SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

CHI/18UB/LBC/2009/0042

Decision of the Leasehold Valuation Tribunal on application made under Section 168 of the Commonhold and Leasehold Reform Act 2002

Applicant:	Dr C F King
Respondent:	Mr K Hoskin
Re:	**Flat 1, 17 Greenway Lane, Budleigh Salterton, Devon EX9 6SG**
Date of Application	4th November 2009
Date of Inspection	5th February 2010
Date of Hearing	5th February 2010 & 19 March, 2010
Venue	Exmouth Town Hall
Appearances for Applicant	Dr C F King in person
Appearances for Respondent	Ms L Spencer of Counsel
Also attending	Mrs King, Mr Hoskin, Mr S Bevan, [Mr L Ramsden & Mrs Murphy 5 February only]

Members of the Leasehold Valuation Tribunal

M J Greenleaves	Lawyer Chairman
T Dickinson BSc FRICS	Valuer Member
Dr M James MA BA FRSA	Lay Member

Date of Tribunal's Decision: 29 March 2010

Decision

1. The Tribunal determined for the purposes of Section 168 of the Commonhold and Leasehold Reform Act 2002 (the Act) that the following breaches of covenant have occurred on the part of Mr R Hoskin (the Respondent), in respect of the Flat known as Flat 1, 17 Greenway Lane, Budleigh Salterton, Devon ("the premises")

a. The Respondent was in breach of Clause 2(i) of the lease (the lease) relating to the premises dated 9th October 1987 in that he did not pay the ground rent due on 9th October 2009 until on or about 10th December 2009

b. Between April 2009 and 1 March, 2010 the Respondent was in breach of clause 2 (ix) of the lease in that he permitted occupation of the premises by Lee Ramsden which did not comply with the clause which provides "not to use or suffer or permit to be used the demised premises for any purpose other than as a private residence for the lessee and the lessee's immediate family nor for multiple occupation by more than one family nor for a holiday letting".

c. On a date in February 2009 the Respondent was in breach of clause 2 (viii) of the lease in that he or his builder created a hole in the external wall of the building known as 17 Greenway Lane without the approval in writing of the Applicant to the plans and specifications thereof.

Reasons

Preliminary

2. This was an application by the Applicant under Section 168 of the Act for determination that the Respondent was in breach of covenants of the lease in respect of the premises. The lease of the premises was at all material times assigned to the Respondent.

3. The Applicant alleged the following breaches by the Respondent of covenants of the lease:

   a. Subletting in breach of clause 2 (ix) of the lease.

   b. Failing to pay ground rent on 9th October 2009.

   c. Undertaking substantial renovations to the premises without first obtaining his written permission under Clause 2(xii).

   d. Installing wiring and pipe work in the loft above the premises which forms part of the freehold of the building without first obtaining his written permission.

   e. Refusing to repair damage to the walls and carpet at the time of renovations to the premises.

   f. Refusing to repair a large hole created by the Respondent's plumber in the gable end of the property.

   g. Refusing to allow the 6 monthly inspection of the premises – Clause 2(vii) - all the preparation of an inspection report. There has been no opportunity to have his agents inspect the roof void for damage and ingress of water.

   h. Failing to maintain the front garden to the detriment of the property as a whole.

   i. Failing to fit smoke alarms and to provide an escape plan.

   j. Cutting off the electrical supply for 14 days to the security light in the common areas of the hallway without explanation or apology.

k. Failing to co-operate in the regular programme of external maintenance organised by the freeholder (clause 2 (xviii)).

l. Failing to confirm the repair of the serious leak from the bathroom of the premises which caused damage to his ceiling and thereby prevented an insurance claim being made for the repair.

m. Failing to observe and perform the covenants of the Respondents lease under clause 3 (i) - the Respondent has seriously affected the Applicant's personal right to peaceable enjoyment of his own Flat.

Inspection

4. The Tribunal inspected 17 Greenway Lane (the property) externally, the internal common hallway, the staircase and the premises and Flat 2.

