose as to use of the Property as a short term let on Airbnb, the lack of the required floor coverings and nuisance and annoyance being caused.
6. The Directions Order listed the steps to be taken by the parties in preparation for the determination of the dispute, including the Applicant providing further details of the basis of the application, the Respondent responding to those including by indicating whether or not the alleged breaches are agreed and, if relevant, the Applicant briefly replying, together with the provision by the Applicant of a bundle.
7. The Directions additionally advised the Tribunal would proceed by way of paper determination without a hearing, unless either party objected. Neither party has subsequently objected and requested an oral hearing.
8. The Applicant has provided a Determination Bundle. That contains no statement by the Respondent as to whether the breaches are agreed or not and contains no other evidence from the Respondent. The Tribunal understands from that lack of documentation on behalf of the Respondent that the Respondent has not provided any statement or other documentation.
9. The Determination Bundle regrettably and unnecessarily contained two copies of the Lease and most of the other documents relied on by the Applicant, involving the Tribunal in spending time reading what turned out to be duplicate documents in case they were in fact different and had been included in the Bundle for a purpose.

10. The Determination Bundle also contains without prejudice correspondence, which the Tribunal has ignored in reaching its determination.
11. There has been no application from either party to vary the directions given or for any further directions. There have been no applications in relation to costs and/ or fees.
12. The Tribunal has accordingly proceeded by way of a paper determination. This is the decision made following that paper determination.

The Background

13. The property which is the subject of this application is a third floor three-bedroomed flat with a living room, a kitchen, a main bathroom and an ensuite to one of the bedrooms
14. Neither party requested an inspection and the Tribunal did not consider that one was necessary, or that it would have been proportionate to the issues in dispute.
15. The Applicant holds a long lease of the property. A lease was originally granted 21st December 1995, for a term of 99 years commencing on 29th September 1995. The specific provisions of the Lease are referred to below, where appropriate.
16. The Applicant's title is registered at HM Land Registry under Title number ESX57259. The Respondent's title is registered at HM Land Registry under Title number EX 211940.
17. The application by the Applicant seeks a determination that the Respondent is in breach on 3 bases, namely:-
 - i) For sub-letting the Property on a short-term holiday let basis;
 - ii) For failing to keep the flooring covered with carpet and underlay or proper cover
 - iii) For nuisance or annoyance caused to neighbouring properties.

The Law in respect of breach of covenant

18. The relevant law in relation to breach of covenant is set out in section 168 Commonhold and Leasehold Reform Act 2002.
19. A covenant is usually regarded as being a promise that something shall or shall not be done or that a certain state of facts exists. The Tribunal must assess whether there has been a breach on the balance of probabilities (Vanezis and another v Ozkoc and others [2018] All ER(D) 52).
20. A determination under Section 168(4) does not require the Tribunal to consider any issue other than the question of whether a breach has

occurred. The Tribunal's jurisdiction is limited to the question of whether or not there has been a breach and cannot encompass claims outside that question, nor can it encompass a counterclaim by the Respondent; an application under Section 168(4) can be made only by a landlord.

21. The issue of whether there is a breach of a covenant in a lease does not require personal fault unless the lease says so: Kensington & Chelsea v Simmonds (1997) 29 HLR 507.
22. In Vine Housing Cooperative Ltd v Smith (2015) UKUT 0501 (LC), HH Judge Gerald said this of the jurisdiction of the Tribunal:

“The question before the F-tT was the straightforward question of whether or not there had been a breach of covenant the motivations behind the making of applications, provided properly made in the sense that they raise the question of whether or not there had been a breach of covenant of a lease, are of no concern to the F-tT. The whole purpose of an application under section 168, however, is leave those matters to the landlord and then the county court, sure in the knowledge that the F-tT has determined that there has been breach.”

23. Construing the Lease applying the basic principles of construction of such lease as set out by the Supreme Court in Arnold v Britton [2015] UKSC 36. At paragraph 15, Lord Neuberger stated as follows:-

“When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all of the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, And it does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions”.

