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FIRST-TIER TRIBUNAL PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference :	CHI/00MW/LBC/2018/0011
Property :	Top View, 25 Victoria Avenue, Shanklin, Isle of Wight. PO37 6PW
Applicant :	Mr A E Dixon (the Landlord)
Representative :	---
Respondent :	Mrs A E Brown (the Tenant)
Representative :	---
Type of Application:	Section 168(4) Commonhold and Leasehold Reform Act 2002 – Application for an order that a breach of covenant or a condition in the lease has occurred
Tribunal Members :	Judge P.J. Barber Mr P D Turner-Powell FRICS Valuer Member
Date and venue of Hearing :	17th August 2018 The Law Courts, Quay Street, Newport, Isle of Wight. PO30 5YT
Date of Decision:	5th September 2018

DECISION

Decision

(1) The Tribunal determines in accordance with the provisions of Section 168(4) of the Commonhold and Leasehold Reform Act 2002, that breaches of covenant have occurred, being breaches by the tenant of the obligations imposed pursuant to Clause 2(4) of the Lease dated 8th August 1979.

(2) The Tribunal determines that no costs are payable in the matter by either party to the other.

Reasons

INTRODUCTION

1. The application dated 5th April 2018 was made by the Applicant, for the Tribunal to determine whether or not breaches of covenant have occurred in respect of certain covenants contained in the lease dated 8th August 1979 made between Lydia Beatrice Jackson (1) Steven Rawson and Judith Gay Smith (2) ("the Lease"), in relation to use of the Respondent`s flat, known as Top View, 25 Victoria Avenue, Shanklin, Isle of Wight PO37 6PW ("the Flat").

2. In broad terms, the complaint made by the Applicant as landlord, is that the Respondent tenant has carried out certain works at the Flat in contravention of various covenants in the Lease by carrying out the following work without landlord consent:

   (1) removing an upstairs entrance porch, light, enclosure wall and handrail.

   (2) installing a new handrail, steps and enlarging the porch deck floor.

   (3) erecting a greenhouse and garden shed.

   (4) installing deck boards and planters in the garden.

   (5) installing a maceration toilet in the Flat creating a noise nuisance to the flat below.

3. A copy of the Lease was provided in the bundle to the Tribunal; the Lease contains the following relevant provision:-

   Clause 2(4):

   "Not to erect any other building structure pipe wire or post upon the demised premises nor to make or suffer to be made any alteration in or addition thereto nor to commit or permit or suffer any waste spoil or destruction in or upon the demised premises nor to cut maim or injure or suffer to be cut maimed or injured any of the roofs walls timbers wires pipes drains appurtenances fixtures or fittings thereof PROVIDED THAT in the event of the Lessor giving his consent to any alterations or additions to the demised premises not to make such alterations or additions except in conformity with plans and specifications approved by the Lessor and upon such terms as the Lessor may deem appropriate"

   Clause 2(6)

   "To repair and maintain the fence dividing the garden of the demised premises from the adjoining garden of the ground floor flat and to keep the

same in good order and condition."

Clause 2(13)

"Not to do or permit or suffer on the demised premises or any part thereof any act matter or thing whatsoever which may be or tend to be a nuisance annoyance damage or disturbance to the Lessor or superior lessor (if any) or the owner tenants lessees or occupiers of any adjoining or neighbouring property"

4. Directions were issued by the Tribunal on 8th May 2018 requiring the parties to carry out various actions in preparation for the hearing.

5. The Flat had been acquired by the Respondent`s daughter Claire Brown and her then partner in 2006 and was subsequently transferred to the Respondent in or about December 2010.

INSPECTION

6. The inspection was attended by Mr Dixon, Mrs Brown and Miss Claire Brown, the latter now being the Respondent`s tenant of the Flat. Numbers 25A and 25 ("Top View") Victoria Avenue, Shanklin respectively form converted ground and first floor flats in a Victorian detached house, built of part brick and part rendered elevations under a pitched, slated roof. Access to the first floor flat is by means of a path leading from the pavement past the left hand side of the building and to a rear garden and flight of steps, by which access is gained to the front door at first floor level. The Tribunal noted that the timber balustrade to the flight of steps was painted in pale green, rising over an original rendered structure and leading to an extended deck area adjoining the front door. A greenhouse was erected adjoining the walls of the main structure and apparently attached to it at least in part; there was also a garden shed of timber construction in the garden and the garden was laid to decking in certain areas. A timber fence, also painted in pale green, divided the gardens of Nos 25 and 25A at the rear of the building. There were half-circular ornamental plant baskets attached along the party wall with No. 27 and the access path was laid to shingle with small square decking insets at intervals. The Tribunal inspected the interior of the Flat and noted that the toilet inside the small room by the front door still remained; in addition there is a maceration toilet installed in a separate bathroom. Despite flushing the toilet four times, no obvious sound was apparent from the macerating device.