5. The premises are situated on the first floor of the property. The Applicant lives in Flat 2 on the ground floor of the property

6. The property appeared to be in fair condition for its age and character, but some external pointing and brickwork needed repair, as did some fascias. The roof tiling was showing signs of age. Internally there is a narrow common hallway with a staircase leading to the subject premises. The premises comprise a living room (containing a sofa) at the front, one bedroom (containing a double bed, television and 4 surfboards), a kitchen (fitted out with kitchen units, white goods and combi-boiler) and bathroom. The kitchen cupboards and fridge/freezer contained a selection of foodstuffs; there were sufficient crockery and kitchen equipment for at least one person.

7. There is a hatch to the loft from the bathroom of the premises but this is understood now to be sealed. There is a stopcock in one of the kitchen units. The combi-boiler is served by pipe work to and from the loft.

8. The Applicant's Flat was also inspected as to evidence of damp to the ceiling of the dining area.

9. The Applicant has installed a new stopcock to the mains water within an outbuilding.

Hearing

10. Prior to the hearing on 5 February, 2010 the Tribunal had received written submissions and evidence from the Applicant and the Respondent. The Respondent's Counsel handed in a skeleton argument and chronology with extracts of cases and of text books. These had not been provided to the Applicant in advance. The Tribunal considered it right that the Applicant should therefore have an opportunity of considering these before the commencement of the hearing and adjourned for 20 minutes for that purpose. After a few minutes the Applicant returned and said that he wanted to take advice on the legal issues referred to in these documents. Counsel for the Respondent submitted that there was no requirement for skeleton arguments to be prepared and that having them on paper simply gave the Applicant and the Tribunal advance notice of arguments to be made in due course.

11. The Applicant considered that he was disadvantaged by these documents and again sought an adjournment. These submissions were considered by the Tribunal which decided to give the Applicant a further 15 minutes to consider the documents for the following reasons:

    a. If the Respondent had not produced a written skeleton, the Applicant would have no advance notice and would be in a position of only being able to listen to Counsel making them. Accordingly he was not disadvantaged.

    b. Nevertheless the Applicant should have a short time to read through the skeleton and accompanying documents so that he should be aware of the submissions to be made in due course on the basis of those documents.

12. Accordingly the hearing commenced at 12 noon on 5 February, 2010.

13. The Applicant was given an opportunity to present his case verbally. He made an opening statement as to some of the history in his dealings with previous owners of the premises who had been aware of constraints on the premises and he felt the Respondent should recognise those as well. He considered that the skeleton argument put a new interpretation on the lease which had never surfaced with previous owners. He considered that the Respondent felt he could do what he liked with the premises and that he could allow Mr Ramsden to live there. His (the Applicant's) actions can be justified; he assumed the covenants would be performed by the new tenant.

14. As regards alleged failure to co-operate, he considered the purpose was to have 6 monthly meetings to discuss issues including the need for ongoing repairs, but the Respondent had not co-operated and had not allowed inspections.

15. Other than the above, the Applicant was content to rely on his written submissions. He was then cross-examined by Counsel for the Respondent, from which we noted the following points:

    a. In the preamble to his statements and documents he said that he had never experienced any difficulty over the years in enforcing past breaches by previous owners and in his letter to the Tribunal of 13th November 2009 he had referred to many years of bitter litigation concerning a previous owners breaches. The Applicant considered that the two statements were not very different: that there were elements of correctness in both.

    b. He had entered the premises through the bedroom window because of water penetrating his ceiling below. He found the basin tap running and water coming out of the inlet pipe. He had repaired most damage in his Flat but left a residual patch in the corner. He had not suffered the problem since. At the request of the Tribunal he produced a copy of his letter of 15th August 2009 to the Respondent; he agreed it does not ask the Respondent to be told when the leak had been done but indicated he had another letter at home about this.

    c. In respect of non-co-operation, he accepted that he had to do repair work and the tenant simply had to pay but his complaint referred to dealing with all the preparation work and deciding with the tenant when the work would be done.

d. In respect of smoke alarms and an escape plan, he relied on the clause giving him the right to inspect periodically.

e. As to cutting off the electricity supply for 14 days to the security light, the light is on the upstairs circuit and serves the common area of the Hall; he did not accept he had to light the hall himself.

f. He does not agree that the lease of the premises includes the loft.

