FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BG/LBC/2018/0015**
Property	:	**Flat 114 New Crane Wharf, 11 New Crane Place, London E1W 3TU**
Applicant	:	**New Crane Wharf Freehold Limited**
Representative	:	**Mr Robert Brown, Counsel**
Respondent	:	**Mr Jonathan Dovener**
Representative	:	**Mr Dovener in person**
Type of Application	:	**Application for determination under section 168(4) Commonhold and Leasehold Reform Act 2002 (breach of covenant in lease)**
Tribunal Members	:	**Judge P Korn** **Mr H Geddes RIBA MRTPI**
Date and venue of Hearing	:	**16th May 2018 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**12th June 2018**

DECISION

Decisions of the tribunal

(1) By virtue of his having granted short-term sublets of the Property without first obtaining landlord's consent the Respondent has committed breaches of covenants contained in clause 3.09(c) and clause 4.09 of the Lease. Also, by virtue of his having failed after the granting of such sublets to provide the landlord with a Deed of Covenant, a copy of the sub-tenancy and payment of a registration fee he has committed breaches of the covenant contained in clause 3.10 of the Lease.

(2) By virtue of his having cut into the communal waste stack pipe and made a hole in the wall so as to create an en-suite the Respondent has committed breaches of covenants contained in clause 4.06 of the Lease.

(3) The Respondent is not in breach of any of the other covenants to which this application relates.

(4) No cost order is made.

The application

1. The Applicant seeks a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("**the 2002 Act**") that one or more breaches of covenant has/have occurred under the lease of the Property ("**the Lease**").

2. The Applicant is the current freehold owner of the Property and the Respondent is the current leasehold owner. The Lease is dated 19th September 1990 and was originally made between New Crane Wharf Limited (1) and Bernard Clarke (2).

3. In its application the Applicant alleges that the Respondent is in breach of covenants contained in clauses 3.08, 3.09(c), 3.10, 4.06, 4.09 and 4.11 of the Lease. The wording of the relevant part of each of those covenants is set out below:-

Clause 3.08: *"To permit the Lessor and its agents and workmen at all reasonable times on giving not less than forty eight hours notice to the Lessee (except in case of emergency) to enter the Demised Premises for [various purposes]".*

Clause 3.09(c): *"PROVIDED ALWAYS that ... [in relation to a] letting or tenancy of the whole of the Demised Premises for a period of two years or less ... prior to the grant thereof the Lessee obtains the Lessor's*

prior written consent thereto (not to be unreasonably withheld) ...".

Clause 3.10: *"To produce to the Solicitors for the time being of the Lessor at its offices upon every devolution ... of the Demised Premises within one month of such devolution the ... counterpart underlease counterpart tenancy agreement ... or other evidence of devolution or a certified copy thereof for registration ...".*

Clause 4.06: *"(a) Not without the prior written consent of the Lessor ... [to] alter the internal construction or design of the Demised Premises nor remove any partitions doors or cupboards or other fixtures therein nor carry out any other alteration thereto*

(b) Not make any structural alterations to the Demised Premises nor remove cut maim or injure or permit to be removed cut maimed or injured any of the floors walls beams or timbers thereof".

Clause 4.09: *"Not to use the Demised Premises otherwise than for the purpose of a private residence in one occupation only ...".*

Clause 4.11: *"Not to do or permit or suffer anything in or upon the Demised Premises or any part thereof which may at any time be or become a nuisance or annoyance or cause of damage or disturbance to the Lessor or to any tenant or occupier of any other premises in the Building or the Development or of any property in the neighbourhood or injurious or detrimental to the reputation of the Development as (inter alia) a complex of high class private residential apartments...".*

Applicant's case

Mr Owen's evidence

4. The Applicant relies in part on a witness statement from Gavin Owen, a Portfolio Director at Kinleigh Limited who are the Applicant's managing agents.

5. Mr Owen states that in October 2016 he was told by the leaseholders of the flat below the Property that there had been a water leak into their flat from the Property. It transpired that the leak was coming from a

waste stack pipe and he asked the Respondent whether he had a plumber who could fix it. The Respondent gave him details of his plumber and asked Mr Owen to instruct his plumber to deal with the matter as the Respondent was away in Yorkshire. The plumber established the source of the leak and the Respondent subsequently emailed Mr Owen stating that the problem had been resolved, but Mr Owen was then informed by the leaseholders of the flat below that the leak was continuing. The Applicant later agreed to instruct its own plumber to fix the problem on the basis that the Respondent would be responsible for the cost, but it then transpired that access to fix the leak was only achievable by removing several tiles in the bathroom of the Property. Mr Owen states that he assumed that the Respondent subsequently arranged for the works to be carried out but he did not hear anything further.

