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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference : CAM/00KF/LBC/2016/0018

Property : 20 Sutton Road,
Southend-on-Sea,
SS2 5EW

Applicant : Sandra Ehlers
Represented by counsel : Tricia Hemans (Chennells)

Respondent : Sarah Grant
Self representing

Date of Application : 15th September 2016

Type of Application : For a determination that a breach has occurred in a covenant or condition in a lease between the parties (Section 168(4) Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”))

Tribunal : Bruce Edgington (lawyer chair)
Evelyn Flint DMS FRICS IRRV

Date and venue of Hearing : 21st November 2016 at The Court House,
80 Victoria Avenue, Southend-on-Sea
SS2 6EU

DECISION

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1. In respect of the Lease of the property dated 4th February 1989 wherein the Applicant is the current freehold reversioner and the Respondent is the current long leaseholder, the determination of the Tribunal in respect of the various allegations by the Applicant that the Respondent is or has been in breach of its terms is that:-

Clause 2(c) – *“the tenant hereby covenants ... not to make any structural alterations to the demised premises nor to erect any new buildings thereon or remove any of the Landlord’s fixtures without the previous consent in writing of the Landlord”.*

- (a) Of the allegation that the Respondent has made structural alterations to the flat without consent, the Tribunal determines that there is no evidence of a breach
- (b) Of the allegation that the Respondent has erected a new building in the rear garden without consent, the Tribunal determines that the shed/summerhouse could just about be described as a building, has

been erected by the Respondent without written consent, which thus constitutes a breach

- (c) Of the allegation that the Respondent has moved a fence installed by the Applicant between the parties' gardens without consent and has removed and damaged the Applicant's electrical installations, plants and containers, the Tribunal determines that the Respondent removed the Applicant's panels from the fence between her garden and the Applicant's and, with them, an electric cable which was not damaged. The panels were 'lift out' panels with no degree of annexation save for being slid between concrete fence posts which are fixtures and were not damaged. Thus, the fence panels, the plants and containers are not 'fixtures'. The electricity cable could have been a fixture but there is insufficient evidence of a significant enough degree of annexation to determine that such cable was in fact a fixture. Thus, no breach has been proved.
- (d) Of the further allegation at the hearing that the Respondent had removed the Applicant's fence at the rear of the property, the Tribunal agrees that the fence was a landlord's fixture and the Respondent removed it without consent, thus creating a breach.

Clause 4(4)(a) – *“the tenant hereby covenants ... that the tenant will at all times hereafter ... permit the Landlord and others authorised by it with or without workmen and others at all reasonable times on notice (except in the case of emergency) to enter into and upon the demised premises or any part thereof for the following purposes namely ... to view and examine the state and condition of the demised premises”.*

Of the allegation that the Respondent has refused to allow the Applicant's surveyor access to the property to examine its state and condition, the Tribunal determines that there has been a breach of this clause

Clause 4(6) and paragraph 4 of the Fourth Schedule – *“the tenant hereby covenants ... to observe ... the restriction (that) no animal shall be kept on the premises without the written permission of the Landlord ..”*

Of the allegation that the Respondent has kept a cat in the property without the Applicant's consent, the Tribunal determines that there has been a breach of this clause

Reasons

Introduction

2. The Applicant has applied to the Tribunal for a determination that the Respondent is in breach of the terms of a long lease. The application sets out a number of allegations as stated above plus others made at the hearing and described below.
3. The law as it stands is that the only task of this Tribunal is to say whether there has been a breach. The Upper Tribunal case discussed below makes it clear that this is the case even if the breach had been rectified so that there was no longer a breach at the date of the hearing. The reason for that is that this Tribunal is not determining whether to grant relief against forfeiture. That is a matter for the court.

4. The evidence filed with the Tribunal before the hearing was copious. It soon became clear to the Tribunal that matters had become so entrenched between the parties that they had almost lost sight of the real issues. Much of the evidence consisted of lengthy descriptions of who said what to whom about the issues in the case and many more issues which were not relevant. The Respondent has sought to make cross allegations of the Applicant's alleged breaches of terms of the lease. These are irrelevant so far as this determination is concerned.

The Lease

5. The Lease is for a term of 125 years from the 4th February 1989 with an increasing ground rent. The relevant clauses in the lease are as set out in the decision above.

The Law

6. Section 168 of the 2002 Act introduced a requirement that before a landlord of a long lease could start the forfeiture process and serve a notice under Section 146 of the **Law of Property Act 1925**, he or she must first make "*...an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred*".
7. On 1st July 2013, the Leasehold Valuation Tribunal was subsumed into this Tribunal which took over that jurisdiction.

