



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

Case Reference : **CHI/29UN/LBC/2015/0024**

Property : **Flat 6 Henley Lawn, 11 Crow Hill,
Broadstairs, Kent CT10 1HN**

Applicants : **Tindrell Limited**

Representative : **Mrs Francesca Elu**

Respondent : **Mr Daniel David Raymond Pearce
& Mrs Helen Pearce**

Representative : **Ms Calder**

Type of Application : **Determination of an alleged breach of
Covenant under section 168(4)**

Tribunal Members : **Judge Paul Letman
Mr R Athow FRICS**

Date and venue of **23 March 2016, Dover Magistrates' Court**

Date of Decision : **20 April 2016**

DECISION

The Application

1. The Applicant has since 21 August 2015 been the registered freehold proprietor of all those premises known as and situate at 11 Crow Hill ('the Building') (with registered title number K193128). The Respondents are and have been since 2006 the lessees of the second floor flat therein known as Flat 6 ('the Property') under a lease dated 18 July 2003 ('the Lease') for a term of 125 years from 1 January 2002 (with registered title number K860175).
2. By application dated 6 November 2015 the Applicant seeks a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 that a breach of covenant or condition in the lease has occurred. Essentially, a single breach is alleged, that without freeholder consent the internal layout of what should be a bed-sit has been altered to create what is now a 1-bedroom flat.
3. On 17 November 2015 directions were made herein providing, amongst other things, for the Applicant by 01 December 2015 to set out its case in greater detail together with supporting evidence, for a statement in response from the Respondents by 04 January 2016 and thereafter a brief supplementary reply from the Applicant by 11 January 2016.
4. The parties duly complied with these directions, and the matter was initially set down for hearing on 10 March 2016. However, the First Respondent was then unable to attend on this date, because of a change in his duties as a police officer, and the matter was adjourned and re-listed for 23 March 2016, when all parties could be available. The matter came on for hearing on that day, preceded by an inspection by the Tribunal of the Property and Building.

The Jurisdiction

5. The relevant jurisdiction of the tribunal is under sub-section (4) of section 168 (entitled 'No forfeiture notice before determination of breach') of the Commonhold and Leasehold Reform Act 2002. The sub-section is in the following terms:

'(4) A landlord under a long lease of a dwelling may make an application to a [First Tier (Residential Property)] tribunal for a determination that a breach of covenant or condition in the lease has occurred.'

6. Notably, the tribunal is not determining whether any breach subsists, but simply whether 'it has occurred.' Further, the decision in *Swanston Grange v Langley-Essen* [2008] L&TR 20 confirms that the tribunal has jurisdiction to determine whether a landlord has waived a covenant or condition or is estopped from asserting a breach, say by reason of promissory estoppel, because the effect of waiver or estoppel is to suspend the tenant's obligation under the covenant, so that these matters go to whether there has been a breach or not. However, as also made clear

by that case, the tribunal does not have jurisdiction to consider any question of forfeiture or waiver of the right to forfeit; so that the tribunal might indeed determine that a breach has occurred, but to little or no purpose because the breach has in fact been waived.

The Inspection

7. The inspection by the Tribunal commenced at 10.00am on 23 March 2016, beginning with the exterior of the Building, and followed by a view of the common parts and interior of the Property. In attendance was Mrs Francesca Elu a director and representative of the Applicant, with Mrs Janice Hook its managing agent. The First Respondent was present on behalf of the Respondents, together with Ms Calder of counsel. The Respondents' tenant was also present at the Building, but having kindly, assisted by his mother, cleaned and tidied the Property absented himself to facilitate the inspection.
8. The Building is a large 3-storey property built some 150 years ago or more. Sited in the northeast corner of its plot, it is bounded by Crow Hill to the north and adjacent properties (with a shared flint wall) to the East, with the entrances, driveway, parking and garden areas surrounding it to the rear. In about 2002 the Building was converted by a predecessor in title of the Applicant into 7 residential units (flats and bedsits), and the current leases including the Lease were granted (between about July 2002 and March 2003).
9. The Tribunal were able to inspect the interior of the Property very closely and spent some 45 minutes studying the layout and fabric of the same. In terms of layout, in so far as is material to the Applicant's case, the Property does presently have lounge area that has been divided (to the right hand side on entry) into a separate bedroom with its own doorway (as indicated on the plan at page 27 (EP3) of the hearing bundle), and a distinct kitchen area beyond in the right hand corner of the lounge.
10. Further details of the precise observations made by the Tribunal as to the layout and fabric of the Property are contained in the discussion below regarding the alleged breach.

