



**Case Number:** CHI/18UB/LBC/2008/0005

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE**

**SOUTHERN LEASEHOLD VALUATION TRIBUNAL**

**PROPERTY:** 29a Station Road, Budleigh Salterton, Devon, EX9 6RW

**Applicant:** Mrs Frances L Williams

**and**

**Respondent:** Ms Bridgett A Denner

**In The Matter Of**

**Section 168(4) Commonhold and Leasehold Reform Act 2002**

**Tribunal**

Mr A Cresswell (Chairman)

Mr T N Shobrook BSc FRICS

**Date of Hearing:** 30 May 2008

## **DETERMINATION**

### **The Application**

1. On 12 March 2008, Miss Daphne Williams, the daughter of Mrs Frances L Williams, head leaseholder in Flat 29a Station Road, Budleigh Salterton, Devon, EX9 6RW, made an application on her mother's behalf to the Leasehold Valuation Tribunal for the determination of whether there has been a breach of covenant by the lessee, the Respondent, Ms Bridgett Denner.

### **Preliminary Issues**

2. The lease supplied by both parties relates to 29 Station Road, Budleigh Salterton, which property was, by a licence, split horizontally into 2 flats. The original lease was between different parties, but it is the common case of both current parties that the Applicant is the landlord/lessor and the Respondent the tenant/lessee of 29A Station Road, the upper floor of 29 Station Road and a part of the garden of the building, and that the original lease dated 20 October 1973 is the contract between the parties, and contains the covenants and conditions of that contract. Within the correspondence produced by the Applicant is a Notice of Transfer to the Respondent with effect from 6 December 2007. The lease is for a term of 99 years commencing on 25 December 1952. The owner of the freehold, Clinton Devon Estates has indicated that it does not wish to be a party to these proceedings.

### **Inspection and Description of Property**

3. The Tribunal inspected the property on 30 May 2008 at 11.00. Present at that time were Miss D Williams, Mr Tushingam, father in law of the Respondent, who resides in 29A Station Road, the demised premises, and Mr Jim McIntosh, solicitor of Ford Simey LLP, who told us that he was present to represent the Respondent. The property in question consists of the first floor of the building at 29 Station Road, which is a self contained flat, and a garden. We noted that the layout of the property differed to the plans attached to the lease, in that a wall had been removed which had previously had the effect of creating a hallway between the dining and sitting rooms and which led from the door reached from a metal staircase at the side of the building. What had been the dining room was now a kitchen, and access is now directly into the

kitchen rather than a hallway. There were 2 bedrooms, where there had previously been only one bedroom, the second bedroom having previously been the kitchen. Much of the flooring was wooden laminate type flooring.

4. We had been supplied with photographs of the outside of the building in a submission by Miss Williams, and saw for ourselves that there had been movements of pipes and cables, clearly as a part of the conversion of the demised premises, and that there was yet required remedial work to fill redundant holes, point and make good the appearance of the outside flank wall facing on to the garden.
5. The garden was primarily to the side and rear of the building and was split by a fence, such that the part nearer to the road belonged to the Applicant's premises and the part further from the road belonged to the Respondent's premises. It was apparent that one of the panels in this fence had been replaced in recent times. A driveway bordered the outer edge of the Applicant's garden and swung around to border also the outer edge or top end of the Respondent's garden. At this top end, we noted what was obviously a whole new fence across the rear of the Respondent's garden, on the drive side of the tree line.

### **Summary Decision**

6. This case arises out of the Landlord's application, made on 12 March 2008, for the determination of whether there has been a breach of covenant. The Tribunal has determined that the Landlord has demonstrated that there has been a breach of covenant. The breaches found are in respect of the covenants relating to the Tenant's duty to reimburse the Landlord in relation to the Insurance of the building, the Tenant's duty to insure the demised premises in the joint names of *"the head lessor the Lessor and the Lessee"*, the Tenant's removal of an internal wall within the demised premises, and her alterations to the design of the demised premises without the previous written consent of the Landlord, and her opening up of the exterior wall for alterations to pipes ducts and wires.

