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

Case Reference : CAM/33UG/LBC/2013/0005

Property : 58 & 76 Earlham House, Earlham Road, Norwich
NR2 3PE

Applicant : Bellgold Properties Ltd

Representative : Timothy Concannon (counsel), instructed by Marcus
Cover (solicitor)

Respondents : Richard Arthur Bennett & Elizabeth Ng Bennett

Representatives : Mr Bennett

Type of Application : For determination that a breach of a covenant or a
condition in the lease has occurred
[CLRA 2002, s.168(4)]

Tribunal Members : G K Sinclair, G F Smith MRICS FAAV REV, and
D S Reeve MVO MBE

**Date and venue of
Hearing** : Thursday 10th & Friday 11th October 2013
at The Old Bakery, 115 Queens Road, Norwich

Date of Decision : 7th November 2013

DECISION

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- Relevant legislation paras 5–7
- The lease paras 8–11
- Inspection and hearing paras 12–20
- Findings paras 21–26

Summary

1. By application dated 30th May 2013 the Applicant landlord alleged, in summary, that the Respondents were in breach of covenant by :
 - Structural alterations to both flats to include (but not by way of limitation) cutting into structural walls to affix bed platforms and creation of ceiling/loft hatches giving access to roof/loft areas excluded from the demise in breach of clause 3.6 within the lease dated 21st January 2008 (flat 58) and 15th February 2008 (flat 76).
2. If alleging that a tenant has breached a covenant in his lease it is essential that the precise nature of that breach is drawn to his attention. The use of “catch all” words, or reserving the right to add further but as yet unspecified complaints later, is not acceptable. The tribunal therefore limits its enquiry to :
 - a. The alleged cutting into structural walls to affix bed platforms, and
 - b. The creation of ceiling/loft hatches giving access to roof/loft areas excluded from the demise.
3. The application was dealt with by the tribunal at the same time as a more general application concerning service charges at this building, where a large number of leaseholder Respondents were represented by Mr Bennett.
4. For the reasons which follow the tribunal determines that the applicant has failed to prove any such breaches, and the application is dismissed.

Relevant legislation

5. Section 168 of the Commonhold and Leasehold Reform Act 2002 provides :
 - (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 (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-dispute 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 a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred.
 - (5) ...

6. Section 169 contains supplementary provisions which this decision need not record.
7. The question whether a lease is forfeit therefore remains one for the court, as is the exercise of its discretion to grant relief against forfeiture; an issue which in the context of a long lease is likely to be of considerable concern to any mortgagee of the tenant's leasehold interest.

The lease

8. A copy of the leases for flats 58 and 76 were in the hearing bundle, but each is essentially the same in its material particulars. Each was granted by a previous freeholder, Relayarch Limited, in early 2008 for a term of 125 years from 1st January 2007.
9. The covenant relied upon is at clause 3.6, whereby the tenant covenants :
Not without the landlord's prior consent to make any structural alterations in or addition to the demised premises or any part thereof or to cut maim alter or injure any of the load bearing walls or timbers thereof or to alter the landlord's fixtures and fittings therein.
10. The First Schedule (definitions), makes no specific reference to any of the words "cut maim alter or injure", so one must fall back on standard or legal dictionaries if required.
11. The demised premises are defined in Schedule 2, and by reference to the part shown edged red on the lease plan. The definition includes :
 - 1.2 the whole of the walls and the partitions lying within the demised premises save where such walls and partitions form part of the main structure of the building;
 - 1.3 the plastered coverings and plasterwork of the ceilings and the surfaces of the floors including the whole of the floorboards (but not any timbers or joists forming part of the main structure of the building);
 - 1.4 all conduits and storage tanks sewers and drains which are laid in any part of the building and serve exclusively the demised premises;...

Inspection and hearing

12. The two flats were inspected on the morning of the first day of the hearing of both this and a separate service charge dispute concerning the building. In addition a further flat was inspected, and it had a built-in mezzanine sleeping area which is approached by a staircase at one side. Flats 58 and 76 are smaller, originally with a single long bed-sitting room, with a kitchen, bathroom/WC, and a small external balcony to one side. The balcony has in each case since been enclosed by the tenants when replacing the original softwood windows with PVCu double glazed units, so the open balcony is now enclosed as a small utility/drying room. These two flats are on the top floor, immediately under the sloping copper roof, and the ceiling also slopes so that at its lowest point it is above head height, whereas at the inner end of the main room the height is perhaps double.
13. At the same time as the tenants, Mr & Mrs Bennett, replaced the windows they also decided to add a wooden mezzanine structure occupying roughly the inner half of the main room, with a narrow staircase by the load bearing wall dividing

one flat from the next. The purpose was to create a separate sleeping platform, with the structure supported on four solid timber corner posts, and with some bolts fixed to the rear and side walls to prevent movement. The corner post under the stairs is concealed by a corner cupboard which was built at the same time.

