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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/29UN/LBC/2015/0025**
Property	:	**Flat 9, 2-8 Athelstan Road, Cliftonville, Kent, CT9 2BF**
Applicant	:	**Olympia Homes Ltd**
Representative	:	**Mr P Tamiz**
Respondent	:	**Mr M Georgiou**
Representative	:	**None**
Type of Application	:	**Section 168(4) Commonhold and Leasehold Reform Act 2002 Breach of Covenant**
Tribunal Members	:	**R T Athow FRICS MIRPM (Valuer Chair)**
Date of Consideration	:	**17th March 2016**
Date of Decision	:	**31st March 2016**

DECISION

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1. The Tribunal find that:
    a. The property is described in the lease as Flat 21, 2-8 Athelstan Road, Cliftonville, Kent CT9 2BA but it is now known as Flat 9, 2-8 Athelstan Road, Cliftonville, Kent CT9 2BF.

    b. There has been a breach of the covenant contained in Paragraph 9 of Part 1 of the Fifth Schedule in that Mr M Georgiou ("the Respondent") had not permitted the duly authorised agent of Olympia Homes Ltd ("the Applicant") to enter into and upon the flat.
    c. There has not been a breach of lease in respect of Paragraph 14 of Part 1 of the Fifth Schedule.

INTRODUCTION

2. An application was made on 25th November 2015 under Commonhold & Leasehold Reform Act 2002 (the Act) s.168(4) for a determination that a breach of a covenant in the Lease has occurred at Flat 9, 2-8 Athelstan Road, Cliftonville, Kent CT9 2BF. The Applicant is the freehold owner of the property and the Respondent is the lessee.

3. The alleged breaches are:
    (1) The lessee has failed to allow access into the flat in accordance with the landlord's rights under Paragraph 9 of Part 1 of the Fifth Schedule and
    (2) has not obtained the landlord's consent to carry out works to the flat in accordance with Paragraph 14 of Part 1 of the Fifth Schedule.

4. On 15th December 2015 the Tribunal directed that the matter should be determined on the papers without a Hearing in accordance with rule 31 of the Tribunal Procedure Rules 2013.

5. The directions set out a timetable for submissions from both sides and the applicant was directed to prepare a bundle including Statements of Case and supporting documents by 8th February.

6. The Tribunal decided that an inspection was not required and that a Hearing was not needed. This had previously been accepted by the parties.

THE LEASE

7. By a lease dated 22nd November 2004, the premises were demised by Soheila Tamiz to Gareth David Martin for a term of 99 years from 1st

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January 2004. The material covenants on the part of the lessee are as follows:

(a) Paragraph 9 of Part I of the Fifth Schedule to the lease which provides:

"To permit the Lessor the Lessor's Managing Agents and their duly authorised Surveyors or Agents with or without workmen at all reasonable times by appointment (but at any time in case of emergency) to enter into and upon the Flat or any part thereof for the purposes of rectifying any lack of repair causing or likely to cause loss or damage to any other flat or part thereof in the Building or viewing and examining the state of repair thereof or of the Flat"

(b) Paragraph 14 of Part 1 of the Fifth Schedule to the lease which provides:

" Not any time without licence in writing of the Lessor first obtained (which shall be at the absolute discretion of the Lessor AND in each case when such licence is required to pay to the Lessor's Agents all fees (inclusive of Value Added Tax) incurred in the giving of such licence Nor except (if such licence shall be granted) in accordance with plans and specifications previously approved by the Lessor and to the Lessor's reasonable satisfaction and in compliance with all relevant Local Authority regulations and requirements to make any alteration or addition whatsoever in or to the Flat either externally or internally or to make any alteration or aperture in the plan external construction height walls timbers elevations or architectural appearance thereof not to cut or remove the main walls or timbers of the Flat unless for the purpose of repairing and making good any defect therein nor to do suffer in or upon the Flat any wilful or voluntary waste or spoil PROVIDED THAT this covenant shall be so limited as not to apply to any alteration addition or replacement of the fixtures and fittings from time to time installed in the Flat"

STATUTORY PROVISIONS

8. The Commonhold and Leasehold Reform Act 2002 restricts forfeiture of residential leases as follows:

"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 (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."

SUBMISSIONS AND EVIDENCE

The Applicant's Case

9. The Applicant referred to its Statement of Case and supporting documents together with the reply, dated 22nd January 2016, to the Respondent's Statement of Case.

10. The claim is based upon the failure of the lessee to comply with two of his obligations under the Lease, as laid out in paragraph 3 above.

11. The Applicant stated that there has been a history of the Respondent failing to grant access over the duration of his ownership of the Flat, giving examples. There had been a previous occasion when access was needed to assess the cause and nature of a substantial water leak from this flat which affected another flat in the block as well as the common parts.

12. The Applicant became aware that some form of building work was being undertaken at the Flat. On 27th January 2015 the Applicant wrote by letter and e-mail to the Respondent notifying him that access to the Flat was required to enable an inspection to take place at 9.30 a.m. on 30th January 2015. This was refused in correspondence from the Respondent dated 28th January.