## **Directions**

7. Directions were issued on 28 March 2008. These directions provided for the matter to be heard on the basis of written representations only, without an oral hearing, under the provisions of Regulation 13 of the Leasehold Valuation Tribunals (Procedure)(England) Regulations 2003, as amended by Regulation 5 of the Leasehold Valuation Tribunals (Procedure)(Amendment)(England) Regulations 2004.
8. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration. It was, in particular, provided that the parties should submit, as well as their Statements of Case, copies of all copy correspondence, witness statements and other documents upon which the Applicant relies and copy correspondence, documents or other papers that the Respondent considered relevant to the matters in issue.
9. This determination is made in the light of the documentation submitted in response to those directions.

## **The Law**

10. The relevant law is set out in section 168 Commonhold and Leasehold Reform Act 2002.
11. Section 168(1) and (2) Commonhold and Leasehold Reform Act 2002 provide that a landlord may not serve a notice under Section 146 Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition in the lease unless it has been finally determined, on an application to the Leasehold Valuation Tribunal under Section 168(4) of the 2002 Act that the breach has occurred.
12. A determination under Section 168(4) does not require the Tribunal to consider any issue relating to the forfeiture other than the question of whether a breach has occurred. The Tribunal's jurisdiction is limited to that question and cannot encompass claims outside that question, nor can it encompass a

counterclaim by the Respondent; an application under Section 168(4) can be made only by a landlord.

### **The Lease**

13. The following are relevant Clauses of the Lease dated 20 October 1973. Shown in bold are the clauses relied upon by the Applicant ; the Respondent relies upon Clauses 30 and 23 and 24 of the Third Schedule.

Clause 2. In consideration of the rent and covenants on the part of the Lessee hereinafter reserved and contained the Lessor hereby demises unto the Lessee the flat on the first floor of the building and the garden for the purpose of identification only coloured pink on the said plan (which flat garden with all Lessor's fixtures and fittings from time to time thereon are hereinafter called the demised premises) together with the rights set out in the first schedule hereto and except and reserving as set out in the second schedule hereto

Clause 3. The Lessee hereby covenants with the Lessor and with and for the benefit of the owners and lessees from time to time during the currency of the term hereby granted of the other flat in the building so far as the obligations hereinafter mentioned are capable or benefiting them that the Lessee and all persons deriving title under her will at all times hereafter observe and perform the obligations on the part of the Lessee set out in the third schedule hereto

### THIRD SCHEDULE

#### Lessee's Covenants

Paragraph 2. To pay by way of reimbursement to the Lessor in respect of each year of accounting a sum equal to the aggregate of

(a) Fifty per cent of the building expenditure and of the cost of upkeep of the entrance gates leading to the garden of the property and

Paragraph 5. To repair and keep the interior of the demised premises and all glass in the windows and doors and all landlord's fixtures and fittings therein sash cords shutters locks hinges fastenings and other internal fittings non-structural walls interior plaster work tiling and other surfaces to floors ceilings

and walls and the cisterns tanks drains wires ducts and conduits with the demised premises which exclusively serve the demised premises and whether or not below the surface thereof and all appurtenances in upon and belonging to or enjoyed with the demised premises properly cleaned and in good and tenantable repair and condition excluding only any damage caused by any risk covered by any insurance effected pursuant to paragraph 2 of the fifth schedule hereto unless the insurance money under any such policy shall by reason of any act or default of the lessee become wholly or partially irrecoverable

Paragraph 7. (i) *That the Lessee will at all times during the said term well and sufficiently repair uphold and cleanse and keep in good repair and condition the interior of the demised premises and all other building hereafter to be erected on the premises hereby demised and all additions made to the demised premises and the fixtures therein and all walls fences drains and appurtenances thereto belonging ... And will not alter the height of character of any of the boundary walls or fences without written consent of the Head Lessor's agent*

