



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

Case reference : **LON/00AF/LSC/2023/0059**

Property : **123C Croydon Road, Penge, London,
SE20 7TT**

Applicant : **Miss Bonny Lawrence**

Respondent : **Ms Anita Arthur**

Type of application : **Determination of breach of covenant
pursuant to section 168(4)
Commonhold and Leasehold Reform
Act 2002**

Tribunal members : **Judge H. Lumby
Mr J A Naylor FRICS**

Venue : **10 Alfred Place, London WC1E 7LR (via
CVP)**

Date of hearing : **11 January 2024**

Date of decision : **19 March 2024**

DECISION

Decisions of the tribunal

The tribunal determines that, on the basis of the evidence provided, no breach of covenant under the Respondent's lease has occurred.

The application

1. The Applicant seeks a determination pursuant to section 168(4) Commonhold and Leasehold Reform Act 2002 (the "2002 Act") as to whether the Respondent is in breach of various covenants contained in her lease of the Property.
2. The relevant provisions relate to requirements for sound-deadening carpets within the Respondent's flat, not causing a nuisance or annoyance, obtaining consent for alterations and a prohibition on the carrying out of a trade or business in the Property, all of which the Applicant contends have been breached by the Respondent.

Background

3. The Property is a flat within a larger Victorian building which has been converted into three flats on four floors. The Applicant owns the freehold to the building and also lives with her family in the ground floor flat. The Property is on the top two floors and comprises three bedrooms.
4. The Respondent is a leaseholder, owning the Property pursuant to a lease dated 22 December 1987 for a term of 99 years from 25 December 1986 and made between Anthony Zaremba (1) and Michael Anthony Finch (2).
5. The Respondent is not resident in the Property. There has been a limited response from her to the proceedings. On 30 November 2023 she emailed the Tribunal confirming receipt of an email from the tribunal and stating that she was currently out of the UK. She also stated that she was putting the Property up for sale in the following week but there is no evidence that any steps have been taken to dispose of the Property.
6. The Applicant's complaints revolve around the fact that the Respondent has allowed a number of people to stay at the Property and these have been disturbing the Applicant in various ways, including through noise, external refuse dumping and looking into her flat.

The hearing

7. This has been a determination following a hearing on 11 January 2024. The documents that the tribunal was referred to are in a bundle of 62 pages; in addition, the Applicant provided a number of recordings, principally of residents of the Property entering or leaving. The tribunal had sight of the

Applicant's application and the lease of Flat A in the building. The contents of all these have been noted by the tribunal.

8. The hearing was conducted online, using the CVP system. A number of technical issues were experienced before and during the course of the hearing, resulting in a delayed start.
9. The Tribunal heard from the Applicant. The Respondent did not attend the hearing and was in any event debarred from adducing any evidence to the tribunal as a result of a failure to respond to Directions. Mr Charlie Stonehill from LPC Law attended on behalf of the Respondent as an observer and so did not participate in the hearing.
10. Having considered all of the documents provided and heard the submissions of the parties, the tribunal has made determinations on the issue as follows.

The Lease

11. The Applicant only supplied the tribunal with a copy of the lease of Flat A in the building, not a lease of the Property. She did however following the hearing confirm that all leases in the building contain the same covenants. Absent any evidence to the contrary, the tribunal has accepted that the covenants identified in the form of lease provided were also contained in the Respondent's lease in identical form.
12. The Applicant contends that the Respondent is in breach of four covenants, all contained in the sixth schedule to the Lease, these being 11 (in respect of alterations), 12 (in respect of nuisance and annoyance), 16 (noise prevention) and 24 (use).
13. Paragraph 11 of the sixth schedule provides:

"The Tenant shall not make any alterations in the Demised Premises without the approval in writing of the Landlord to the plans and specifications such approval not to be unreasonably withheld or delayed and shall make such alterations only in accordance with those plans and specifications when approved The Tenant shall at the Landlord's expense obtain all licences planning permissions and other things necessary for the lawful carrying out of any such alterations and shall comply with all bye-laws regulations and conditions applicable generally or to specific works undertaken"

14. Paragraph 12 of the sixth schedule provides:

"The Tenant shall not permit or suffer to be done in or upon the Demised Premises anything which may be or become a nuisance or annoyance or cause damage or inconvenience to the Landlord or to the owner or occupier of any other Flat or in any way to behave in such a manner as to cause

offence to the Landlord or to such owners or occupiers or whereby any insurance for the time being effected on the Estate or any part thereof (including the Demised Premises) may be rendered void or voidable or whereby the rate of premium may be increased and shall pay all costs and expenses incurred by the Landlord in abating a nuisance in obedience to a notice served by a competent Authority”