24. Context is relevant but as Lord Neuberger also emphasised at paragraph 17:-

“the reliance placed in some cases on commercial sense and surrounding circumstances (e.g. in Chartbrook [2009] AC 110, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And again save perhaps in a very unusual case, the parties must have been

specifically focussing om the issue covered by the provision when agreeing the wording of that provision.”

The Lease

25. The relevant parts of the Lease contain covenants by the Lessee (referred to in the Lease as the Tenant, which term is used where quoting from the Lease requires it) as follows:-

“4. THE Tenant HEREBY COVENANTS with the Lessor and with and for the benefit of the Flat Owners that throughout the term the Tenant will:-

- (1) Repair maintain renew uphold and keep the Demised Premises and all parts thereof including so far as the same form part of or are within the Demised Premises all windows glass and doors(including the entrance door to the Demised Premises) locks fastenings hinges sanitary water gas and electrical apparatus and walls and ceilings drains pipes wires and cables and all fixtures and additions in good and substantial repair and condition save as to damage in respect of which the Lessor is entitled to claim under any Policy of Insurance....”
- (5) Observe and perform the regulations in the Fourth Schedule hereto PROVIDED that the Lessor reserves the right to amend modify or waive such regulations in his absolute discretion”

“THE FOURTH SCHEDULE Regulations

1. Not at any time to use or occupy or permit the Demised Premises to be used or occupied except as a private residential flat only
3. Not to do or permit or suffer in or upon the Demised Premises or any part thereof any act or thing which may be or become a nuisance or annoyance or cause damage to the Lessor or the Tenants of the Lessor or the occupiers of any part of the Building or of any adjoining or neighbouring premises.
15. At all times to cover and keep covered with carpet and underlay the floor of the Demised Premises other than those of the kitchen and bathroom and at all times suitably and properly to cover and keep covered the floor of the kitchen and bathroom in the Demised Premises.”

Consideration of the alleged breaches of covenant

26. The Tribunal considers each of the three alleged breaches in turn as follows below.

Covenant not at any time to or occupy or permit the Demised Premises to be used or occupied except as a private residential flat only (Fourth Schedule, clause 1.)

27. The Applicant’s case is that the Respondent made short-term holiday lets of the Property and that the Respondent has admitted doing so. The

Applicant submits that the Respondent has thereby breached the covenant relating to the use of the Property only as a private residential flat.

28. In relation to evidence, the Applicant's representative places reliance upon the advertising by the Respondent of the Property for short-term lets on Airbnb in July 2019, producing a copy of the advertisement, and the continued advertising of the Property up to and including December 2019. The Applicant further relies upon evidence contained in emails from the owner/ occupier of the flat below.
29. The Applicant's representative relies in law upon the decision of and principles in the Upper Tribunal decision in Nemcova v Fairfield Rents Limited [2016] UKUT 303 (LC), although the Applicant's representative provides no details as to upon which particular elements of the judgement.
30. The Respondent has not made any comments in respect of the alleged short-term holiday lets within these proceedings or as to whether or not such lets would constitute a breach of the Lease, having not made any statement either way.
31. However, the Respondent has commented in emails provided by the Applicant in the Determination Bundle. Those comments admit the advertising of the Property on Airbnb up until 10th July 2019 and does not deny short-term occupants via Airbnb but contends that the Property was then removed from the Airbnb site.
32. The Applicant has included an email dated 3rd February 2020 from Ellie Koutsouris of Brices to Nick Staff at Priors Property Management.

Findings of Fact

33. The Tribunal finds as facts the following:-
 - i) The Property was used by the Respondent for short-term holiday lets via Airbnb during June and July 2019. The evidence is strong that the Respondent did let out the Property for short-term holiday lets. The evidence of the Airbnb advert and of the other flat owner/ occupier of occupation by short-term occupant is convincing. The specific admission by the Respondent of advertising with Airbnb contained in her email dated 25th July 2019 is additional relevant evidence.
 - ii) The Property remained advertised by Airbnb as at December 2019. However, the evidence is not clear that there were any short term lets after early July 2019 via Airbnb or of a similar nature and so no finding is made of such short-term lets at any later time.

