



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

Case Reference : **MAN/00BM/LBC/2013/0024**

Property : **32D Albert Avenue
Prestwich
Manchester M25 0LX**

Applicant : **Firmrock Associates Limited**

Representative : **N/A**

Respondent : **Mrs J Pickford**

Representative : **N/A**

Type of Application : **Commonhold & Leasehold Reform
Act 2002 – section 168(4)**

Tribunal Members : **Judge J Holbrook
Mr D Pritchard FRICS**

**Date and venue of
Hearing** : **8 January 2014
Manchester**

Date of Decision : **15 January 2014**

DECISION

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Breaches of covenant in the lease of the Property (dated 11 August 1960) have occurred by reason of the Respondent (1) having failed to “leave open and unbuilt upon” part of the land shown coloured brown on the lease plan; and (2) having obstructed the lawful use of that land by other persons.

REASONS

Background

1. On 7 October 2013 an application was made to the First-tier Tribunal (Property Chamber) under section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination that a breach of a covenant or condition has occurred in a lease of a property known as 32D Albert Avenue, Prestwich, Manchester M25 0LX (“the Property”).
2. The application was made by Firmrock Associates Limited, which owns the reversionary interest in the Property and is the current landlord under the Lease.
3. The application was made on the basis of an alleged breach of covenants to leave part of the Property open and unbuilt upon and not to obstruct the use of a shared drive.
4. The Respondent to the application is Mrs June Pickford, the current tenant under the Lease.
5. A hearing was held at the Tribunal’s office in Manchester on 8 January 2014. The Applicant was represented by Mr Rosenberg, an officer of the company. Mrs Pickford appeared in person. The Tribunal had previously received statements of case and supporting documentary evidence from both parties.
6. Immediately prior to the hearing, the Tribunal had made an external inspection of the Property in the presence of Mrs Pickford and Mr Rosenberg.

Law

7. A prerequisite for the forfeiture of a lease (otherwise than for a breach of a covenant to pay rent) is the service of a notice under section 146(1) of the Law of Property Act 1925. However, section 168(1) of the Commonhold and Leasehold Reform Act 2002 provides that a landlord under a long lease of a dwelling may not serve such a notice unless section 168(2) of the 2002 Act is satisfied.

8. One of the ways in which section 168(2) may be satisfied is for it to be finally determined by the Tribunal (upon an application by the landlord under section 168(4)) that a breach of a covenant or condition in the lease has occurred.

The Lease

9. The lease in question (“the Lease”) is dated 11 August 1960 and was made between Lily Kay (1), L Kay & Co. (Builders) Limited (2), SFR (Builders) Limited (3) and Lilian Miller (4). It was granted for a term of 999 years from 25 December 1958 at an annual rent of £4.00.
10. The demised premises are expressed to comprise the ground floor maisonette (known as 32D Albert Avenue) together with part of an intended drive as well as a dustbin store at the rear. All of the land and buildings demised are shown edged red on the lease plan (“the Plan”) a copy of which is annexed to this Decision for ease of description.
11. The original tenant (defined as “the Purchaser” in the Lease) entered into various covenants with the landlord which now bind Mrs Pickford as the present owner of the leasehold interest. In particular, clause 8(a)(v) of the Lease contains a covenant that the Purchaser:

“... will at all times hereafter leave open and unbuilt upon such part of the said drive shown coloured brown on the said Plan as is hereby demised”.
12. In addition, paragraph 7 of the first schedule to the Lease contains a covenant by the Purchaser:

“Not to permit any vehicle to use the said drive shown coloured brown on the Plan other than for the purpose of passing and repassing and not in any way to obstruct other persons lawfully using the same”.
13. Certain rights are reserved by the third schedule to the Lease. These include:
 - a right of access (including vehicular access) over the drive coloured brown on the Plan for the landlord and the owners or lessees of “the garages now erected or hereafter at any time to be erected on the land shown coloured blue on the Plan”;
 - a right of access on foot over the drive for the landlord and lessees of neighbouring maisonettes “for the purpose of obtaining access to the dustbin stores shown coloured grey on the Plan”; and
 - rights of entry for the purpose of repairing and maintaining adjoining premises.

Evidence and submissions

14. The Applicant contends that Mrs Pickford has breached the terms of the Lease by enclosing the garden at the rear of the Property with a fence, and also by building an extension onto the rear of her maisonette so that it sits over part of the land coloured brown on the Plan. Mr Rosenberg argues, on behalf of the Applicant, that both the fence and extension have been erected on land which, according to the Lease, was to be kept open, and that the effect of enclosing the rear of the Property is to deprive the landlord, and the lessees of neighbouring premises, of the right to use and pass over the brown land in order to build the garages mentioned in the Lease or to access the dustbin stores. He also argues that the extension prevents the exercise of the right to repair and maintain the adjoining premises.
15. Mr Rosenberg contends that both the fence and extension encroach not only onto the land shown coloured brown on the Plan, but also onto land which is not demised by the Lease.
16. In response, Mrs Pickford accepts both that her garden is enclosed by a fence and that she has added an extension to her maisonette. However, she denies that a breach of covenant in the Lease has thereby occurred. Mrs Pickford asserts that the garden has been fenced for the entirety of the 28 years during which she has owned the Property, and that she has never in that time been asked to grant access to the land at the rear (she points out that neither the garages shown coloured blue on the Plan nor the dustbin stores coloured grey have ever been constructed). She therefore argues that the relevant easements reserved in the Lease have been abandoned or extinguished.
17. As far as the construction of the extension is concerned, Mrs Pickford asserts that the building work was completed in 2008 and that it was undertaken only after she had obtained the express (albeit verbal) consent of the landlord at that time, Mr Kay. Mrs Pickford also argues that any breaches of covenant have been waived by the acceptance of ground rent by the landlord.

