S38

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CH1/21UD/LBC/2013/0023**
Property	:	**Flat 1, 10 Cornwallis Gardens, Hastings, East Sussex TN34 lLP**
Applicants	:	**Mr David Donaldson and Mrs Barbara Donaldson**
Representative	:	**Mr Donaldson**
Respondents	:	**Mr Geoffrey David Nichols and Mr Patrick Stephen Bowles**
Representative	:	**Mr Nichols**
Type of Application	:	**Section 168 Commonhold and Leasehold Reform Act 2002 (breach of covenant)**
Tribunal Members	:	**Judge E Morrison (Chairman)** **Mr B H R Simms FRICS MCI Arb (Surveyor Member)** **Mr T W Sennett MA FCIEH (Professional Member)**
Date and venue of Hearing	:	**14 November 2013 at Horntye Park, Hastings**
Date of decision	:	**26 November 2013**

DECISION

The Application

1. By an application dated 19 July 2013 the Applicant lessors requested an order that the Respondent lessees had breached certain covenants in their lease.

Summary of Decision

2. There has been no breach of the covenants in clause 2(2) of the lease.

3. There has been a breach of the covenant in clause 2(14) of the lease in that alterations have been made to Flat 1.

4. There has been a breach of the covenant in clause 2(24) of the lease in that there has been a failure to keep and maintain in good and substantial repair the walls marked T on the lease plan.

The Lease

5. The Tribunal had before it a copy of the lease for Flat 1 which is dated 27 June 1974 and is for a term of 99 years at a yearly ground rent of £15.00. The relevant provisions in the lease may be summarised as follows:

   (a) In clause 2(2) the lessee covenants with the lessor "to pay and discharge all rates taxes duties assessments charges and outgoings whatsoever whether parliamentary parochial or of any other description which now are or during the term hereby granted shall be imposed or charged on the Flat or any part thereof or the Lessor or the Lessee or the owner or occupier in respect thereof ...".

   (b) In clause 2(14) the lessee covenants with the lessor "Not to cut main or injure any of the principal timbers roofs or walls of the Flat nor make any alteration or addition to the Flat or any part thereof".

   (c) In clause 2(24) the lessee covenants with the lessor "At all times during the said term to keep and maintain in good and substantial repair and condition and of the same height and type as at present the walls and fences of the garden marked T within the boundary on the said plan and also to keep the garden in a neat and tidy condition".

   (d) The plan referred to is the plan attached to the lease, which has T marks along the southern, eastern and western sides of the rear garden. The plan also shows the extent of the Flat and the position of the internal walls and the arrangement of rooms within it. The demise specifically includes the front and back garden, which is edged green on the plan.

The Inspection

6. The Tribunal inspected the subject property on the morning of the hearing, accompanied by Mr Donaldson and Mr Nichols. 10 Cornwallis Gardens is a semi-detached Victorian house with cement rendered elevations under a pitched, concrete-tiled roof. The plot is on sloping ground. Accommodation is arranged on the basement/lower ground floor, ground floor and 3 upper floors. The house has been converted into 5 flats with the main entrance at the front approached from a flight of steps. There is an area at the front with sloping paving and at the side of the house a passage with two short flights of steps leading to the rear garden.

7. The Tribunal inspected the exterior and gardens and a small part of Flat 1 which is on the lower ground floor and has its entrance from the side passage. There is an entrance hall and to the left a partitioned area forming a small room and to the right a cloakroom with W.C. Neither the remainder of the interior of Flat 1 or any other parts of the interior of the building were inspected.

8. In the rear garden the Tribunal was directed to the extreme rear (east) wall of the rear garden which is of brick construction and is about 1 metre high to the boundary of No. 10. The wall itself is much taller, being a retaining wall to the property behind to the east but this was not visible from within No. 10. This wall is leaning and bowing outwards and has a central crack. The north and south rear garden flank walls are broken down and dilapidated with random fencing panels erected to roughly mark the boundary.

The Law and Jurisdiction

9. Section 168(1) and (2) of the Act provide that a landlord under a long lease of a dwelling may not serve a notice under section 146 of the Law of Property Act 1925 in respect of a breach of covenant unless either the tenant has admitted the breach, or a court or tribunal has finally determined that a breach has occurred.

10. Section 168(4) permits a landlord to apply to a tribunal for such a determination.

Representation and Evidence

11. Mr Donaldson attended and represented himself and his wife, who are jointly the lessors of Flat 1. In addition to the information in the original application, Mr Donaldson had provided additional written evidence and submissions upon receipt of the Respondents' statement of case. A Procedural Judge had decided that this should be admitted.

The Applicants' written evidence included witness statements from Mrs J Gierus and Mr C Hassall, and a report from Mr H Conlin, a surveyor. All three attended the hearing. Mr Conlin gave very brief oral evidence.