13. On 30th January 2015 Charles Stimpson Associates, surveyors for the Applicant, wrote giving notice to inspect. The letter stated –

"We can come to the flat next week, during working hours. We would like to make an inspection inside the flat by no later than 5pm on Friday 6th February."

14. Correspondence ensued from Beverly Morris & Co, solicitors for the Respondent, questioning the reason for the inspection. The reason given was a Small Court Claim ongoing at the time. A case management hearing had taken place a few days earlier at which it was stated expert evidence/a flat inspection was not required in this instance. Reference was made to the Applicant unlawfully entering the flat and that a Section 146 Notice had been served by the Applicant on the Respondent alleging an alteration to the property. This was subsequently withdrawn. The conclusion reached by Beverly Morris & Co was that there was no reason for an inspection to take place.

15. Burrough's solicitors for the Applicant replied and stated that paragraph 9 of Part 1 of the Fifth Schedule gave the right for the landlord to inspect at all reasonable times by appointment to view and examine the state of repair, or of the flat generally.

16. Burrough's wrote to Beverley Morris on 6th March 2015 stating that the Applicant requires to have access to inspect the Flat at 10am on the 10 or 12 March 2015 pursuant to paragraph 9. It relied on the Respondent contacting them to confirm *"when he will be available."*

17. On 18th June the Applicant wrote to the Respondent notifying him that *"Following the Court Order, which I enclose a copy for your record our witness Jeremy Parkin will be inspecting your flat on Tuesday 23rd June 2015 at 3pm."* A copy of a Notice of Allocation to the Small Claims Track (Hearing) claim number A6QZ506F was attached. However, this did not elucidate on the nature of the claim.

18. The Respondent wrote to the Applicant on 22nd June stating –

"There has already been a preliminary hearing at which it was decided that an expert witness would not be required in this case. As such I shall not be granting access to the flat on 23rd June 2015."

19. By letter dated 26th June Mr Parkin of Bradstowe, surveyors for the Applicant, reported to Goldkorns, solicitors for the Applicant, that he had not managed to carry out an inspection of the flat in spite of there being someone in. The door was answered, but not opened and the person inside refused to grant access. He was unable to ascertain who that person was.

20. A letter dated 27th August 2015 from the Applicant to the Respondent gave notice -

that "our witness Jeremy Parkin will be inspecting your flat on Wednesday 2 September 2015 at 3pm." This was also sent by e-mail on the same day.

21. The Respondent replied by e-mail on 2nd September 2015 accepting that he must allow the inspection as ordered by the Court.

22. The County Court Claim was heard on 9th September 2015. In the bundle for this case were two witness statements from Mr Parkin. The first was undated and unsigned, but referred to what was found at the inspection which took place. The second one was signed and dated 8th September 2015 in which he stated from his inspection on 15th July 2014 -

"... at the time of the inspection within Flat 9, I noted two specific areas of leak. The first evidence of leaking was in the bathroom, where it was apparent that water was leaking from the copper pipe fitting joints to the wash hand basin. The second evidence of leaking was in the lounge. In the cupboard housing the combination boiler, there were leaking joints to the pipework feeds to the boiler."

23. His witness Statement says

".... I reinspected the Flat on 2 September 2015 at about 15:30. Mr Georgiou was in attendance as well. Both areas had pipework boxed in, which made a full inspection difficult. There were no obvious signs or indications of leaks within the bathroom or the lounge/kitchen." Photos were attached showing the latest situation and these were included in the bundle for this case.

24. The outcome of the Court case was that the Applicant was successful in recovering £7,683.80 for debt and interest and costs. There was no mention of any Breach of Lease.

25. On about 23rd November the Applicant became aware that the Respondent was carrying out building work to the Flat. The Applicant wrote to the Respondent on 25th November:

"We want to inspect your flat on Wednesday 25 November 2015 at 12pm. Failure to give us access on 25 November 2015, you will give us no option but to commence proceedings against you in the First Tier Tribunal for breach of lease without further notice to you."

This was also attached to the front door of the Flat, as well as being sent by e-mail on the same date at 20:43.

26. The inspection did not take place. Because Mr Georgiou did not visit the flat until 27th November, it was the Applicant's opinion that it was incumbent upon Mr Georgiou to contact them and arrange another time to carry out the inspection. His failure to make contact constituted a refusal to allow access. Making no attempt to communicate to arrange another date and time demonstrates the Respondent's refusal to allow access.

27. Turning to the breach of paragraph 14, the pipework has been altered and boxed in. the Respondent has not sought the consent of the Lessor for these works.

The Respondent's Case

28. With regard to the latest application for access to the Flat on 25th November, the Respondent states that he had not been at the flat for several days and did not see the note on the door until 27th November 2015, at which time he checked his e-mails and found one from Mr Tamiz. Because this was after the date set for the inspection he did not consider this to be a refusal to inspect.

29. The Applicant's request to view the property was threatening and made no offer for re-arranging the inspection. No reason was given for the inspection.

30. The Applicant made no attempt to re-schedule the inspection, nor resolve the dispute before referring the matter to the Tribunal.