THE LAW

8. Section 168 of the Commonhold and Leasehold Reform Act 2002 (as amended by *Regulation 141 of the Tribunals and Inquiries, England and Wales Order No. 1036 of 2013) provides that :*

"168 – No Forfeiture Notice before determination of breach

(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 (c.20) (restriction on forfeiture) 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 arbitration agreement, has finally determined that the breach has occurred.

(3) But a notice may not be served by virtue of subsection 2(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made

(4) A landlord under a long lease of a dwelling may make an application to the appropriate tribunal for a determination that a breach of a covenant or a condition in the lease has occurred.

(5) But a landlord may not make an application under subsection (4) in respect of a matter which-

(a) has been, or is to be, referred to arbitration pursuant to a post dispute arbitration agreement to which the tenant is a party

(b) has been the subject of determination by a court, or

(c) has been the subject of determination by an arbitral tribunal pursuant to a post dispute arbitration agreement

(6) For the purposes of subsection (4), "appropriate tribunal" means-

(a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) in relation to a dwelling in Wales, a leasehold valuation tribunal"

HEARING & REPRESENTATIONS

10. The hearing was attended by the Applicant Mr Dixon, accompanied by a friend, Jean Bowen. Also in attendance were the Respondent Mrs Brown, and her daughter Claire Brown who represented her mother.

11. At the outset of the hearing, the parties accepted and agreed that the issues are the five matters as referred to in paragraph 2 above. The Tribunal reminded the parties of the purpose of the hearing, being limited to simply whether a breach or breaches of covenant has or have occurred. Accordingly the Tribunal proceeded to hear representations from the parties on each of the five disputed issues.

12. (1) Removal of the old porch & staircase and (2) Erection of Replacement Staircase & enlarged porch decking floor

Mr Dixon alleged that removal of the old porch over the staircase and renewal of the balustrade, was in breach of Clause 2(4) in the Lease; he said he was aware that the porch had been in need of repair, but that there had been no consultation; he considered that the new structure was not in keeping with that which it had replaced. Miss Brown submitted that the new structure had been erected in

compliance with the tenant obligation at Clause 2(5) to repair and keep the exterior of the demised premises in good and tenantable repair. Miss Brown said they had seen a solicitor who had told them they were entitled to remove the old structure. Miss Brown referred to photographs at Page 49 of the bundle which she said showed the poor condition of the steps in 2006 and she alluded to a problem getting larger items of furniture in and out of the Flat with the old porch in place. Miss Brown accepted that the deck area outside the front door of the Flat at the top of the stairs, had in the process, been extended outwards by approximately 30cms. Miss Brown also referred to the 1956 plan of the building attached to the Lease at Page 85 of the bundle, adding that it showed that there had been a similarly open handrail previously. Mr Dixon said the action was not a repair, but removal and replacement with a different structure, with complete removal of the porch. Miss Brown said they had initially envisaged constructing a replacement porch, but that they had subsequently been advised that consent was not needed. Miss Brown referred to Clause 2(10) of the Lease, being the requirement to allow the lessor to inspect and give notice of any defects, and reference was made to two surveys carried out for Mr Dixon. Mr Dixon accepted that the Flat had been in poor condition in 2006, but said the structure had been sound and should have been replaced, not altered; he added that the extended new platform at the top of the staircase required planning permission, although he adduced no evidence to this effect. Miss Brown said they had been advised that planning permission was not required.

13. (3) Erection of Greenhouse & Shed

Mr Dixon said that the erection of the greenhouse and shed are in breach of Clause 2(4) in the Lease, given that no permission had been sought and that the greenhouse is attached to the wall of his ground floor flat. Miss Brown said they had obtained legal advice to the effect that the greenhouse and shed are not permanent structures and that no permission was needed from the lessor under the Lease. Miss Brown added that the greenhouse encloses, and therefore offers protection to, the toilet window of the ground floor flat. Miss Brown referred to a letter from Mr Dixon`s previous tenants at Pages 33-36 of the bundle and in which reference was made to the greenhouse not affecting them. Miss Brown added that the greenhouse is actually only used for storage, that it has been in place since 2010, had not been an issue before, and could be removed at any time.

14. (4) Garden Works & Fence

Mr Dixon said that in essence a garden had been created along the access path at the side of his ground floor flat, reducing privacy to the bedroom window in the flank wall and to some extent to the living room window at right angles to the path, at the front of the building, in breach of Clause 2(13) of the Lease and being a nuisance or annoyance. Mr Dixon said that Miss Brown as the tenant of the Respondent`s Flat, spends much time tending and watering the half-round baskets alongside the flank wall path. Miss Brown said that the headlease of the building provides that the boundary wall between Nos 25 & 27 Victoria Avenue, is the sole responsibility of No. 27; she said she had obtained the adjoining owner`s consent to attach the baskets to the wall and added that they have been there for a long time, without previously being an issue. Miss Brown said that Mr Dixon`s tenants in the ground floor flat had never complained and that she had simply wanted to make the path look nice. Mr Dixon said it was less safe now to use the path and he further objected to the large number of garden gnomes which he said created more