**(ii)** That it should be lawful for the Lessor or her agent with or without surveyors and workmen at all reasonable times in the daytime during the said term to enter into and upon the demised premises or any part thereof to examine the condition of the same and of any want of repair and amendment or other defect there found to give or leave notice in writing upon or at the demised premises

**(v)** That the Lessee will not do or permit to be done upon the premises anything which may be or grow to be a nuisance or annoyance to the Lessor any of his lessees or tenants or the occupiers of any adjoining or neighbouring property

**(vi)** That the Lessee will not during the said term make any addition or alteration to the messuage and buildings or the boundary walls or fences hereby demised nor erect nor have erected add to or alter any other buildings on the demised premises or any part thereof without the consent in writing of the Head Lessor and Lessor first obtained

Paragraph 8. Without prejudice to the generality of the lessee's covenant hereinbefore contained to repair to the satisfaction of the Lessor or the surveyor any part of the demised premises which needs to be repaired before the Lessor can carry out its obligations in regard to outside painting and if the Lessee shall fail to repair any such part so needing repair as aforesaid the Lessor may execute such repair and recover the cost thereof from the lessee as rent in arrear

**Paragraph 9. To bear the cost of making good any damage to any part of the estate or any adjacent premises of the lessor caused by any act omission or negligence of any occupant or person using the demised premises**

**Paragraph 12. To permit the superior lessors the Lessor or their respective duly authorised agents with or without workmen and others upon giving forty-eight hours previous notice in writing at any convenient hour in the daytime to enter into and upon the demised premises to take inventories of the landlord's fixtures fittings and appliances therein and to view the condition thereof and upon notice being given by the superior lessors the Lessor or the surveyor specifying any repairs or works necessary to be done for which the lessee is liable hereunder forthwith to comply with the same and if the Lessee shall not within thirty days after the service of such notice proceed diligently with the execution of such repairs or works then to permit the superior lessors the Lessor or their duly authorised agents with or without workmen and appliances to enter upon the demised premises and cause such repairs or work to be executed and the cost thereof shall be repayable by the Lessee on demand as rent in arrear**

Paragraph 18. Not to do or permit or suffer to be done any act or omission which may render any increased or extra premium payable for the insurance of the demised premises or the building or any part thereof or which may make void or voidable any such insurance or the insurance of premises of the lessor adjoining the said premises and so far as the lessee is liable hereunder to comply in all respects with the reasonable requirements of the insurers with

which the building and such adjoining premises may for the time being be insured and forthwith to make good to the Lessor all loss or damage sustained by the lessor consequent upon any breach of this provision

**Paragraph 23. Not to make any structural alteration in or addition to or cut maim or injure any of the walls or timbers of nor make any breach in any part of the structure of the demised premises nor without the previous consent in writing of the Lessor or the surveyor to make any alteration whatsoever to the plan design or elevation of the demised premises nor make any openings therein nor to open up any floors walls or ceilings or any other part of the demised premises for the purpose of altering repairing or renewing any pipes wires ducts sewers drains conduits or channels nor to alter any of the lessor's fixtures fittings or appliances therein**

**Paragraph 24. On making application for any consent by the lease required and before commencing the reinstatement or the re-erection of the demised premises or any part thereof after destruction or damage to submit to the Lessor or the surveyor such plans block plans elevations and specifications as the Lessor or surveyor shall require with duplicates for retention by the Lessor as may be required and to reinstate or re-erect only in accordance with such plans block plans elevations and specifications as the Lessor or surveyor shall approve in writing making use of good sound and substantial materials all of which shall be subject to inspection and approval by the lessor or the surveyor AND the Lessee shall pay all costs fees and expenses of the superior lessors the Lessor or the surveyor or their or his agents and whether and such application shall be granted or refused**