Inspection

8. The members of the Tribunal attended the property on a damp overcast morning. The house in which the property is situated was half a semi detached house of brick construction under a pitched interlocking concrete tiled roof and uPVC windows, built in the first half of the last century. There has been at least one extension at the rear and there is a flat roof over the ground floor extension. The house has been converted into 2 flats, presumably in 1989 when the lease started. The rear garden is in 2 halves and the front garden is a parking area. The property is within easy walking distance of Southend town centre and train stations used by commuters into central London.
9. The exterior of the property is in reasonably good order. The members of the Tribunal were shown round both flats. It should be said that both the Applicant and the Respondent have made every effort to make the flats very pleasant homes. In the ground floor flat, the 2 bedrooms at the rear have been converted into an open living area including a kitchen. There are bathrooms and WCs in the centre and 2 double bedrooms.
10. The first floor flat, occupied by the Applicant, has a living area at the rear. The attention of the tribunal was directed to part of the wall to the stairwell going down to the front of the property where it was said that building works had been undertaken to the ground floor flat behind the wall. The other thing pointed out to the Tribunal was the view to the rear garden showing the new shed. The Applicant clearly did not like the view she now had after the installation of the shed and changes to the garden area.

The Hearing

11. The hearing was attended by Ms. Hemans, counsel for the Applicant, and the Applicant herself. The Respondent attended and represented herself. Counsel provided an 8 page skeleton argument from which it appeared that the Applicant was changing her position in several material ways. This was most unfortunate as the Respondent was unrepresented. Most of these changes consisted of assertions that the removal of the stud wall in the conversion of the rear of the property, the removal of a fireplace surround, the removal of fences and the removal of the old shed all amounted to removal of landlord's fixtures without consent.
12. The Tribunal went through the allegations one by one and there was a reasonable degree of agreement as to the facts. However, even at the hearing the parties engaged in 'discussions' between themselves over issues such as the reason for the Respondent having paid cash for the property which seemed quite important to the Applicant for some reason which the Tribunal simply did not understand.
13. What did become crystal clear was that the Applicant simply had no real idea of what this tenant had done to the property as opposed to what the previous tenant had done. She said that she suspected that there had been no RSJ beam under her bay window at the rear when she bought. She had a conversation with the previous tenant's builder and was reassured that an RSJ was now there. Of all the allegations as to possible structural work, the Tribunal concluded that this installation of an RSJ was probably the only structural work and it seemed quite clear that the Respondent had not done this.
14. As to the assertions that numerous items such as fences, stud walls and fireplace surrounds were landlords fixtures, the Tribunal was less than impressed that these arguments were only being put forward at the hearing itself and that counsel produced no case law or legal argument as to the definition of a fixture. The Tribunal chair put it to counsel that the only real way of defining a fixture was to look at the degree of annexation to the property with which she agreed.
15. The Respondent gave her views. As to the discussion she had with the surveyor who wanted to inspect the property, it had been thought that the Applicant intended to serve a section 146 notice (of the **Landlord and Tenant Act 1925**) and she said that in view of this, her solicitors had advised her not to permit the surveyor access without giving her details of the allegations.

Discussion

16. In the case of **Forest House Estates Ltd. v Al-Harhi** [2013] UKUT 0479, LRX/148/2012, Peter McCrea FRICS considered the matters which should be determined by this Tribunal in circumstances relevant to this determination. He said, at paragraph 30,:-

"The question of whether a breach had been remedied by the time of the LVT's inspection was not an issue for determination by the LVT. Questions relating to remedy, damages for breach and forfeiture are matters for the court. The LVT was entitled to record the fact that the breach had been remedied by the time of its inspection,

but that finding was peripheral to its main task under section 168(4) of the 2002 Act. The LVT should have made an explicit determination that there had been a breach of covenant, notwithstanding that the breach had subsequently been remedied at the time of the LVT's inspection"

17. As to the definition of a fixture as opposed to a chattel – or ‘fitting’ as it sometimes termed – this does depend on the degree of annexation. However, in order for something to be a fixture, it has to be an item fixed to the property. Fence posts fixed into the ground with concrete are, in the Tribunal’s view, fixtures. A heating system with radiators, pipes and water tank are items fixed to the property and, thus, fixtures. Fence panels just slid into concrete posts or a small garden shed just resting on the earth are chattels and are not fixtures.
18. As to the more controversial suggestion that a built in fireplace surround or a stud wall are fixtures, the Tribunal could not accept this as a proposition. They are not separate items fixed to the building, they are part of the fabric of the building. It is perfectly possible to have a part of the fabric of the building which is not structural. Counsel’s argument seemed to stem from a starting point that if the stud wall or fireplace surround were not structural items, they must, by definition, be fixtures. The Tribunal simply did not accept that argument.

