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

Case Reference : **CHI/45UF/LBC/2014/0008**

Property : **28 Bishopric Court, Horsham, West
Sussex RH12 1TJ**

Applicant : **Fencott Limited**

Representative : **Mr S Spanier, Counsel**

Respondents : **Mr Mathew Varughese
Ms Mini Joseph**

Representative : **No attendance**

Type of Application : **Determination of breach of covenant**

Tribunal Members : **Judge E Morrison (Chairman)
Mr R A Wilkey FRICS (Surveyor
member)**

**Date and venue of
Hearing** : **20 October 2014 at Crawley
Magistrates Court**

Date of decision : **21 October 2014**

DECISION

The Application

1. By an application dated 2 June 2014 the Applicant lessor requested an order that the Respondents, as joint lessee of Flat 28, had breached certain covenants in the lease.

Summary of Decision

2. There has been a breach of the lessee's covenant set out in clause 2((9) of the lease in that the lessee has failed to permit the lessor and/or its surveyors to enter upon the Flat to view the condition thereof, access having been denied to the bedrooms.

The Lease

3. The Tribunal had before it a copy of the lease for Flat 28 dated 24 October 1978. The lease is for a term of 99 years at a yearly ground rent of £20.00 for the first 33 years and rising thereafter.
4. The lessee's covenants are set out in clause 2 of the lease, and the relevant provisions relied on by the Applicant for the purpose of this application are as follows:

2(7): Once in every seven years of the said term to paint with two coats of good quality paint the internal parts usually painted of the Flat and at the same time with such inside painting to varnish whitewash and colour those parts of the inside of the Flat as are usually varnished whitewashed or coloured and to paper those parts which are usually papered

2(8): From time to time and at all times well and substantially to repair cleanse maintain and keep the Flat (other than the parts comprised in and referred to in paragraphs 1) and (2) of Clause 5 hereof) and the walls pipes cables wires and appurtenances thereof with all necessary reparations cleansings and amendments whatsoever (damage by fire and other risks insured by the Lessor not due to any neglect or default of the Lessee causing the insurance policy to be vitiated or payment of the insurance money to be refused only excepted)

2(9): To permit the lessor and its agents and workmen after reasonable notice in writing at all reasonable times during the said term to enter upon the Flat to view the condition thereof and take any measurements plans or sections thereof or of any part or parts thereof and to give to or leave upon the Flat for the lessee notice in writing of all defects and wants of repair there found AND within two months after every such notice well and sufficiently to repair and make good such defects and wants of repair.

The Inspection

5. The Tribunal attended at Bishopric Court on the morning of the hearing in order to inspect the flat, which is on the first floor of a purpose-built block constructed circa 1930s, and which externally appears to be in a generally poor state of repair. However the Respondents were not present and as the flat appeared to be empty and unoccupied no internal inspection was possible.

Procedural Background

6. Directions dated 5 June 2014 provided for statements of case and any witness statements to be served by each party. The Respondents failed to submit any documentation and have not communicated with the tribunal office. Letters sent to the property address by the tribunal office were returned through the postal system with the envelopes marked "No this address". Emails sent by the office to addresses provided by the Applicant for the Respondents have not been answered.

Representation and Evidence at the Hearing

7. The Applicant had set out its case in the witness statement of Mr Gavin Noe, who is employed by the Applicant's managing agents. He attended the hearing, at which the Applicant was represented by Mr Samson Spanier of counsel. The Respondents were not present or represented at the hearing.

The Law and Jurisdiction

8. Sections 168(1) and (2) of the Commonhold and Leasehold Reform Act 2002 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.
9. Section 168(4) permits a landlord to apply to a tribunal for such a determination.

The Applicant's Case

10. In the application, it was alleged that there had been breaches of the covenants in clauses 2(7), 2(8) and 2(9) of the lease. However, at the outset of the hearing, it was accepted that there as there was no evidence as to when Flat 28 was last redecorated, a breach of clause 2(7) could not be established.
11. In respect of clause 2(8) the Applicant relied on a Notice to Repair dated 5 March 2014, prepared following a pre-arranged inspection of

part of the flat on 6 February 2014 by a surveyor instructed by the Applicant's managing agents. The Notice was served pursuant to clause 2(9) of the lease, and attached what was described as a Schedule of Dilapidations. The Schedule set out brief details of matters described as breaches of the lease, and the remedial work required. These matters related to the kitchen, bathroom, hallway and living-room, access to the bedrooms having been denied.