15. Paragraph 16 of the sixth schedule provides:

“The Tenant will at all times keep the windows of the Demised Premises suitably curtained and keep covered all the floors (except those of the kitchen and bathroom) with good sound-deadening carpet or other covering so as to prevent disturbance or annoyance to the owners tenants and occupiers of the other Flats Comprised in the Estate”

16. Paragraph 24 of the sixth schedule provides:

“Neither the Demised Premises nor any part thereof shall be used for any illegal or immoral purpose nor shall any trade or business be carried on nor shall any boarders or lodgers be taken and the Tenant shall use the Demised Premises for the purposes of a private residence only”

Applicant’s submissions

17. The Applicant made submissions both in writing and at the hearing in relation to each claimed breach of covenant.

18. She argued in relation to paragraph 11 (unauthorised alterations) that the Respondent had made alterations so as to allow the Property to be used by a number of occupiers. She explained at the hearing that this comprised fitting separate locks to each door. She has not seen the locks herself but was told by a housing enforcement officer from the London Borough of Bromley that they were there. She also asserted that her husband had seen them.

19. The Applicant argued that the breach of paragraph 12 (nuisance and annoyance) arose from what she described as the “constant flow of traffic” through the communal areas, occupiers of the Property talking loudly on their mobile phones in the communal entrance including at night, doors being slammed, occupiers peering into her window and leaving a mattress and other household items outside of the Property.

20. Turning to paragraph 16 (sound-deadening carpets), the Applicant contends that the breach is the lack of sound-deadening carpets. She argues that because they can hear noise from the Property which causes a nuisance and annoyance to the Applicant and her family, there must be a breach of this covenant. She also contended that she had a recording of one of the occupiers agreeing that the carpets were light and rotten. She had not seen

the Property itself recently to confirm what the carpet covering was but her husband had seen it six months or so ago and had told her there was no sound-deadening carpet.

21. Finally, the Applicant argues that there has been a breach of paragraph 24. She argues that the Respondent is not using it as a private residence but is using the Property as a business. Furthermore, the occupiers are breaching the prohibition on taking in boarders or lodgers. She alleges that the living room has been converted into a bedroom and there are eight adults and three children in occupation. An investigator employed by her to establish who the occupiers are suspects they are illegal immigrants. She believes that they are separate family groups rather than one overall family unit. She does not know whether they have leases or not.

Tribunal's determination

22. The burden of proof rests with the Applicant and it is for her to evidence sufficient facts to show that the covenants in question have been breached. The tribunal considered each of the alleged breaches from this perspective.

Paragraph 11 – unauthorised alterations

23. The tribunal began with paragraph 11, the purported unauthorised alterations. There was no evidence for this in the bundle and the only evidence at the hearing was the Applicant's assertion that locks had been fitted to individual doors. She had not seen these herself but had been told about the alterations by the Council's housing enforcement officer and by her husband. There was no witness statement or other evidence from the Council. Her husband had provided a witness statement but this did not refer to the alterations. Furthermore, he did not attend the hearing to answer questions.
24. As a result, the tribunal determined that there was no evidence that the purported alterations had been made. Even if locks had been added, as the internal doors did not form part of the definition of Demised Premises within the Lease, the tribunal considers that such works would not in any event require landlord's consent pursuant to paragraph 11 of the sixth schedule to the Lease.
25. The tribunal therefore determines that on the evidence before it no breach of paragraph 11 has been demonstrated.

Paragraph 12 – nuisance and annoyance

26. The tribunal next turned to paragraph 12. The Applicant had provided various photographs and videos and recordings as evidence of the occupiers' behaviour. The witness statements from her husband and daughter also referred to the alleged breaches.