Consideration of the covenant

34. The covenant only permits use as a private residential flat. The question is therefore whether the letting of the Property by way of short-term lets through Airbnb breached that covenant.

Decision

35. The Tribunal determines that the Respondent has breached the covenant in clause 1 of the Fourth Schedule of the Lease in respect of short-term holiday lets in June and July 2019.
36. The Tribunal determines that there was, however, no breach by way of any other occupation of the Property by others than the Respondent.
37. The Tribunal further determines that the Respondent cannot rely upon the email dated 3rd February 2020.

Reasons for decision

38. In respect of the Lease, the Respondent has not denied the Applicant's assertion that the short-term lets placed the Respondent in breach of clause 1 of the Fourth Schedule and the requirement within that for the Property to not be used or occupied except as a private residential flat only. However, neither has the Respondent specifically admitted the matter. Therefore, the Tribunal deals with that aspect.
39. The decision of the Upper Tribunal in Nemcova considered carefully the previous caselaw and did so in the context of short-term holiday lets where the lease relevant to that decision stated that the flat could not be used "other than as a private residence" Whilst the wording is not identical to that used in the Lease of the Property and the Tribunal is mindful of the caution recommended by the Upper Tribunal in considering previous decisions and the need to give due consideration to the context, the Tribunal cannot discern any material difference between "a private residence" on the one hand and "a private residential flat" on the other hand.
40. The Tribunal follows the determination in Nemcova that the duration of the lettings is very important to the question of whether the occupier is using the Property as "a private residential flat" and that such use would require, as described in paragraph 53 of Nemcova:

"a degree of permanence going beyond being there for a weekend or a few nights in the week".
41. In contrast, the use of the property by those taking short-term lets is, as also explained in paragraph 54 of Nemcova:

"so transient that the occupier would not consider the property he or she is staying in as being his or her private residence even for the time being."
42. The Tribunal accordingly determines that the occupation of the Property pursuant to the short-term lettings did not amount to occupation of the Property as "a private residential flat" and therefore breached the terms of the covenant in clause 1 of the Fourth Schedule.

43. The Tribunal does not accept the contention of the Applicant's representative that the Property needed to be the private residence of the Respondent. The Lease requires use of the Property as "a" private residential flat. There is no positive requirement that the Respondent reside in the Property herself. There is no requirement for the Property to be the Respondents home.
44. Construing the Lease such as to find that intention was that only the Respondent was permitted to reside in the Property is very unlikely to have been the intentions of the original parties to the Lease and would be inconsistent with the natural meaning of the wording used. Use by anyone as a private residence would have been sufficient, had there been such use.
45. The evidence provided on behalf of the Applicant that the Property was advertised as still available for rent as a short- term let in December 2019 demonstrates that the Property was not removed from Airbnb by that date. The Tribunal has no evidence as to whether the Respondent sought the removal but the Property remained advertised by Airbnb in spite of that, or whether the Respondent did not attempt to remove it.
46. The answer to that question does not need to be determined, the relevant matter being that there is insufficient admissible evidence of actual short-term Airbnb or similar lets of the Property by the Respondent after July 2019.
47. The email dated 3rd February 2020 is further evidence sought to be relied upon by the Applicant but provided later than the date for the Applicant to serve evidence and with there being no indication that it was provided to the Respondent. The Tribunal has no evidence as to whether the emails said to have been received and quoted in that email were received only on 3rd February 2020 or any earlier date.
48. It is also unclear whether the Applicant intended the email to constitute evidence of a short- term let or whether it was intended to provide evidence of another breach.
49. The email was not included as part of the Applicant's case and in all of the circumstances, the Tribunal has excluded the email from its consideration of the Applicant's application.

Covenant to at all times to cover and keep covered with carpet and underlay the floor of the Demised Premises other than those of the kitchen and bathroom and at all times suitably and properly to cover and keep covered the floor of the kitchen and bathroom in the Demised Premises (Fourth Schedule, clause 15.)