12. The Applicant's case was that these matters, individually or collectively, established a breach of clause 2(8) as they demonstrated that the flat had not been well and substantially repaired and maintained as required by that provision.
13. The inspection had been arranged primarily because of a complaint of water ingress in to Flat 14, which is directly below Flat 28. Mr Noe said this was not the first such complaint, but no other details of the complaints, or the water ingress, were provided.
14. The Schedule of Dilapidations set out the following alleged breaches:

Kitchen

- Laminate timber floor soft underfoot and distorted, indicating it has deteriorated due to water ingress
- Kitchen sink base unit suffers distortion, suggesting it has settled on the distorted laminate floor
- Crude mastic seal around the kitchen worktop, the appearance of which suggests it is not entirely watertight
- Laminate flooring has been cut around washing machine, so it cannot be readily removed for maintenance purposes
- Damage to laminate flooring suggests a possible leak to the plumbing
- Decorations are tired and elderly

Bathroom

- No cistern cover to WC
- Shower head not supported and shower curtain inadequately supported
- Bath front panel is bowed and loose
- No seal between vinyl floor covering and edges of floor
- Grouting on tiles to rear of basin and round bath suffers localised deterioration
- Decorations are tired and elderly

Hallway and Living Room

- Could not ascertain whether timber laminate floor was laid over suitable acoustic underlay.
- Decorations tired elderly and suffer graffiti.

15. Mr Spanier submitted that all these matters established, on a balance of probabilities, that there was a breach of clause 2(8). He argued that the water ingress to the flat below made it more likely that the breaches were serious. The most important breaches related to the lack of a seal around the bathroom floor and the deterioration of some grouting on the bathroom tiles, as these could allow water penetration.
16. As to clause 2(9) the Applicant relied both on the denial of access to the bedrooms during the surveyor's inspection, and the subsequent failure of the lessees to carry out the remedial work specified in the Schedule of Dilapidations within two months of the Notice of Repair as required. An email from the First Respondent, Mr Varughese, dated 14 April 2014, noted that no work had been done (although that was still within the two month period) and Mr Noe stated that when he had last spoken to Mr Varughese, on 27 May 2014, he was told the same thing.

Discussion and Determination

17. A covenant for substantial repair does not require that the premises be kept in perfect or pristine condition: *Riverside Property Investments v Blackhawk Automotive* [2004] EWHC 3052 (TCC).
18. The Tribunal accepts the accuracy of the matters set out in the Breach column of the Schedule of Dilapidations, there being no challenge to these. However there is no evidence that any of those matters have any connection whatsoever with the alleged water ingress in the flat below. Nor is there even any evidence of the water ingress, other than a wholly vague, unsubstantiated and unparticularised statement by Mr Noe, who has no first-hand knowledge, and is simply repeating an allegation made to him by an unidentified person. We do not know anything about when or where such damage may have occurred, or its alleged extent. It is therefore impossible to conclude that any of the matters set out in the Schedule of Dilapidations have caused or contributed to any water problems in Flat 14. Mr Noe accepted as much in his evidence at the hearing.
19. The Schedule of Dilapidations lacks detail and there are no photographs. Some matters described as breaches are clearly not breaches on any view. "Possible leak to plumbing" - and then requiring the lessee to check the plumbing - is not properly included. Similarly, querying whether there is a suitable acoustic underlay beneath the laminate flooring - and requiring lessee to check this even when the lease contains no requirements as to flooring - is not properly included. In neither of these instances has any breach been identified.
20. With regard to the other matters described as breaches, it is the Tribunal's firm conclusion, in light of its knowledge and experience, that none of the matters identified, individually or collectively,

establish a failure to well and substantially repair and maintain. They are all minor and/or purely cosmetic matters. They have no structural connection and there is no cogent evidence that, on a balance of probabilities, they have caused or are likely to cause any water leakage or any other problem to anyone. In respect of the kitchen floor, the extent of the area described as "soft" is unknown and the suggested remedy, addressed only to the floor covering and not the floor itself, does not suggest a serious problem. There is no evidence of any actual water seepage or leakage from the mastic or grouting in either the bathroom or the kitchen. The suggested need for a mastic seal to be placed around the edge of the vinyl bathroom floor covering is not understood as this is simply not normal practice.

21. In essence, it appears that on receiving a complaint of water ingress into Flat 14, the surveyor inspecting Flat 28 was simply looking, albeit extremely superficially and seemingly without any proper inspection of pipes and conduits etc., for any clearly visible potential source of water escape from Flat 28. The Schedule of Dilapidations does not identify any actual defect which points to a condition less than a substantial level of repair, which is all that the lease requires. The Tribunal therefore does not find that there has been a breach of clause 2(8) of the lease.
22. As to clause 2(9) the Tribunal determines there has been a breach of covenant insofar as the Applicant's surveyor was not permitted to inspect the bedrooms. The lease requires access to "the Flat", which must mean the whole flat. In view of the Tribunal's determination under clause 2(8), no further finding of breach is made in respect of the failure to carry out the remedial work set out in the Notice to Repair and Schedule of Dilapidations.

Dated: 21 October 2014

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.