27. The tribunal considered all of this evidence carefully. It considered that videos and recordings did not show actions amounting to a nuisance or annoyance. These showed no more than the usual comings and goings of occupiers. The Lease did not prevent occupiers from entering at certain times and they were therefore just exercising their rights as residents. There was no evidence to suggest that the disturbance was of unreasonable frequency or intensity, as the evidence was just a few, short recordings.
28. The photographs showed a mattress left outside the building and an unknown person peering through a window, neither of which were sufficient to show the occurrence of a nuisance or annoyance.
29. The witness statements provided lacked detail and the witnesses were not present at the hearing to answer questions. On questioning the Applicant, the issue was in relation to noise by the front door and in the communal areas. This was directly beside the Applicant's kitchen. However, the covenant is against causing nuisance and annoyance "in or upon the Demised Premises". Noise in the communal areas or by the front door are not "in or upon the Demised Premises" and so would not amount to a breach to paragraph 12 even if they did amount to a nuisance or annoyance. Furthermore, as freeholder she has the ability to make modifications to doors to prevent them slamming.
30. The two witness statements do refer to noise from upstairs which could in theory amount to a nuisance or annoyance. However, no evidence of this was provided.
31. Overall, the Applicant had not demonstrated that there was behaviour from the occupiers of the Property that was substantial and unreasonable. The Applicant may believe this to be the case but without considerably more and better quality evidence, the tribunal cannot find that there is a breach. As a result, the tribunal determined that there was no evidence that there was behaviour amounting to a nuisance or annoyance in breach of paragraph 12 of the sixth schedule to the Lease.
32. The tribunal therefore determines that on the evidence before it no breach of paragraph 12 has been demonstrated.

Paragraph 16 – sound-deadening carpets

33. Paragraph 16 was then considered by the tribunal. There was evidence of noise from above from the Applicant's husband and daughter but not of the lack of carpet. Only limited weight could be given to the recording and the main evidence was the report of her husband having seen the lack of sound-deadening carpet. However, he did not refer to this in his witness statement and did not attend the hearing to give evidence.

34. In a similar way to the purported alterations, the Applicant has not provided the evidence to the tribunal to demonstrate a breach of covenant by showing there is a lack of sound-deadening carpet. The fact that they can hear a noise does not prove that there is no such carpet. The tribunal needs further evidence that no such carpet is there. Without this, it cannot determine that there has been a breach of paragraph 16.
35. The tribunal therefore determines that on the evidence before it no breach of paragraph 16 has been demonstrated.

Paragraph 24 - user

36. The tribunal concluded by considering whether there had been a breach of paragraph 24. There were three elements to this. First, whether a trade or business was being carried on at the Property. Secondly, whether the Respondent had taken in boarders or lodgers. Finally, whether she was using it as a private residence.
37. We first looked at whether a trade or business was being carried on at the Property. This was considered by the Upper Tribunal in the case of *Triplerose Ltd v Beattie and another [2020] UKUT 180 (LC)*. The issue in that case was whether a user covenant in a residential lease that prohibited the carrying on of a trade or business and use other than as a private dwelling house had been breached, in that case by carrying out short term lets. The Upper Tribunal drew a distinction between using premises as a business resource and carrying on a business 'upon' the premises. The covenant prohibited the lessees from conducting business "upon" the property, but that was not what they were doing. Although they were using the flat for the business of short-term letting, the business was being carried on from elsewhere.
38. The situation in that case is similar to the circumstances here. The covenant prohibits any trade or business being carried on at the Property. This is a prohibition on conducting a business from the Property, not a prohibition against using it for a business. In any event, the Respondent's business (as evidenced by the Applicant from her LinkedIn profile) is as HR executive. She is using the Property as an investment not as a trade or business.
39. No evidence was provided that any of the current occupiers are using the Property for a trade or business.
40. The tribunal therefore determines that there is no evidence that a trade or business is being carried out on the Property.
41. The second question is whether the Respondent has taken in boarders or lodgers. The Applicant was unable to provide evidence of the basis upon the current occupiers were using the Property. However, giving boarders and lodgers its usual meaning would suggest occupiers who share with the

Respondent. This is supported by the fact that there is no prohibition on underletting. The Respondent is not in occupation of the Property and so the tribunal determines that there is no evidence that she has taken in boarders or lodgers.

42. The third question is whether the Respondent is using the Property for the purposes of a private residence. The fact that she is able to underlet means that the requirement is not for her to use it as her private residence; the requirement is that it must be a private residence. The question is therefore whether the occupiers are using the Property as a private residence. As referred to above, there is no evidence that a trade or business is being carried out on the Property. The Applicant has not shown any evidence to the tribunal that the occupiers are not using the Property as a private residence. Without such evidence, the tribunal can only determine that there is no breach of the requirement to use the Property as a private residence.

43. Accordingly, the tribunal therefore determines that on the evidence before it no breach of paragraph 24 has been demonstrated.

Conclusion

44. As the tribunal has been unable to determine that any of the identified covenants have been breached, it must determine that, on the basis of the evidence provided, no breach of covenant under the Respondent's lease has occurred.

Name: Judge H Lumby

Date: 20 March 2024

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).