**Paragraph 30. That the Lessee shall and will from time to time and at all times during the said term insured and keep insured the premises hereby demised in the joint names of the head lessor the Lessor and the Lessee in the Commercial Union Assurance Company Exeter in the full value thereof against all risks usual in a Comprehensive policy and will when required produce the receipts for the premium payable in respect of such insurance to**



*the head lessor the lessor or to their respective agents effecting and keeping on foot such insurance through agency of the Head Lessor*

#### FOURTH SCHEDULE

Paragraph 1. Subject as hereinafter provided the expression "building expenditure" means and includes all sums required or estimated to be required (whether in respect of the current or future years) to provide any services or carry out any maintenance repairs renewals reinstatements rebuilding or decorations on or in relation to the building including cisterns tanks drains wires ducts and conduits which serve both the demised premises and the ground floor flat and premises retained by the Lessor (excluding any work which is the liability of any lessee of the Lessor) and in particular (but without prejudice to the generality of the foregoing) includes all sums so required in respect of any of the following :

(a) Effecting and maintaining any policy or policies of insurance as the Lessor or surveyor may decide and in particular any policy or policies required to be effected and maintained pursuant to the lessor's obligations in that behalf under the fifth schedule hereto

#### FIFTH SCHEDULE

##### Landlord's Covenants

**Paragraph 2. To effect and maintain a policy or policies of insurance against loss or damage to the building and the garage hereinbefore mentioned by fire storm and damage by impact and such other risks as the Lessor shall think fit in the full value of that part of the premises not hereby demised as the Lessor shall think fit and a sum equal to the aggregate of two years' loss of rent and the estimated amount payable during such period in respect of the combined expenses And to produce to the Lessee or his agent evidence of the policy or policies of such insurance and payment of the current premium thereon within seven days after request therefor And to lay out or cause to be laid out in rebuilding and reinstating the building all monies received by virtue of any such insurance thereon other than monies received in respect of loss of rent**

## **The Applicant's Case**

### Insurance

14. Miss Williams explains in her Statement of Case that paragraph 2 of the Fifth Schedule of the Lease indicates the responsibility of the Lessor to insure the property. The Applicant had insured the property and had informed the Respondent. Rather than paying the half of the insurance premium required under the lease, the Respondent had indicated via a letter from her solicitor that she would be taking out her own insurance.

### Alterations/Consent

15. Miss Williams says that no requests had been made by the Respondent for written permission to undertake structural alterations as is required under paras 7(vi) and 23 and 24 of the Third Schedule of the Lease. Extensive redevelopment had taken place including the relocation of the kitchen. Miss Williams pointed to the plan within the lease and the fact that alterations had been made to that plan. Fencing had been erected in the garden without permission and contrary to paras 7(i) and 7(vi) of the Third Schedule. The fence and gate at the parking area end of the Respondent's garden did not replace the former fence, but a panel of fencing near the house did replace a panel which had fallen down during the Respondent's works.

### Permit Inspection

16. Requests to inspect the demised premises in accordance with paragraph 12 of the Third Schedule had been ignored by the Respondent.

### Repair of Damage

17. Structural damage had been caused to the side of the house by repeated drilling through the brickwork for various pipes and cables and had not been repaired, in contravention of paragraph 9 of the Third Schedule. The damage can be seen in photographs produced by Miss Williams.

### Nuisance

18. The Respondent had failed to refrain from activity which had become a nuisance, in contravention of paragraph 7 (v) of the Third Schedule. The

activity consisted of the extensive renovations including early work and weekend work; the failure to install modern soundproofing, inappropriate wooden flooring throughout, and continual noise nuisance from the two tenants, a dog and two cats; Mrs Williams has a poor state of health and has been rendered virtually housebound for several months, and the noise from above has made her reluctant to invite visitors to her home.