g. The renovation work carried out by the Respondent does constitute alterations for which the Applicant's consent is required in writing; the First Schedule to the lease, paragraph 2, has rights included in the demise but are not relevant concerning pipes and wires have been run through the loft space by the Respondent because the loft belongs to the Applicant. He did not however object to a the installation of the combi-boiler or to the pipes running to and from it.

h. Hole in gable wall. This had been left there since the boiler was installed in the premises; he had not prevented a vent being put over it externally. His own builder had blocked the hole about the end of March 2010.

i. He had not agreed the replacement of any of the windows; he considers that written consent is required. He considered the licence to install the kitchen window he had granted to the previous owner of the premises, prevented it being removed without his consent.

j. As to the allegation that the Respondent had refused to repair damage to the walls or the carpet, he was not aware that it had been cleaned professionally by or behalf of the Respondent but didn't think it had been done too successfully; he would accept the matter if he saw a receipt for the cost. He did not recall the Respondent offering to repair the damage.[Mr Bevan produced an invoice in respect of this dated 23 April 2009 relating to cleaner hire on 8/9 April 2009].

k. The garden. The bed in the middle needed maintenance because it had looked a mess and he submitted it looked a mess on the day of the hearing because there were dead leaves from the fuchsia.

l. Inspection. He would not accept an offer to inspect from a mere workman. He referred to his letter to Mr Hoskin of 5th May 2009 to show that he had asked for an inspection.

16. On 19 March, 2010 the hearing resumed. Neither Mrs Murphy nor Mr Ramsden were available to give evidence and the Respondent tendered their written statements in evidence on their behalf. The Respondent tendered his statement dated 18 December, 2009 as his evidence in chief and he was cross-examined by the Applicant. He told us:

a. that he had originally intended a full time sublet and had not realised the terms of the covenant concerning usage and he had taken on Mr Ramsden as caretaker and for him to use it for that purpose. On this subject, in the course of counsel's submission, the Respondent accepted that Mr Ramsden's use of the flat did not comply with clause 2 (ix) of the lease.

b. He had asked his builder to pay any money due to the Applicant;

c. He had offered inspection of the premises to the Applicant through his builder;

d. The condition of the premises before he started renovation was poor and the work he had had carried out could only benefit the freehold, although it was of more benefit to him as the owner of the premises;

e. He accepted that he had never sought approval from the Applicant of the work that he was doing;

f. His solicitor had advised him that he could put pipe work in the loft;

g. That the Applicant had not raised any issue about installation of the windows until the last one was being done: that he had told the builder to install it.

17. Mr Hoskin accepted with hindsight he could have done things differently in relation to Dr. King.

18. We also heard evidence from Mr Bevan on the basis of his statement dated 21 December, 2009. He said that he had offered inspection of the premises to Dr. King; that he was not aware until he started work that there was any other occupier in the building. He did not know that Dr. King had power to stop any work and Dr. King and not raised any suggestion of a breach of covenant regarding windows or other aspects of the work.

Consideration

19. We have considered the evidence and submissions presented to us in writing and at the hearing. We preface our comments below by saying that we realise that Dr. King feels very strongly that the Respondent has been riding roughshod over him. It appeared to us, and we think that Mr Hoskin accepted, that Dr. King had not been made aware at all of Mr Hoskin's intention to renovate the flat or do any particular type of works. In many ways it appears to us that the difficulties between the parties have largely arisen because of the Respondent's failure to communicate appropriately with the Applicant who, although perhaps not being entitled to be involved, except as to alterations and windows, could reasonably expect at very least to be kept informed, not least about Mr Ramsden's use of the flat.

20. Counsel for the Respondent made an issue of the Applicant's credibility. While we noted some discrepancies in his evidence, we noted also that the Respondent had, on his own admission, made errors in his written statement. We make no findings as to conduct save as referred to below.

21. In our consideration, we have had to consider the relevant evidence in the light of the specific terms of the lease to decide under the terms of section 168 of the Commonhold and Leasehold Reform Act 2002 whether a breach of covenant has occurred. That does not allow us to take into consideration the effect that any action may have on the Applicant: it is a matter of determining the facts as we find them to be and considering whether they constitute a breach of any covenant. We should add, that as a general comment the lease is poorly drawn because it is unclear in some respects and is inadequate in others. That too has been unhelpful to both parties and that has been exacerbated by the parties' lack of understanding of relevant lease terms as they are.