Conclusions

18. It was immediately apparent from the Tribunal's inspection of the Property that there are marked differences between the physical development scheme which was contemplated by the original parties to the Lease (as reflected by the Plan) and the reality of what is on the ground today.
19. The Property is one of a row of several similar blocks, each comprising four maisonettes, constructed in about 1960 along the south side of Albert Avenue. The blocks are separated from each other by shared drives. Although this much is readily discernable from the Plan, the position regarding the land to the rear/south of the blocks is less straightforward. The Plan shows a row of 16 adjoining garages to the

rear (including three coloured blue). In fact, however, only the first eight of those garages were ever constructed – being the eight at furthest distance from the Property – and only two of them still stand today. In particular, the garages shown coloured blue on the Plan have never been constructed, nor have the dustbin stores shown coloured grey. It seems likely that the reason why only the garages at the eastern end of the development were built relates to the terrain of the site, which narrows from east to west and which is bounded to the south by wooded land which drops away steeply to a stream below. It would presumably be both difficult and costly to properly construct one or more garages in the very limited space between the land demised to Mrs Pickford and the boundary of the Applicant's site.

20. Mrs Pickford's maisonette occupies the rear half of the ground floor of her block. Her front door gives access to the shared drive shown coloured brown on the Plan. The drive has a hard surface between Mrs Pickford's front door and Albert Avenue (and it is apparent that – in common with residents of other blocks – Mrs Pickford and her neighbours keep their wheelie-bins in this area).
21. The shared drive does not extend beyond the southern elevation of the blocks to either side of it (as they were originally constructed). Indeed, there is a fence at this point spanning the distance between the two blocks. Access to the garden areas to the south of this fence (which include part of the land shown coloured brown on the Plan) may only be gained, as to part, via a gate into Mrs Pickford's garden and, as to the other part, via the relevant maisonette in the neighbouring block.
22. The garden fence completely encloses the land to the rear of Mrs Pickford's maisonette. The fence (which has clearly been in-situ for many years) appears to follow the boundary of the demised premises on its western side. However, on the eastern side of the garden, the fence appears to be positioned further east than the boundary of the demise (it is apparent from the Plan that only about half of the width of the land to the rear/south of the block is demised by the Lease).
23. An extension has been constructed to the rear/south of the block. The footprint of the extension covers part of the land shown coloured brown on the Plan. However, as the extension is almost as wide as the block itself, its footprint encroaches onto land which is beyond the eastern boundary of the demise (for the reason explained in the previous paragraph).
24. Appropriate remedies may be available to the Applicant in the civil courts arising from the apparent encroachment of Mrs Pickford's garden fence and extension onto its retained land. However, such encroachment does not itself amount to a breach of covenant in the Lease. Nor does any alleged interference with the rights reserved to the landlord in the third schedule to the Lease: the Applicant is not entitled to a determination under section 168 of the 2002 Act in this regard.

However, it is necessary to consider whether there has been a breach of the specific covenants described in paragraphs 11 and 12 above.

25. Dealing first with the matter of the garden fence, we accept Mrs Pickford's assurance that the fence (or an earlier version of the fence) has occupied the same position ever since she acquired the Property 28 years ago. However, the fact that a fence has been erected unquestionably means that the land shown coloured brown on the Plan has not been "left open": thus there has been a breach of covenant in the Lease irrespective of whether Mrs Pickford is correct to argue that the easements reserved in the third schedule to the Lease have been abandoned or extinguished. In addition – and on the assumption that the landlord does retain rights of access over the land shown coloured brown on the Plan – the fencing of the land must (in theory at least) constitute an obstruction to the exercise of that right.
26. Turning to the matter of the extension, it is equally clear that its construction amounts, on the face of it, to a breach of the covenant to leave the land shown coloured brown on the Plan "open and unbuilt upon". However, Mrs Pickford argues that there has been no breach of covenant in this regard because Mr Kay gave his consent to the building of the extension. Mrs Pickford's evidence was that she contacted Mr Kay in 2005 following the death of her husband and that Mr Kay gave his verbal consent to the construction of an extension, on the condition that Mrs Pickford obtained the necessary planning permission from the local authority before building it. She produced a copy of a letter which she had sent to Mr Kay in March 2006 confirming their conversation. Mr Rosenberg suggested that it is unlikely that the landlord would have granted consent in this informal way. However, he offered no tangible evidence to contradict Mrs Pickford's evidence. We found Mrs Pickford to be an honest and credible witness and we are satisfied that Mr Kay did indeed grant consent on the basis described above.
27. Nevertheless, it seems clear that the extension which was actually constructed does not accord with the consent granted by Mr Kay. This is because, as built, the extension does not appear to conform to the drawings which were approved by the local authority when granting planning permission (those drawings show an extension which is considerably narrower than that which has been built). It must also have been implicit in Mr Kay's consent that the extension should not encroach onto land which is not demised by the Lease. The fact that the extension does appear to encroach onto adjoining land therefore means that it was not built in accordance with the landlord's consent.
28. In summary, therefore, we find that whilst the practical benefit to the Applicant landlord of compliance by Mrs Pickford with the relevant covenants in the Lease may be thought to be modest, it is entitled to a determination that such breaches have occurred. We note Mrs Pickford's contention that any such breaches have been waived by virtue of the acceptance of ground rent. It is not within the Tribunal's jurisdiction to determine whether or not the breaches have been waived

in this case – that is a matter for consideration by a county court in the event that further legal proceedings flow from this determination.

BLOCK PLAN

Scale 1/500th