6. Mr Owen also states that the Respondent installed an en-suite in place of a walk-in closet and that Mr Owen became aware of this in November 2016 and informed the Respondent that this was a breach of the Lease. The Respondent did not respond to the concerns raised by Mr Owen on this point, and in Mr Owen's view it was apparent that he was avoiding the issue, and so on 16th January 2017 he asked the Respondent to provide the Applicant's surveyor access to the Property in order to inspect the en-suite. No response was received on this point and the matter was referred to the Applicant's solicitors. Mr Owen notes that the Respondent claimed to have submitted plans to Kinleigh, but he states that he did not receive any plans.

7. Mr Owen also states that it came to the Applicant's attention that the Property was being used for short-term holiday lets, and he has provided details of the information relied upon, including a complaint on or around 11th April 2017 that various unknown persons were occupying the Property.

Cross-examination of Mr Owen

8. At the hearing Mr Owen accepted that the man he had described in his witness statement as "[the Tenant's] normal plumber ... somebody called Steve" also did work for the Applicant. He also accepted that the Respondent was communicative initially in relation to the leaks, but he said that the Respondent became less helpful later.

9. Mr Owen accepted that he did not try to speak to the Respondent after 13th April 2017 but said that matters were then placed in the hands of the Applicant's solicitors as Mr Owen had done all that he could. The Respondent put it to Mr Owen that the Respondent had worked with the plumber to try to resolve the problems with the leaks and that as far as he was aware everything had been sorted out, but Mr Owen did not accept this.

10. As regards the access issue, Mr Owen accepted that there had been no actual refusal of access, but neither was the Applicant invited to gain access.

11. As regards the plans for the en-suite, the Respondent put it to Mr Owen that he had sent him the plans twice, but Mr Owen did not accept this.

Mr Cork's evidence

12. The Applicant also relies in part on a witness statement from David Cork, the senior building manager employed at the estate of which the Property forms part. In relation to the leak issue he states that he attended the Property with the Respondent's plumber on 7th February 2017, that his view was that the leak was not caused by rain water and that as far as he is aware the leak is continuing.

13. In relation to the use of the Property by third parties, he states that during 2017 he saw a number of unknown persons accessing the estate using a fob allocated to the Property and that all of the people he approached said that they had booked to stay at the Property via "Onefinestay" or "Airbnb" and were renting the Property for 3 or 4 days. After these various people had left he would see cleaners arrive and attend at the Property. He and Gavin Owen later searched the websites to see if the Property was listed and he immediately recognised the Property. He also received verbal complaints from other lessees of the block who had seen strangers in the lifts and lobbies and were concerned about security and felt that it lowered the tone and reputation of the estate. As late as 26th October 2017 someone told him that he was renting the Property for a week, despite the Respondent having previously been asked to desist in subletting the Property.

Cross-examination of Mr Cork

14. In cross-examination Mr Cork accepted that the Respondent did sometimes tell him that he was having guests to stay in the Property.

Applicant's submissions

Clause 3.08 of Lease

15. Under clause 3.08 the Respondent had covenanted to permit the Applicant and its agents access to the Property on their giving not less than 48 hours' notice.

16. In breach of this covenant the Respondent had failed to permit access. The Applicant was relying on the letters from the Applicant's solicitors, Northover, to the Respondent dated 11th September 2017 and 18th

January 2018. The latter asked for confirmation that access would be given and the Respondent did not permit access. At the hearing Mr Brown said that the Applicant also noted the contents of the Respondent's email of 17th January 2018 which it was argued constituted a refusal of access.

Clause 4.06 of Lease

17. Under clause 4.06 the Respondent had covenanted not to carry out any alterations to the Property without the landlord's prior written consent.

18. In breach of this covenant, the Respondent had converted a space that was formerly a walk-in wardrobe to an en-suite containing a WC and shower unit and had plumbed the WC into a redundant communal waste stack and penetrated an internal wall to access the same. No consent was sought before the carrying out of the works and the Respondent has not sought to argue otherwise.

Clause 4.09 of Lease

19. Under clause 4.09 the Respondent had covenanted not to use the Property otherwise than as a private residence in one occupation.