### Communication

19. The Respondent has ignored correspondence and instructed her solicitor to refrain from answering points made. The Applicant is anxious to proceed with the provision of a new roof and requires communication from the Respondent.

### **The Respondent's Case**

#### Insurance

20. The Respondent points out that the lease is contradictory and that she has relied on paragraph 30 of the Third Schedule which states that it is the responsibility of the Lessee to insure the property. She has insured the property with a company other than Commercial Union Insurance, which no longer exists in Exeter, and says that if the insurance needs to be placed in joint names, she is happy to arrange this. She notified Miss Williams in December that she was about to insure the property.

#### Alterations/Consent

21. With regard to structural alterations, none have been made as none of the original structure has been altered. She points to the Oxford English Dictionary definition of structure as "the manner in which a building or its supporting framework is constructed". Consequently, requirements for consent in paragraph 24 of the Third Schedule do not arise. So far as the fence is concerned, she is required by paragraph 7(i) of the Third Schedule to keep all fences in good order. An old fence had fallen down at the property and she had replaced it, thus complying with the requirements of the lease.

#### Permit Inspection

22. Miss Williams had been allowed into the flat on three occasions. Reasonableness should be applied to paragraph 12 of the Third Schedule

and she cannot be expected to allow Miss Williams into the flat two or three times a week, as was being requested.

#### Repair of Damage

23. She had not been alerted to any structural damage to the house, and would be more than happy to rectify the position if there had been such damage.

#### Nuisance

24. The residents of her flat are her 72 year old father-in-law, who is a retired university professor, and his wife. There has been no nuisance. The dog is a Basenji which is incapable of barking. Much of the flat has also been soundproofed.

#### Communication

25. She had answered letters and had taken legal advice, but after a while it proved counter-productive to enter into correspondence as it was expensive. Her in-laws wish to live happily alongside Miss and Mrs Williams. She had given Miss Williams two quotes for the roof but had had no response. She is happy to pay half of the cost of the roof, the state of which is impacting upon her father-in-law's enjoyment of the flat.

### **Consideration and Determination**

#### Insurance

26. The Tribunal finds it clear from examination of the lease that the Respondent is required to insure the demised premises (paragraph 30 of the Third Schedule) and the Applicant is required to insure the building (paragraph 2 of the Fifth Schedule). By paragraph 2 of the Third Schedule, the Respondent is required to pay half of "building expenditure", which is defined by paragraph 1 of the Fourth Schedule to include the insurance required by paragraph 2 of the Fifth Schedule. During our inspection, we were given a copy of the insurance taken out by the Applicant, and noted that it was for the whole building effective from 12 January 2008 at a premium of £245.64, and in the documents before us we noted that a request to the Respondent for half payment had been refused. Such a refusal constitutes, therefore, a breach of a covenant of the lease (paragraph 2 of the Third Schedule). We did not see

the insurance taken out by the Respondent, but, in her case, she indicated that the insurance taken out by her was not in the joint names of the Head Lessor, the Lessor and herself, which also constitutes a breach of covenant.

#### Alterations/Consent

27. Whether or not there had been structural alterations, there was in any event work which was in contravention of the covenant at paragraph 23 of the Third Schedule of the Lease. A wall had been removed; holes had been cut in the structure (the outside wall); without written consent substantial alteration had been made to the design of the demised premises; and the outside wall had been opened up for the purpose of altering, repairing or renewing pipes, wires, ducts, sewers, drains, conduits or channels. All of this constitutes a clear breach of the terms of paragraph 23.
  
28. There is limited judicial authority on the meaning of "structural alteration" (as the courts in the few relevant cases have emphasised). In the (unreported) High Court case of **Bent v High Cliff Developments Ltd** (1999) the court referred to **Irvine v Moran** [1991] 1 EGLR 261 and held that the question whether works amounted to a "structural alteration" had to be determined in the context of the particular lease as a whole. Given our findings in the above paragraph, it is unnecessary for us to determine whether what had occurred in terms of the works to the demised premises also constituted structural alteration.
  