14. Unlike the main room, the kitchen and bathroom share a level ceiling at normal height. The wall separating these two rooms is not load bearing, and the ceiling probably extends over both, creating a large but sloping void beneath the inner side of the main roof. When undertaking the other work the Bennetts installed a hatch in the bathroom ceiling giving access to this void. The hatches were not opened nor the voids inspected by the tribunal.
15. Although the leases date from early 2008 the building is much older, being constructed in the 1960s. Broadly L-shaped, with retail or restaurant units on the ground floor fronted by a concrete awning for pedestrians, the building has two upper floors of flats under a copper roof. A substantial programme of works to the building and its surrounding common parts is nearing its conclusion. This has included replacement of the windows to all the flats with PVCu double glazed units. That is the subject of a separate service charge dispute involving the same parties and more, dealt with under case reference CAM/33UG/LSC/2013/0086.
16. The hearing bundle included a short statement by Christopher Paul Goddard, a director of the Applicant company. Starting at page 118, the body of the statement barely covers two pages and, after explaining how access was obtained to inspect the interior of each flat, paragraph 13 lists four complaints :

During such inspection I discovered that the following works had been carried out by the Respondents without the consent of the Applicant :

 - (a) ceiling hatches had been cut into the ceilings of each flat, giving access to the roof space above each flat, i.e. to an area excluded from the relevant demise in each case;
 - (b) heating apparatus had been installed within the roof space above each flat, i.e. within an area excluded from the relevant demise in each case
 - (c) sleeping platforms had been affixed to the walls and floors within each flat accessed by stairs affixed to the walls of each flat;
 - (d) the balconies to each flat had been incorporated within each flat and new windows had been installed.
17. Photographs were attached, showing hatches (from below), the wooden stairs to the sleeping platforms, balustrades, and a general view underneath, including the corner cupboard. There were no photos taken inside the roof voids. It was noted that consent had later been given to the fourth item.
18. In response Mr & Mrs Bennett each filed a very short, one page statement. The material parts of Mr Bennett's statement say :

The sleeping platforms are supported by legs down to the floor and no cuts have been made into the walls of the premises.

The loft hatches were installed in 2008 following approval that was given during a phone conversation with Doig Rudling of 4D Properties Ltd, the

owners agents, regarding access to allow us to instal insulation in the premises. This was required as Norwich City Council were considering issuing an improvement notice.

I have not received from the Applicant any paperwork evidence of their claim or Statement of Truth. I also have had no correspondence from, or conversation with, Bellgold Properties Ltd about these claims.

19. In his oral evidence, Mr Goddard appeared to lay considerable stress upon the fire risk that may have been created by inserting hatches in the ceiling but, more importantly, from placing water heaters in the lofts. This had not featured either in the alleged breaches listed in the application or in his written statement. He explained his background in selling fire protection equipment for about 12 years, and he argued that the voids are outside the demise. On the subject of sleeping platforms he was equally concerned about the fire risk, and he questioned whether the structures complied with the building Regulations. Again, none of this had been mentioned in his written statement or the alleged breaches listed in the application. He also expressed concern about the point loading to the floor of the flat caused by the four wooden posts. The floors are concrete. It was put to him by the tribunal that a water bed would add considerably more load to the floor and he agreed that it would, and there was nothing in the lease enabling him to do anything about that.
20. Mr Bennett gave evidence, confirming that consent had been obtained from the previous freeholder in 2008, via its managing agent Mr Rudling of 4D Properties. He also disputed that any cuts (in the sense of cutting a slot into the wall with a grinder) had been made, and disputed whether drilling a hole for a picture hook or for a stronger bolt (for example to support a heavy mirror) could constitute a breach of covenant. He denied that any wall had been cut, maimed or injured.

Findings

21. The tribunal was not impressed by the way the landlord's complaints expanded in Mr Goddard's witness statement beyond the two breaches alleged in the application, and expanded further in his oral evidence. That is not the case the Respondents expected to meet, and nor should they.
22. Dealing first with the hatches, it is arguable that the ceilings are partitions within the demise, and that the voids are also included, as the only parts of the main structure are the full-height walls on either side, the wall between the flat and the corridor, and the external wall and windows, which all support the main roof. The internal wall between kitchen and bathroom is not structural and extends only as high as the roof void. Further, the tribunal was told that electric cabling and other pipes serving the flat run through the void from the corridor. This had also been seen where a hole had been cut in the corridor ceiling outside the third flat inspected, where new cabling was visible.
23. The most crucial evidence, however, is that the Bennetts had permission from the then landlord, through its managing agent. Mr Goddard did not give consent, but the relevant landlord at the time had. No breach has been proved.
24. As for the sleeping platforms, the tribunal accepts that these are supported by the

four vertical posts and are merely tied in to the walls with bolts to prevent movement. The covenant is not to cut maim or injure, so the tribunal applies the *sui generis* rule and therefore regards each as meaning something serious. The only definitions for “maim” in Stroud’s Legal Dictionary refer to bodily injury, and to injury to a limb that is so severe as to render it useless in battle. Drilling a hole for a screw or bolt does not maim or injure the wall. One might “cut” into a wall by, for example, creating a serving hatch, or a new doorway. Cutting a deep horizontal channel so as to insert a supporting beam might be a breach, but the tribunal is satisfied that the behaviour alleged in the application form does not.

25. Should the installation of a water heater in the roof void or the construction of a wooden sleeping platform offend against Building Regulations or trouble the fire officer then the local housing authority and/or the fire authority have ample powers to deal with any perceived problem. Mr & Mrs Bennett owe a duty of care to their sub-tenants to ensure that the premises are safe. The tribunal trusts that they are alive to that duty.

26. The application is therefore dismissed.

Dated 7th November 2013



Graham Sinclair
Tribunal Judge