31. The Respondent was concerned that another inspection was required again so soon after the Court case, it having last been inspected on 2nd September 2015.

32. At the Court Hearing Mr Parkin had said the flat was in a good state of repair.

33. In his opinion, the Respondent felt there was no good reason for a further inspection to take place.

34. He felt intimidated by the Applicant and felt this case was being treated in the same manner as earlier cases that had been brought before the Tribunal relating to other flats in the block. Three cases were referred to. He saw no reason for the landlord to be of the opinion that he had

breached any clauses in his lease. Various statements in the Application Form section 13 "Grounds of Application" were untrue and unfounded.

35. The Applicant had failed to comply with its obligations to keep the main structure and common parts in good condition; he cited three aspects where there were breaches.

Applicant's Reply

36. The Applicant responded to the comments made by the Respondent by repeating the view that the Respondent had had plenty of time to make contact and re-arrange the inspection date and time.

37. The Respondent's claim that Mr Parkin stated the flat was in good state of repair was refuted.

38. The Respondent had not quantified which statements were untrue and unfounded.

39. The matters of the claimed failure on the Applicant's part to maintain the common parts were untrue and irrelevant to the right to inspect.

TRIBUNALS CONSIDERATION

The Tribunal considered all the documentary and oral evidence given and the submissions made, and made findings of fact on a balance of probabilities.

Breach of paragraph 9 of Part 1 of the Fifth Schedule.

40. In this instance all earlier matters have been dealt with by the County Court case. It falls to this Tribunal to consider only the alleged breach for the inspection due to have taken place on 25th November.

41. The Tribunal must consider whether the request was issued in accordance with the lease. Paragraph 9 allows access for, amongst other reasons, " ... viewing and examining the state of repair ... of the Flat"

42. If the Applicant had been made aware that the Respondent was carrying out building work to the Flat it would have been prudent for this to have been stated in the request to inspect. It would have set the Respondent's mind at ease that he was not being harassed, and that there had been a genuine reason for this request so soon after the 2nd September inspection.

43. One concern is that the correspondence by post was sent to the Flat, when it was well known to the Applicant that the Respondent lived elsewhere. Indeed the Applicant's surveyor had written to him at this other address. It would have been prudent to have written to that address as well as the Flat.

44. The letter was dated 23rd November 2015 with the inspection due just two days later. The e-mail was sent at 20:43 in the evening of 23rd, thus giving less than 48 hours' notice to inspect. It is not known whether the letter caught the post that day, or whether it was posted too late and not collected from the mail box until the next day. If so, and if it was so important that a short time lead was essential, it should have been hand-delivered to the Respondent's home by Mr Tamiz at the same time he visited the block and placed the notice on the door. The Respondent lives less than half a mile from the flat. Today's postal service means that letters are delivered throughout the day and if the letter was not collected from the post box until 26th November it might not be delivered until the afternoon of the 27th, after the time set for the inspection to take place.

45. There was no reason given in the letter, so the Tribunal is unable to ascertain that there was an urgency in this matter. The Tribunal decides that this gave the Respondent very little time to react to the notice, something the Respondent brings out in his Statement of Case when he states that he did not see any warning of this inspection until his visit to the Flat on 27th. It is not clear from the evidence whether the Respondent was away for this period of time or not. If a copy of the letter had been sent to the Respondent's home address it is possible that he might have been there and could have reacted appropriately.

46. The Tribunal considers the short period of notice to be of great concern. The Applicant should have allowed a greater lead-in time, with at least two clear days for the Notice to have been delivered by post. The action of placing a notice on the front door of the flat does not shorten the period of Notice required. Consequently the notice was not served with adequate time allowance for proper service.

Breach of Paragraph 14 of Part 1 of the Fifth Schedule

47. The wording of this paragraph has a specific section:

"PROVIDED THAT this covenant shall be so limited as not to apply to any such alterations or replacement of the fixtures and fittings from time to time installed in the Flat"

48. This allows the Respondent to undertake renewal or minor alterations within the Flat to fixtures and fittings. The main part of paragraph 9 deals with alterations to the structure of the flat and building.

49. The photographs included in the bundle show the filling in of the gap between the pedestal of the wash hand basin and the wall behind (pages 118 and 119). The photograph at page 120 shows only part of the door frame, part of a WC pan, and two parts of adjacent walls (one tiled and one painted). This is not adequate evidence to show anything of significance.

50. As a result the Tribunal is unable to state that there has been a breach of the lease.

DECISION

51. Based upon the evidence given by the parties the Tribunal finds the following:

52. **Breach of paragraph 9 of Part 1 of the Fifth Schedule**

The shortness of the period of time is of major significance in this instance and, as set out in paragraph 44 above, was insufficient to have reached the Respondent before the time stated in the Notice. Consequently, the Notice is deemed to be invalid and there has not been a breach of lease.

53. **Breach of Paragraph 14 of Part 1 of the Fifth Schedule**

The Tribunal decides that there has not been a breach of this part of the lease by the Respondent for the reasons given above.

R T Athow FRICS MIRPM (Chairman)

Appeals

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.

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.

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.

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.