50. The Applicant contends that the Respondent did not keep the floors covered with carpet and underlay, or in the case of the kitchen, with other

suitable floor covering. The Applicant relies upon the photographs of the Property shown on the advertisement of the Property for letting via Airbnb. The Applicant further relies upon emails from Richard Baker, the owner or occupier of the flat situated below the Property from July 2018, which refer to the Property having “exposed floorboards”.

51. The Applicant additionally relies upon emails from the Respondent on various dates from April 2019 to January 2020 in which the Respondent admits a lack of carpeting, refers to tiling the kitchen, refers to plans and arrangements to fit carpets and refers to carpet having recently been fitted.
52. The Respondent has neither admitted or denied that in the course of these proceedings, not providing a statement either way. However, the Respondent has again commented in relevant ways, as summarised above, in emails provided by the Applicant’s representative in the Determination Bundle.

Findings of Fact

53. The Tribunal finds as facts the following:-
 - i) There was no carpet and underlay to the floorboards of the lounge of the Property until January 2020 and no suitable floor covering to the floorboards of the kitchen.
 - ii) There is insufficient evidence to make a finding of lack of suitable coverings in respect of the other rooms.

Consideration of the covenant

54. The covenant requires carpet and underlay, or other suitable floor covering to the kitchen and bathroom. The clause does not state what type of floor covering to the kitchen and bathroom would or would not be suitable.

Decision

55. The Respondent has breached the covenant set out in clause 15 of the Fourth Schedule of the Lease in respect of covering and keeping the floors of the Property covered with carpet and underlay other than the kitchen and bathroom and has breached the covenant in the clause with regard to suitably and appropriately covering and keeping covered the floor to the kitchen.

Reasons for decision

56. The photographs of the Property contained within the advertisement on Airbnb clearly show uncovered wooden floorboards to the lounge and to the kitchen. The photographs do not shown any other rooms except the bathroom, the floor to which is covered with tiles and where there is no challenge to the appropriateness of that, nor could there obviously be.

57. The Respondent does not refer in any of her emails to each room within the Property individually. Her comments in relation to carpeting are about the flat as a whole. The only specific comment about an individual room is to a proposal to tile the floor of the kitchen.
58. The tenor of the Respondent's comments suggest there being no carpet to any room, at least until January 2020, but there is no direct evidence one way or the other. Nowhere in the Bundle is there a clear statement that the other rooms were or were not carpeted and there is no other evidence or the condition of the floors of those other rooms. The Tribunal therefore makes no finding that there was a breach in relation to any rooms other than the lounge and the kitchen.
59. There is no evidence that suitable covering has yet been fitted to the kitchen. At the very least, the Respondent has provided no evidence that tiling has been arranged and taken place, the only references by her in emails having been to the carpeting intended of the other rooms.
60. The Respondent is in breach by not having provided the required floor coverings, notwithstanding the extent to which she has done so now.

Not to do or permit or suffer in or upon the Demised Premises or any part thereof and actor thing which may be or become a nuisance or annoyance or cause damage to the Lessor or the Tenants of the Lessor or the occupiers of any part of the Building or of any adjoining or neighbouring premises (Fourth Schedule, clause 3.)

61. The Applicant's representative contends in the application that the Respondent is in breach of the covenant with regard to doing or allowing matters causing a nuisance or annoyance to other occupiers of the Building. The application indicates that nuisance and annoyance to be caused by the movement of persons occupying the Property and because of the lack of suitable floor coverings.
62. The Applicant's extended reasons add in a further cause of nuisance and annoyance to other occupiers of the Building, namely leaks from the ensuite bathroom and the kitchen of the Property. Those leaks are contended to have occurred from July 2018 and up until potentially February 2020, on what are asserted in mid-2019 to have been in the region of 60 occasions.
63. The Applicant's representative relies on emails from the occupier of the flat below the Property in respect of leaks, one of which mentions an insurance claim in respect of ceilings, although no details are provided. There are no photographs showing the effects of the asserted leaks. There is also reliance placed on emails sent to the Respondent about the leaks by Nick Staff of Priors Property Management.
64. In addition, a third allegation is made, namely that short-term occupiers of the Property dropped items onto the patio, as described, of Flat 2.