activity adjacent to his downstairs bedroom window. Miss Brown said that the downstairs tenants had not complained to her about the matter during the last 12 years. In regard to the fence between the gardens of the two flats, Mr Dixon said that he had asked for the previous one metre high fence to be replaced, but the two metre high new structure is an alteration, in breach of Clause 2(4). Miss Brown referred to Clause 2(6) of the Lease which she said was to repair and maintain the fence, free of any stipulations by the lessor; she added that the new fence provides additional privacy for each garden. Mr Dixon said he had wanted something in line with what already existed. Miss Brown said that they had had the fencing done by a proper contractor and had tried to please Mr Dixon.

15. (5) Maceration Toilet

Mr Dixon said that the consent he had given for the installation of a maceration toilet, had been subject to compliance with regulations and that when he had lived in the ground floor flat for about 5 weeks in 2012, the toilet had made a noticeable gurgling noise when flushed, although he accepted it had not been noisy when flushed during the inspection. Miss Brown referred to written statements given by Mr Dixon`s ground floor flat tenants at Pages 33-38 of the bundle, and in which no reference was made to complaint about noise nuisance from the toilet. Miss Brown further referred to a Building Regulation Completion Certificate for installation of the maceration toilet, at Page 55 of the bundle. Miss Brown said that Mr Dixon had never complained to her previously about noise nuisance from the toilet when he had been living at the ground floor flat.

16. Costs and Compensation

In regard to the Respondent`s claim against the Applicant for costs and compensation in regard to the making of the application, the tribunal pointed out that it has no jurisdiction to award compensation; however it invited the respondent to provide a copy of any written submissions and any supporting invoices, each to the Applicant and the Tribunal by 31st August 2018, and for the Applicant to provide any written representations in response, each to the Respondent and the Tribunal by 7th September 2018. In a letter dated 24th August 2018, the Respondent referred to, and attached, invoices from Eldridges solicitors for advice which they had given, and she also appended various receipts for stationery and postage costs and similar items. By an undated letter of reply, Mr Dixon referred to, and attached, certain receipts in respect of his secretarial expenses which he appeared to be claiming, and he also contested that the Respondent`s expenses appeared to relate to a period prior to the hearing.

17. In her closing, Miss Brown submitted that she loves her home and would do nothing to harm it, adding that she has always tried to act within the terms of the Lease. Miss Brown further submitted that they had never been asked to remedy the matters now complained of and that most of the changes have been in place for at least the last 10 years. In his closing, Mr Dixon said that he had owned the property for 30 years and had always been peaceable with previous occupiers but had ongoing issues with the Browns. Mr Dixon said he only wants to be able to enjoy his flat if he moves back, and ended by suggesting that the Respondent`s statements were less than truthful.

CONSIDERATION

18. The Tribunal, have taken into account all the oral evidence and those case papers to which we have been specifically referred, and the submissions of the parties. The Tribunal noted that the covenant contained at Clause 2(4) of the Lease is relatively draconian, prohibiting the erection of any other building or structure, nor the making of any alteration, nor cutting or injuring of any of the walls, subject to the proviso that if the lessor gives consent to any such work, the alterations or additions must be in conformity with plans and specifications approved by the lessor and upon such terms as the lessor may deem appropriate. The Tribunal considers that the erection of the extended platform adjacent to the front door of the Flat is technically, an alteration or addition and in breach of Clause 2(4). However, on the basis of the evidence as presented, the Tribunal considers the new staircase balustrade to be a replacement; the removal of the old porch is an alteration, and therefore in breach of Clause 2(4) although the porch was of no structural importance, and on the evidence provided, was previously in poor condition. Similarly the erection of the greenhouse and shed structures are technically in breach of Clause 2(4) by way of being new structures or additions, and in the case of the greenhouse, involving attachment to a wall, thereby technically injuring such wall. The greenhouse also enclosed the window of the ground floor bathroom thereby preventing direct access to light and ventilation from outside. However the Tribunal does not consider the baskets or deck boarding in the garden to be breaches of any of the covenants, and similarly that on the evidence provided, the new fence is not in breach of Clause 2(4), on the basis that it is Clause 2(6) which contains the relevant provision or obligation in regard to fencing, not entailing any requirement for landlord approval. In regard to the macerator toilet, no clear evidence as to any noise nuisance was provided and accordingly the Tribunal finds no breach.

19. In regard to the parties` claims for costs against each other, in all the circumstances of the case, the Tribunal is not minded to make any order.

20. Accordingly the decision of the Tribunal is that breaches of covenant have occurred, albeit of a relatively minor nature.

21. The Tribunal`s decision is of necessity made by reference to the provisions of the Lease.

22. We made our decisions accordingly.

Judge P J Barber (Chairman)

A member of the Tribunal
appointed by the Lord Chancellor

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.