12. Mr Nichols attended and represented himself and Mr Bowles. The Respondents had submitted a statement of case in accordance with the Tribunal's Directions dated 24 July 2013. They also filed a short supplemental statement in response to the Applicants' further evidence.

Background

13. Mr Donaldson and Mr Hassall acquired the freehold of 10 Cornwallis Gardens and the leases of Flats 4 and 5 in 1997. Mr Hassall already held the lease of Flat 3. The Respondents acquired the lease of Flat 1 in December 1998. In recent years Mrs Donaldson has replaced Mr Hassall as joint lessor and lessee of Flats 4 & 5. Mr and Mrs Donaldson have also, with a third party, acquired the lease of Flat 2.

Clause 2(2) of the Lease

14. The Applicants contended that the Respondents had breached the covenant in clause 2(2) because they had refused to contribute towards a fee of £919.20 paid by the Applicants to Hastings Borough Council. This was the fee for a licence which, as from 2011, was required for 10 Cornwallis Gardens because the Council has extended the licensing requirements for houses of multiple occupation under the Housing Act 2004 to buildings converted into self contained flats, where the conversion does not comply with the 1991 Building Regulations (or later) and less than two-thirds of the flats are owner-occupied.

15. It was not disputed by the Respondents that a licence was required. None of the flats at 10 Cornwallis Gardens are owner-occupied.

16. Mr Donaldson submitted that the wording of clause 2(2) was wide enough to require the Respondents (and all other lessees, even if they were owner-occupiers) to contribute 1/5th towards the cost of the licence. As the lessor, he had applied for the licence. He described the fee as one imposed on the lessor in the management of the building.

17. Mr Nichols argued that the licence fee related to the building, not to the Flat, and that the wording of clause 2(2) was not wide enough to require him to contribute.

Discussion and Determination

18. The Tribunal accepts that the wording of clause 2(2) is wide enough to cover fees or charges required by a local authority even if those fees or charges were not in existence at the date of the lease. However the charges must be of a type falling within clause 2(2).

19. Clause 2(2) only covers charges etc. "imposed or charged on the Flat or any part thereof or the Lessor or the Lessee or the owner or occupier in respect thereof". When construing a lease, words must be given their ordinary and natural meaning unless the context requires otherwise. The words "in respect thereof" can only mean "in respect of the Flat". There is no reference in clause 2(2) to the building as a whole.

19. The fee for a HMO licence is payable by the person applying for the licence. One fee is payable for the whole building. The need for a HMO licence in this case is triggered by the fact that more than 1 of the 5 flats is let-out. It is not triggered by the fact that Flat 1 specifically is let-out, because in fact all 5 flats are let-out. Any two of the flats being let-out would mean that a licence was needed for the building. Nor does the relevant legislation require that the freeholder of the building must be the person who applies for the licence, and is thereby liable to pay the fee.

20. Because the licence fee is attributable to the building as a whole and the nature of its occupation viewed in the totality, it cannot be classed as "a charge on the Flat or any part thereof". For the same reason the fee is not charged "on the Lessee or the owner or occupier in respect thereof". This conclusion is supported by the fact that clause 2(2) does not require the lessee to pay any particular proportion of a relevant charge, and therefore contemplates only charges which the lessee would be required to pay in their entirety.

21. It remains to be considered whether the fee is "imposed or charged on ... the Lessor ... in respect" of the Flat. The Tribunal concludes that it is not, for two reasons. First, the fee is payable by the applicant for the licence. Although in this case Mr Donaldson is the applicant for the licence, the fee is not charged on him in his capacity as lessor. Second, it is not a fee in respect of the Flat, for the reasons set out in paragraph 20.

22. Accordingly the Tribunal determines there has been no breach of clause 2(2).

Clause 2(14) of the Lease

23. The Applicants relied on that part of clause 2(14) which prohibits the making of alterations. Their case was that the Respondents had moved the WC from its original location to the left of the front door, put up partitioning to form a new room incorporating the area of the old WC, and the door to the area shown as a Store on the lease plan had been blocked off. Mr Donaldson and Mr Hassall both said that they had seen the WC in its original location shortly before the Respondents had purchased the flat. The Applicant also relied on a report prepared by Mr H Conlin, a chartered surveyor, dated 19 November 2012. This was prepared following an inspection of Flat 1 and indicated what walls

shown in the original lease plan had been removed, and the position of the new walls.

24. Mr Nichols denied that the Respondents had moved the WC, and said that when they purchased the WC had already been moved to its present location next to the bathroom. He admitted that the Respondents had put up partitioning to form a small room to the left of the front door and that the Store had been blocked off (because it was damp).

Discussion and Determination

25. The Tribunal is only required to determine whether there has been a breach, not who is responsible. The lease plan clearly shows a WC to the left of the front door and a door from the hall into the Store area. The WC is no longer in that location. Furthermore, as Mr Nichol accepted, the Store access has been blocked off and new partition walls erected to create a small room that was not there when the lease was granted. Accordingly the Tribunal determines that there has been a breach of clause 2(14).