65. It may be that the Applicant wishes to add a fourth allegation also contained in the email 3rd February 2020, addressed above.
66. The Respondent having not providing a statement has neither admitted denied the allegations in the course of these proceedings. The Respondent has provided limited comments in emails provided by the Applicant's representative in the Determination Bundle.
67. However, the Respondent has referred in an email dated 30th April 2019 to the kitchen being tiled "as this is where the leaks have come from", in an email 2nd July to contact if "any further leaks" and in an email 28th October 2019 to "there was another leak from bathroom".

Findings of Fact

- i) There was noise from occupiers of the Property as short- term lets audible excessively in the flat below
- ii) There were leaks of water into the flat below and caused damage to decoration.
- iii) Items were thrown by occupiers of the Property onto the balcony of the flat below.

Consideration of the Covenants

68. The covenant requires the Respondent not to allow any nuisance or annoyance or to commit any nuisance or annoyance or to cause any damage. The terms are not defined but are commonplace.
69. The covenant within clause 4.(1) requiring the Respondent to repair, maintain, renew, uphold and keep the sanitary and water apparatus, drains and pipes in good and substantial repair and condition places responsibility on the Respondent for those matters and would render the Respondent liable for any leaks caused by her failure to keep those items in good and substantial repair.
70. The covenant in respect of floor coverings applies to the extent that the lack of such floor coverings allowed greater noise nuisance to be caused than would otherwise have been the case and to the extent that the lack of floor coverings permits any leaking of water into the flat below which would otherwise have been prevented from reaching the flat below because of the presence of that covering.

71. Decision

72. The Respondent has breached the covenant in clause 3 of the Fourth Schedule not to do or permit or suffer any act or thing which may be or become a nuisance or annoyance or cause damage to the Applicant or other occupiers.

Reasons for decision

73. The only evidence in respect of noise from occupiers of the Property when let on short-term lets is contained in short emails from the occupier of the flat below, which gives very little information upon which to reach any determination. However, there was apparently sufficient to persuade the occupier to report the matter to the Applicant's agents, indicating that nuisance and/or annoyance was caused.
74. It is more likely than not that the impact of noise in the Property to the flat below was greater than it would have been had there been carpet and underlay in situ. The requirement for the floors to be covered in the manner provided for is very commonplace in leases of flats and is aimed at reducing the prospect of noise to flats below the given flat. Whilst there is no way of identifying the precise extent to which the noise might have been reduced by the laying of appropriate floor coverings, on the balance of probabilities, there would have been a reduction and consequently the level of noise was greater to one extent or another in the absence of the floor coverings than would otherwise have been the case.
75. The evidence as to leaks is limited in terms of the extent of the effects, not least in the absence of photographs. The other evidence, such as it is, indicates there to have numerous problems with water leaks from the Respondent's property and importantly, the Respondent accepts leaks from equipment in her flat or otherwise from her flat in her emails. There is no evidence to suggest that the leaks were caused by anything falling outside of the responsibility of the Respondent.
76. There is only one email in respect of items being dropped onto the patio of Flat 2. It would be difficult for the Respondent to gainsay any evidence given, necessarily not being in occupation of the Property at the time of the short-term lets. However, the Respondent has not challenged the information in the email and there is no reason before the Tribunal to disbelieve its contents. On balance, items were so dropped.
77. The Tribunal need not, and so does not, repeat its comments at paragraphs 47 to 49 above in respect of the email 3rd February 2020. The Tribunal does not determine any further allegation of nuisance or annoyance which the Applicant may have sought to raise.
78. Taking the above evidence, the Tribunal finds that there has been nuisance and annoyance caused, in breach of the Respondent's covenant.

Judge Dobson

RIGHTS OF APPEAL

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