20. In breach of this covenant the Respondent had listed the Property since at least August 2017 on various short-term letting websites and had sublet the Property for periods of one week or less on a number of occasions to third parties for commercial gain. Mr Brown for the Applicant said that the breaches had been admitted and he referred the Tribunal to the decision of the Upper Tribunal in *Nemcova Ltd v Fairfield Rents Ltd (2016) UKUT 303 (LC).*

Clause 4.11 of Lease

21. Under clause 4.11 the Respondent had covenanted not to do or permit or suffer anything in the Property which may be or become a nuisance or annoyance or cause of damage or disturbance to the landlord or to other occupiers or injurious or detrimental to the reputation of the estate.

22. In the Applicant's submission, the leaks referred to above constituted a breach of this covenant. There had been two separate leaks and they were the Respondent's responsibility to deal with. The leaks continued for a considerable period of time and in the Applicant's submission the Respondent had permitted or suffered them to continue.

23. In written submissions the Applicant also argued that the short term sublets constituted a breach of the covenant contained in this clause,

with other residents making complaints about security concerns in respect of unknown people occupying the Property and also potential damage to the reputation of the estate.

Clauses 3.09(c) and 3.10 of Lease

24. Under clauses 3.09(c) and 3.10 the Respondent had covenanted not to sublet the Property without the landlord's written consent and, on any subletting, to provide the landlord with a Deed of Covenant, a copy of the sub-tenancy and payment of a registration fee.

25. In breach of these covenants the Respondent had sublet the Property without obtaining the Applicant's written consent and had failed to provide a Deed of Covenant or a copy of the sub-tenancy or to pay the registration fee.

Respondent's case

26. In written submissions the Respondent states that he has always allowed the Applicant access to the Property.

27. As regards the leaks, whenever there have been leaks he has worked with the building managers to resolve them. As far as he was aware the problem with the leak into the flat below was resolved almost a year ago. It was a complicated matter but he co-operated fully with the managing agents to resolve it, and it was finally resolved by his plumber replacing the cistern in the original bathroom.

28. The Respondent installed the en-suite over 6 years ago and made no secret of this. The building managers were aware of it and he did not seek permission as he believed that none was required as no change was being made to the structure or layout. When he was later told that permission was required and that plans needed to be submitted he sent plans to the managing agents in June 2017. When they claimed not to have received the plans he re-sent them in January 2018. Many other leaseholders have installed en-suites.

29. He was not aware that short-term lets were not allowed. When he was asked to desist he did so as soon as he could once he had been released from his existing contractual commitments. The holiday let company initially made a mistake in that it did not at first remove the Property from its website when requested to do so, but this mistake was later remedied. He was not aware of any concerns or complaints from other occupiers. The Property is now only available for non-paying family and friends.

30. At the hearing the Respondent said that he approached his plumber (who had also worked for the Applicant) in April 2017 to fix the leak or

leaks, and the plumber later told him that the leaks had been fixed. As regards access, he had not actively denied access.

The statutory provisions

31. The relevant parts of section 168 of the 2002 Act provide as follows:-

"(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 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.

(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."

Tribunal's analysis

Clause 3.08 of the Lease

32. This is the clause relating to access, and it contains a positive obligation to permit entry to the landlord, and its agents and workmen at all reasonable times on their giving not less than 48 hours' notice. There is the usual wording regarding emergency access but this is not relevant here.

33. There is a simple disagreement between the parties as to whether the Respondent has at any stage failed to permit entry. No case law or other legal authority has been brought by either party on this issue, and the Applicant relies on two letters from its solicitors, Northover.

34. In their letter of 11th September 2017 Northover state inter alia as follows: *"... you are required to give our client access to inspect the Property on 29 September 2017 at 10.30am. We therefore await hearing from you by close of business on 18 September 2017 ... with your confirmation that access will be given on 29 September 2017".* Then in their letter of 18th January 2018 Northover state inter alia as follows: *"You should be aware that clause 3.08 of the Lease clearly entitles our client to access upon giving 48 hours' notice. Notice was given to you as far back as 11 September 2017 but you have failed and*

d our client or its agent's access to inspect the ne circumstances, we will await hearing from you by refuseless on Friday 19 January 2018 with ... your confirmation Progs will be given to the Property by 5.00 pm on Tuesday 23 clo y 2018".

eference was also made during the hearing to an email from the
35 Respondent to Northover dated 17th January 2018 in which he states inter alia *"As far as I am aware the leak was fixed months ago. No further leaks have been reported to me. Why does your client require access to my flat? That is an invasion of privacy and prevents my quiet enjoyment of my property. More threats ...".*

36. Clause 3.08 lists various purposes for which access can be sought by the landlord, and it is clear – and not disputed by the Applicant – that access can only be sought for something which constitutes what we will characterise for the sake of brevity as a proper purpose. Provided that the purpose is a proper one then the Respondent must permit access on being given not less than 48 hours' notice. The letters from Northover clearly provide more than 48 hours' notice and we are satisfied on the facts that access was being sought for a proper purpose.