Clause 2(24) of the Lease

26. The Applicants' case was that the Respondents had carried out no maintenance at all on the walls marked T on the lease plan, and that they were in an obvious state of disrepair. There had been a long-running dispute as to whether the walls fell within the Respondents' demise, but Mr Donaldson maintained he had always told the Respondents that the walls were their responsibility. A large, leaning tree in the back garden of Flat 1, eventually removed in early 2012, had caused the crack in the rear wall. Mr Conlin's report did not go that far, but stated that "initial damage to the wall has likely been caused by the roots" of the tree.

27. Although Mr Donaldson accepted that there were other clauses in the lease which referred to the lessor's obligation to repair party walls and fences, he said these were general and that the specificity of clause 2(24) made it clear that the walls marked T were the lessees' responsibility.

28. For the Respondents, Mr Nichols queried whether the lease plan did in fact have a T mark along the south side wall; his copy was very faint. The Land Registry plan for the freehold title of 10 Cornwallis Gardens did not show any T marks along any of the boundaries. He said that the present condition of the walls was the more or less the same as when they had purchased Flat 1 in 1998. He believed most deterioration had taken place between when the walls were originally built and 1974 when the leases were granted. Recently, the neighbour to the rear at 41 Cambridge Gardens had told him that the rear wall had collapsed in 1974 and been rebuilt at that time. This was just before 10 Cornwallis

Gardens was converted into flats. He questioned whether the lessor had been entitled to include the walls in the demise of Flat 1, telling the Tribunal that he believed the rear wall had been rebuilt on land belonging only to 41 Cambridge Gardens (a point not previously mentioned in the Respondents' statement of case). He noted that the freehold title of 10 Cornwallis Gardens referred to a personal covenant being given by an (unnamed) Company to the purchaser of the building in 1974 in respect of liability for the walls. Overall he submitted it was unreasonable and/or unlikely that all the walls were demised with Flat 1, and that the lease was confusing with regard to the walls and gardens. Clause 3(1)(b) and (d) required the lessor to maintain party walls serving the Flat and Building and also the gardens. There were no gardens other than those apparently included in the demise of Flat 1. The lease of Flat 2 included a prohibition on allowing children to play in the gardens, and Mr Nichols queried why that clause was included in that lease if all the gardens were demised to Flat 1. Clause 2(3)(i) required the lessee to pay one-fifth of the costs via the service charge.

Discussion and Determination

29. Although the lease plan is faint in parts, the Tribunal is satisfied that there are T marks along the north, east and south walls, at least so far as the back garden is concerned. It is also entirely self evident that none of these walls is in a state of "good and substantial repair and condition". The rear wall is cracked and bowed. The side walls are substantially crumbled in places, not of full height and with many missing bricks.

30. While it is correct that the lessee has no obligation to repair party walls serving the Flat itself (clause 2(4)), the lease imposes a very specific obligation on the lessee with respect to the walls marked T. It is inconceivable that these walls would not have been so identified on the lease plan and then specifically referred to in clause 2(24) if there was no intention that the repair of these walls would not be the lessee's responsibility. The lease must be construed as a whole and in context. The general reference to the lessor's obligation to repair the party walls in clause 3(1)(b) (such as those structural building walls between No 10 and its neighbour) must take effect subject to the specific obligation imposed by clause 2(24).

31. Further, the wording of the lease read in conjunction with the lease plan also makes it quite clear that the gardens are included in the demise of Flat 1 (whatever the lease of Flat 2 may imply).

32. Although Mr Nichols asserted at the hearing that the rear wall had been rebuilt on land outside the original boundary, there was no supporting evidence whatsoever to support this proposition, and the Tribunal cannot be satisfied that it is correct.

33. Similarly no evidence was adduced to suggest that the south or north side walls were not within the freehold title or were walls which the lessor was not, apart from the provisions in the lease, liable to repair. If any weight can be given to the covenant noted on the freehold register, it suggests that the freeholder was indeed under a liability to repair the walls. There is no reason why this liability could not be passed onto the lessee of Flat 1 by the provisions of the lease.

34. Finally we turn to Mr Nichols' argument that there has been no material deterioration in the walls since he purchased, or since 1974, and that the Respondents are only responsible for returning the walls to the state they were in when the lease was granted. This lease requires the lessee "to keep and maintain in good and substantial repair" the walls marked T. There is well-established authority that to "keep" in repair means to put into repair. Thus a lessee who agrees to "keep" property in good repair is not excused from doing so by reason of the fact that the property was in disrepair at the date of the lease (see generally *Woodfall on Landlord and Tenant* para. 13.030). Accordingly it makes no difference what the state of repair was either in 1974 or in 1998 if the walls are in disrepair now.

35. Accordingly the Tribunal finds there has been a breach of clause 2(24) because the walls marked T are not in good and substantial repair.

Dated: 26 November 2013

Judge E Morrison (Chairman)

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.