The Lease

11. In so far as is presently material under the terms of the Lease the tenant covenants with the landlord, by clause 6(3), 'Not to commit any waste or to permit any waste to be committed nor to injure cut or maim any of the walls ceilings or floors of the demised premises or forming part of the reserved portions of the Building nor to make any structural alterations or additions to the demised premises or to the reserved portions of the Building or the internal arrangement of the demised premises or the electrical installations therein without the consent of the Landlord

whose consent shall not be unreasonably withheld in the case of an alteration not of a structural nature to the demised premises'.

The Applicant's Case

12. The Applicant's case as stated above is that the layout of the Property has been changed without consent so as to amount to a breach of the above clause. By the Applicant's statement of case, this was put both on the basis of waste and an unauthorised alteration of the internal arrangement. However, before the Tribunal Mrs Elu appeared content to rely principally on the latter, given that as a general proposition an alteration will not constitute waste unless it adversely effects the freehold reversion; which is unlikely to be the case with what would normally be regarded as an improvement from a bedsit unit to a one bedroom flat (see below).
13. As regards the internal alteration Mrs Elu pointed the Tribunal to the planning application for the conversion works in 2002 and the permission dated 08 May 2002 and approved plans (pages 12 to 31 of the hearing bundle). These show that the scheme approved by Thanet District Council was for conversion of the Building into 4 flats and 3 bedsits. In particular the approved amended plan numbered MGB-2 dated 'Nov 2001' and stamped (as amended) on 18 March 2002 (at page 22 of the hearing bundle) clearly shows the second floor flat (that was to become the Property) as a bedsit. As approved this unit plainly was intended to have an open plan 'Bed/sitting room (30m²)' with combined kitchen area, as indicated by the kitchen worktop including a sink (marked as a square labelled 's') drawn against the northern internal wall to the left hand side on entry into the room.
14. The Applicant relies upon the plain fact that the present layout of the Property is different from the approved scheme, in that as described above the Property has a separate bedroom and dedicated kitchen area in the right hand corner. The Applicant fairly accepted of course that she has no first hand knowledge of the layout of the premises on the grant of the Lease, nor indeed any evidence of when the change in layout was made. However, she points out that she has made enquiries of the local planning authority (page 32 refers) and there is no record of any application being made to amend the internal layout of the Property. The Applicant also referred the Tribunal to the lease plan as supporting her case, although she could offer no explanation for the added lines thereon (albeit faint) that would appear to depict the current layout.
15. Further, the Applicant relies upon the fact that there is no evidence that any of its predecessors in title gave consent to any alteration in the layout. Mrs Elu also maintained that it is unlikely that such a change would have been approved because under the approved scheme the kitchen areas were stacked one above the other, presumably to simplify the installation but also so Mrs Elu submitted to minimise the risk of damage to other living areas in the units below. In this regard the Applicant's case refers to signs of water damage to the far right hand corner of the

ceiling in Flat 4 immediately below the existing kitchen in the Property, although Mrs Elu in her evidence before the Tribunal fairly accepted that she had no direct or other supporting evidence, such as a surveyor's report, to link this to any defect in the Property above.

16. In the light of the foregoing the Applicant specifically rejected any suggestion that the Property was laid out in its current state prior to the grant of the Lease. Further, Mrs Elu submitted that no support for this allegation could be derived from the sale prices produced by the Respondents (at page 41 of the bundle). Firstly, because she did not accept the figures were accurate. But more importantly because, so it was argued, the different prices could just as easily be attributable to and explained by market fluctuations or the differences in the sizes (floor areas) of the units.
17. Thus the Applicant maintained that the Respondents were in any event in breach of covenant at clause 6(3) of the Lease. Further, and for completeness, Mrs Elu also made legal submissions in support of the Applicant's entitlement to pursue any alleged breaches and enforce the terms of the Lease, pursuant to the express assignment of the right to sue for pre-assignment breaches under the applicable auction sale conditions (see page 97 of the hearing bundle) and the proviso for re-entry in the Lease. However, whilst the Respondents denied any relevant breach of covenant (see below), they did not contest the Applicant's entitlement if a breach were established and this was relevant in any way to the tribunal's determination.