37. However, the fact that access was not then gained does not by itself demonstrate that the Respondent failed to permit entry in breach of covenant. There is nothing contained in or – in our view – implied by the wording of the covenant to indicate that the landlord may only gain access after first securing the tenant's confirmation that the chosen day and time is convenient. The landlord must give 48 hours' notice but then, having done so, it may exercise the right at the stipulated time provided that it is a reasonable time (not, for example, in the middle of the night). Clearly in the context of a good landlord and tenant relationship there will often be communication as to how convenient or otherwise the chosen day/time is, and the landlord may well decide for the sake of good relations and practicality that it is prudent to obtain the tenant's express agreement to the precise time, but it does not follow that this is a pre-condition to the exercise of the right.

38. The evidence indicates that apart from his email of 17th January 2018, which is not in fact relied on in the Applicant's written submissions, the Respondent did not respond to Northover's statements that its client wished to gain access to the Property. The Applicant's case therefore seems to be that, through failing to respond positively to the Applicant's solicitors' statement that their client wished to gain access to the Property, the Respondent was in breach of the obligation to permit entry. We do not accept this analysis. Having given more than 48 hours' notice and having specified a reasonable time it was open to the Applicant then to exercise its right of entry. If on the Applicant attempting to gain entry such entry had either been refused or not been facilitated then it could at that point have been established that entry

was not being permitted, but in our view this is not the case in the absence of either an attempt to enter or an express refusal of permission to enter in advance.

39. As regards the Respondent's email of 17th January 2018, on which the Applicant does not in fact appear to be placing any reliance, in our view it does not in any event constitute a refusal to grant access. At this point in the correspondence there had been a history of, and the email is indicative of, strained relations. In this context the Respondent is seeking clarification as to why access is needed given that – according to his narrative – there is nothing that the Applicant needs to see and therefore that its request may be an unnecessary one and might represent an interference with his quiet enjoyment. Whilst it is clear that the Respondent is annoyed at this point, his email does not constitute either a refusal of access or a failure to permit access but instead is a somewhat tetchy request for an explanation as to why access is needed.

40. In conclusion, on the evidence before us there has been no breach of the covenant contained in clause 3.08.

Clauses 3.09(c), 3.10 and 4.09

41. It is common ground between the parties that the Respondent has sublet the whole of the Property on a number of occasions (through "Airbnb" or similar) for periods of a few days at a time without obtaining or even seeking the Applicant's prior consent.

42. The Respondent states that he was not aware that this constituted a breach of the terms of the Lease and that he desisted as soon as he was requested to do so. Whilst there is insufficient evidence to make a proper assessment as to whether the Respondent did originally realise that he needed to obtain the Applicant's prior consent, we accept on the balance of probabilities that he desisted once the Applicant asked him to do so, subject to honouring any existing contractual commitments made to potential subtenants.

43. However, even if the Respondent was unaware that granting short-term sublets constituted a breach of the terms of the Lease and even if he desisted as soon as he was requested to do so, his actions in subletting the Property without obtaining the Applicant's prior consent still constituted a breach of clause 3.09(c) (coupled with the preamble thereto), as this clause requires the tenant to obtain the landlord's prior written consent to any letting or tenancy of the whole of the Property for a period of two years or less. Therefore, one or more breaches of clause 3.09(c) has/have occurred.

44. As regards clause 3.10, the Respondent has not sought to argue that in relation to the unauthorised sublets he complied with the obligation to provide the Applicant with a Deed of Covenant, a copy of the sub-tenancy and payment of a registration fee. Therefore, one or more breaches of clause 3.10 has/have occurred as well.

45. As regards clause 4.09, the issue is whether the unauthorised sublets also constitute a breach of the covenant not to use the Property otherwise than for the purpose of a private residence in one occupation only. In *Nemcova Ltd v Fairfield Rents Ltd (2016) UKUT 303 (LC)* the Upper Tribunal considered a long residential lease containing a covenant *"not to use the Demised Premises or permit them to be used for any illegal or immoral purpose or for any purpose whatsoever other than as a private residence"*. The issue, as in our case, was whether advertising on the internet the availability of the premises for short term lettings and then granting a series of such lettings constituted a breach of such covenant. The Upper Tribunal took the view that in order for a property to be used as someone's private residence there must be a degree of permanence going beyond that person being there just for a few nights. Where a person occupies a property for such a short period the occupation is transient such that the occupier would not consider the property to constitute his or her private residence even for the time being. Therefore, the Upper Tribunal concluded that granting such short term lettings involved permitting those persons occupying pursuant to those lettings to be using the property otherwise than as a private residence and hence in breach of covenant.