Conclusions

19. As far as the alleged breaches are concerned, some were admitted and some were not. The end result of the evidence gathering process was as follows.
20. As far as **structural alterations** were concerned, the evidence was complicated by the fact that the previous owner of the long leasehold interest appears to have undertaken some building works but possession of the flat was taken over by a mortgagee before being transferred to the Respondent. The Respondent acknowledges that she has undertaken building works but they are all ‘cosmetic’ and not structural. The Applicant has simply been unable to prove that any structural alterations have been undertaken by this Respondent.
21. The only truly structural work appears to have been the installation of the RSJ which was not by this Respondent. Whilst this could be termed as a breach of the lease, it was not possible for the Respondent to ask for permission for this work and as the Applicant was clearly relieved that this had been done, it is absolutely clear that if her permission had been sought for the work, it would have been forthcoming.
22. As to whether any **new buildings** have been erected, the allegation is again complicated. There is a suspicion on the part of the Applicant that a structure has been built which is intended as living accommodation. The Respondent accepts that she has taken down a dilapidated shed and built a new and larger shed/summerhouse without consent. The Tribunal accepts the Respondent’s evidence but the structure she has put there is, on balance, a building and as consent was not obtained, the breach is therefore proved. Whether consent should have been granted, even

retrospectively, is another matter. This new shed is remarkably similar in size and design to the Applicant's adjoining shed.

23. On the question of the **moving of the fences etc.**, the middle fence consisted only of fence panels and there is therefore no breach. The Respondent seems to have confused legal ownership under the terms of a 1896 conveyance set out in the Land Registry title entries with actual ownership. They are not the same thing. For the benefit of the Respondent, it should be said that title deeds cannot confirm who actually owns a fence, merely who is responsible for maintenance. Many people, over the years, do not actually abide by these covenants and one often finds that neighbours have replaced – and therefore now own – fences. It does appear that the original fence was not in a good state of repair.
24. As to the fence at the rear, the Respondent admits removing it and putting a rear door into her shed. This was, she said, to ensure that she had rear access to her garden area as the lease shows that she should have had such access down the side passageway, but there is no opening. Thus, technically there has been a breach.
25. In respect of the alleged **failure to allow inspection**, it is clear that the Applicant's surveyor gave adequate written notice of his intention to inspect and entry was refused. The Respondent refused because she wanted to know what the allegations were that the surveyor was investigating. The power to inspect under the terms of the lease is unconditional. If she was given the legal advice she suggests, then that is unfortunate. It may provide mitigation but there has been a breach of this clause.
26. As far as the **cat** is concerned, the Respondent accepts that she kept a cat at the property which she was looking after. Whether she realised that she had to obtain permission or not, the lease is clear. The Applicant's permission should have been sought and the breach is therefore admitted.

The Future

27. It seems clear that the Applicant is aggrieved about the behaviour of the previous owner of the leasehold interest. The Tribunal can well understand that she had to be involved in substantial cost. There is a suggestion in the papers that the Respondent has offered compensation to the Applicant but this appears to have been part of a proposal for her to buy a share of the freehold which the Applicant was unwilling to agree to.
28. At the hearing, there was even a suggestion that the 'offer' put forward by the Respondent had not been received by the Applicant. Not only was this an irrelevant point, but the Applicant has clearly known about such offer for some time during the continuance of this application and could have at least opened negotiations if she had wanted to.
29. The Applicant does not seem to have even considered whether she would have granted permission if it had been requested in respect of those breaches where permission was needed. Given the circumstances set out in the evidence presented to the Tribunal, there would appear to this Tribunal little doubt that any reasonable landlord would have granted permission.

30. For whatever reason, the written correspondence between the parties has become vitriolic and is verging on the offensive. The Applicant and the Respondent live in their flats and life must be almost intolerable.
31. None of the breaches, given the circumstances, appear to the Tribunal to be serious enough to warrant forfeiture. It can only be hoped that the parties will speak to each other in a civilised and friendly way with a view to setting some reasonable ground rules for mutual coexistence.

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Bruce Edgington
Regional Judge
23rd November 2016

ANNEX - RIGHTS OF APPEAL

- i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
- ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
- iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.