29. As detailed above in respect of our inspection of the property, a fence panel had apparently been replaced in the fence dividing the two gardens. Such replacement appears to us to be quite proper, having regard to paragraph 7(i) of the Third Schedule. So far as the fence at the end of the Respondent's garden is concerned, we noted some confusion and contradiction between the parties during our inspection, as to whether the new fence replaced an old fence, and, if it did, whether the old fence had been previously inside or outside the tree line. We indicated during our inspection that we could not take evidence, and find that, on the basis of the documentation available to us, we are unable to determine whether a new fence had been erected without permission or whether the Respondent had repaired a broken old

fence by replacing it with new fencing. Accordingly, we do not find that there has been a breach of covenant in respect of the fence.

#### Permit Inspection

30. It was not possible for us to determine this issue on the papers, as we simply had the word of one party against the word of the other without any supporting evidence on either side, and we feel that this is an issue which could only be resolved by hearing evidence. Accordingly, we do not find that there has been a breach of covenant in a failure to allow inspection.

#### Repair of Damage

31. We have already found that the breaching of the outside wall is in itself a breach of the covenant in paragraph 23 of the Third Schedule. We note that there had, prior to the issue of proceedings, been no written request to the Respondent to make good the damage caused, although there may have been discussion with the Respondent's builder. We further note, having heard a conversation between Mr Tushingham and Miss Williams, that it was the Respondent's intention to make good the damage when scaffolding is erected for the roof works. Without a written request to the Respondent to bear the cost of making good the damage and without a refusal by the Respondent to do so, we cannot find that this covenant has been breached and, accordingly, do not do so.

#### Nuisance

32. In the Court of Appeal case, **Shephard and others v Turner and Another** (2006) EWCA Civ 8, Mummery LJ referred to a covenant not to cause nuisance and annoyance and said: "*I agree with the appellants that such a covenant is intended to provide protection against temporary as well as long term annoyance, and further that it is not necessarily to be confined by analogy with the common law of nuisance. The cases give little guidance on the scope of such a covenant, other than that, like the law of nuisance, it is to be applied "according to robust and common sense standards" (per Megarry J, **Hampstead and Suburban Properties Ltd v Diomedous** [1969] 1 Ch 248, p 258). However, we have been referred to no authority in which ordinary*

*construction works, carried out with reasonable care, have been held to involve a breach of such a covenant.”*

33. It is not possible for the Tribunal to say in this case whether or not the construction works carried out in the demised premises were other than ordinary works carried out with reasonable care, as we have only the written and contradictory words of each of the parties. It was clear to us that the demised premises were being used as a home and that there was a dog and at least one cat within that home, and that the floors were of wood laminate type, but it was not possible for us to find that those factors caused in law, objectively (as opposed to the subjective views of Miss and Mrs Williams), nuisance and annoyance such as to constitute a breach of a covenant of the lease.

#### Communication

34. Whilst communication does not form part of a specific covenant of the lease, it is clearly a requirement of a sensible and proper relationship between the parties. The papers before us make clear that the Respondent has not always responded to communications from the Applicant. There can be no breach of covenant in this specific respect, but it was very clear to us both from the reading of the papers before us and from our own observations at the inspection, that the parties need considerably more dialogue, whether it be to settle outstanding issues, to plan the works required for the roof, or to live together as good neighbours.

#### **General**

35. The Tribunal finds it unfortunate that this matter should have had to be brought before it. We noted during our inspection a suggestion by Mr McIntosh that he and Miss Williams should meet to resolve outstanding issues, and hope that this might provide a way forward.

*A. Cresswell*

**Andrew Cresswell (Chairman)**

**Date 5/6/ 2008**

**A member of the Southern Leasehold Valuation Tribunal**

**Appointed by the Lord Chancellor**