46. No legal authority other than *Nemcova* has been brought on the above point. The facts of our case are indistinguishable from those in *Nemcova*, and if anything the relevant clause is more favourable to the Applicant's view than the equivalent clause in *Nemcova*. In our case the covenant is not to use the Property otherwise than for the purpose of a private residence in one occupation only, and in our view the additional words "in one occupation" could arguably be said for example to include an intention that those in occupation must be connected in some way (for example by being part of the same family), which could serve to exclude certain types of letting which would otherwise be permissible. In conclusion, there is no good reason to distinguish our case from *Nemcova* and therefore one or more breaches of clause 4.09 has/have occurred as well.

Clause 4.06

47. The Applicant argues that the Respondent has carried out alterations in breach of the provisions of this clause. The Respondent accepts that he installed the en-suite without seeking the Applicant's prior consent but adds various points in mitigation. Having reviewed the written and oral evidence we have come to the conclusion that in creating the en-

suite the Respondent cut into the communal waste stack pipe and also made a hole in the internal wall. Making a hole in the wall constitutes a minor breach of the covenant contained in clause 4.06(b) *"not [to] ... cut ... any of the ... walls"*. As regards the cutting into the communal waste stack pipe, our view on balance – in the absence of any specific submissions or any legal authority having been brought – is that this qualifies as a minor structural alteration in that it is an alteration to part of the structure. As such, it constitutes a minor breach of the covenant contained in clause 4.06(b) *"not [to] make any structural alterations"*.

48. Whilst the breaches are relatively minor ones, and whilst it is possible that the managing agents knew about the proposal to install the en-suite and/or that other leaseholders have installed en-suites without complaint, nevertheless on the basis of the evidence before us we are of the view that the installation of the en-suite was in breach of clause 4.06 for the reasons given above.

Clause 4.11

49. The parties' respective narratives in relation to the leaks differ markedly. Having considered the evidence we prefer the Respondent's witness evidence to that of Mr Owen and Mr Cork. Mr Owen initially tried to give the impression that the plumber used by the Respondent had no connection to the Applicant but then later conceded that he had done a significant amount of work for the Applicant. On Mr Owen's own evidence, the Applicant did not tell the Respondent that the leak(s) had not been fixed, and it is notable that in Northover's letter of 11th September 2017 the issue of the leak(s) was not even referred to. Mr Cork's evidence on this issue does not add much to that of Mr Owen and in any event we did not find him to be a particularly persuasive witness.

50. The burden of proof is on the Applicant and we are not persuaded that the Applicant has demonstrated that the Respondent failed to deal properly with leaks emanating from the Property such that he could be said to have permitted or suffered anything in or upon the Property which may at any time be or become a nuisance or annoyance or cause of damage or disturbance to others.

51. The Applicant has also argued that the unauthorised sublettings constituted a breach of clause 4.11 in that they involved the Respondent permitting or suffering something to be done in the Property which may be injurious or detrimental to the reputation of the estate as (inter alia) a complex of high class private residential apartments. We have not been provided with any credible evidence that the presence of any specific occupiers of the Property pursuant to short term sublets did or even might be detrimental to the reputation of the estate as a whole; the most that the Applicant has been able to offer is vague hearsay evidence

from Mr Owen and Mr Cork. In any event, there is at least a question as to whether granting short term sublets is the sort of activity envisaged by this particular clause.

52. In conclusion, therefore, on the evidence before us there has been no breach of the covenant contained in clause 4.11.

Costs

53. At the end of the hearing the Applicant applied for an order that the Respondent reimburse its application and hearing fees pursuant to rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

54. Whilst there have been breaches of covenant, these are confined to matters which have already been admitted by the Respondent. Both of those breaches (the one relating to subletting and the one relating to alterations) are in the past. The one relating to alterations was in our view relatively minor and may possibly have been informally acquiesced to on behalf of the Applicant if not actively waived. The other one may have been the result of an honest mistake on the Respondent's part. In the circumstances we are not persuaded that the application was a necessary one, and nor are we persuaded that it would be appropriate to penalise the Respondent by ordering him to reimburse these fees. Accordingly, the application is refused.

Name: Judge P Korn **Date:** 12th June 2018

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. 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.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. 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.