The Respondents' Case

18. In summary the Respondents deny that a breach of covenant has occurred as alleged or at all. They contend that it is for the Applicant to prove its case, and that there is simply no evidence that the layout of the Property has changed during the term of the Lease. Certainly, the evidence for the Respondents is that the Property was marketed and sold to them in 2006, relatively soon after the grant of the lease, as a one bedroom flat rather than as a bedsit (the letter from Ward & Partners Estate Agents at DP.2 (page 44) refers).
19. The Respondents also sought to rely upon information they had gathered about the original sale prices of the flats and bedsits, indicating that numbers 2 and 4 which are bedsits had realised sale prices of about £65,000, whilst flats 3, 5 and 6 had sold at prices around £75,000. Further or alternatively, Ms Calder submitted that if the alleged alteration had been carried out by a predecessor in title of the Respondents there was no evidence that consent had not been sought and obtained.

Reasons

20. The Tribunal accept the Respondents' case that there is no or certainly no sufficient proof that the layout of the Property has been altered subsequent to the grant of the Lease. Indeed in so far as necessary in this regard the Tribunal accepts the First

Respondent's evidence that the Respondents purchased the Property as a one bedroom flat and have not during their period of ownership carried out the alleged or any works of alteration including any works to the ceiling finishes. In respect of this period and any period since grant Mrs Elu on behalf of the Respondent commented in her closing submissions that it was 'hard to ask her for evidence that does not exist,' and likewise that 'she assumes that permission was not sought.' But that of course is exactly the point, regardless of any issue as to burden of proof, the evidence to show that any lessee has altered the Property without consent as alleged or indeed at all is simply not before the Tribunal.

21. On the contrary in fact there is abundant evidence in support of the Respondents' case that the Property has not been altered but was laid out as a one bedroom flat when the Lease was first entered. Firstly, there are of course the added lines drawn on the Lease plan, coincident with the partition walls of the bedroom and kitchen. In the Tribunals' view these are clear evidence that the layout at the time of grant was as a one bedroom flat rather than a bedsit. Whilst this revised layout would have been in breach of the planning consent, the Tribunal is not persuaded that this departure from the consent affords any real basis for disregarding the added lines on the Lease plan.
22. Further, there is significant physical evidence observed on the inspection that supports the allegation that the Property was originally sold as a one bedroom flat. On close examination of the north wall (where the kitchen area is indicated on the approved plan) there is no indication in the wall finishes that any plumbing or electrical installation existed in that wall, no vestige of any cut outs for sockets or pipework that one might have expected to see had the unit been laid out as originally planned, nor evidence that the wall has been boarded, re-skimmed or made good in any way so as to conceal or eradicate such indicia.
23. In addition the ceilings of each room have a patterned artex finish that respects the current layout of the flat, and whilst of course completely new ceilings could have been applied throughout as part of the alleged alterations, it appears more likely that this work was original (in the sense it existed at the date of the Lease). Likewise the central fuse box and common wiring, including the positioning of the power points, throughout the flat also in the Tribunal's view indicate the rooms are as they were when the Building was converted. This conclusion, that the current layout is original, is also in the Tribunal's judgement supported by the obvious uniformity of features, fixtures and fittings between the lounge and what would on the Applicant's case be the later constructed separate bedroom.
24. Thus, the electrical sockets, light switches, doors and door handles, door frames, architrave and skirtings were all noted by the Tribunal to be common between the different parts of the flat. A similarity that in the Tribunal's view is unlikely to arise had the separate bedroom been constructed at any time after the main conversion works. The only exception were the shiny hinges to the bedroom door, but these

appeared to be new relative to the door and the rest of the door furniture and hence likely in the Tribunal's view to be more recent replacements. The exception of the hinges, thereby, if anything, tending to prove the rule, that the separate bedroom was an earlier creation.

25. Thus in the light of the Lease plan and the totality of the observable evidence, and in the absence of any evidence to the contrary, the Tribunal has no hesitation in finding as a fact in this matter, on the balance of probabilities, that the present bedroom and kitchen layout is as it existed at the date of the Lease, and is not the product of some subsequent alteration works carried out by any lessee.

Decision

26. For the reasons set out above (under Reasons) the Tribunal determines for the purposes of section 168 of the Commonhold and Leasehold Reform Act 2002 that a breach of covenant or condition under clause 6(3) of the Lease has not occurred in this case as alleged by the Applicant.

Appeal

27. Pursuant to rule 36(2)(c) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013/1169) ('the Rules') the parties are duly notified that they have a right of appeal against the decision herein. That right of appeal may be exercised by first making a written application to this tribunal for permission to appeal under rule 52 of the Rules. An application for permission to appeal must be sent or delivered to the tribunal so that it is received **within 28 days** of the latest of the dates that the tribunal sends to the person making the application (a) written reasons for the decision or (b) notification of amended reasons for, correction of, the decision following a review (under rule 55) or (c) notification that an application for the decision to be set aside (under rule 51) has been unsuccessful.

Dated: 20 April 2016