22. Our determination of the issues on each of the allegations made was on the following basis:

a. Ground rent. It was admitted by the Respondent that the ground rent had not been paid as required by the lease. It had not been paid until on or about 10 December, 2009. That does not in itself rectify the failure. The Respondent's counsel sought to persuade us that the payment clause should be construed to provide that the lessee was only required to make reasonable endeavours to pay and if he did so, that would satisfy the requirement to pay. First, we do not consider that the Respondent could be taken to have made reasonable endeavours until he had taken the simple course of sending the Applicant a cheque in the post. Secondly, we see no ambiguity in the clause such that it is necessary to imply any such provision at all. It is perfectly plain as it stands. So we found there had been a breach by the Respondent of clause 2 (i).

b. Unlawful subletting. This was the description that Dr. King gave to Mr Ramsden's occupation of the premises. Clause 2(ix) essentially prevents the premises being used other than by the lessee and the lessee's immediate family. Dr. King's complaint was that Mr Ramsden was using it. In view of the admission made by Mr Hoskin in the course of the hearing that Mr Ramsden's use of the premises did not comply with the clause, we did not have to consider the issues any further.

c. Renovations.

i. The relevant clause in the lease is clause 2 (viii) which, in terms, prohibits alterations to the premises without the approval in writing of the Applicant. We were satisfied that the Respondent has carried out substantial renovations to the premises but the question is whether they constitute alterations. Counsel for the Respondent referred us to extracts from the legal textbook Hill and Redman's Law of Landlord and Tenant. In particular we are referred to paragraph 3403 which makes it clear what constitute alterations. These are essentially when the construction or fabric of the building is altered; conversion of the house into business premises or the conversion of a house into Flats; an alteration which increases the risk of fire. We take these only to be examples but for our consideration the principle is clear that there has to be a significant alteration to the building itself and not simply to its interior fittings etc.

ii. The work carried out by the Respondent is almost entirely and substantially refitting the premises, particularly as to the kitchen, boiler, central heating and windows. None of these affect the construction or fabric of the building and do not constitute a conversion, nor do they constitute an increased fire risk. The one exception is the creation of the hole in the gable wall which evidently does affect the fabric of the building. We made our decision on that basis but regard this hole to constitute no more than a technical breach which, however upsetting to Dr.King, is of little importance.

d. Windows.

i. According to Dr. King's chronology replacement of window frames started on 19 March, 2009. He says that he informed his solicitors and spoke to Mr Bevan. On 24 March the kitchen window was removed and the new window installed. On April 7, Dr. King's solicitors wrote to Mr Hoskin's solicitors saying that Mr Hoskin "has failed to seek our client's consent for

the replacement(and has now in fact proceeded to do so by installing a design which does not match the rest of the building)". They also referred to extensive works being done to the premises without notice to Dr. King.

ii. The kitchen window was of particular importance to Dr. King. It had been the subject of a retrospective licence to approve its installation by Mrs Rudd. It was clear from Dr. King's evidence that he thought that the licence prevented that window being removed without his consent.

iii. Had that been the effect of the licence concerning the kitchen window, Dr.King's concern would have been totally understandable. However in relation to windows we found that while Dr. King raised the issue of the windows generally on 19 March, he did not actually object and was not moved to object until the kitchen window issue arose on 24 March. It was not until about 2 weeks later that Mr Hoskin would have had Dr. King's solicitors letter objecting.

iv. The lease does require the lessee to obtain the lessor's prior approval. He failed to do so. However, that failure has to be looked at in the light of Dr. King's failure to take prompt action. If he had done so on 19 March and Mr Hoskin had continued replacing windows, Mr Hoskin would have been in breach. However, Dr. King's failure to take prompt action means that in law he is estopped from relying on the terms of the clause in the lease concerning windows as, by his failure, he allowed the Respondent to continue with the windows work. We accordingly found that there was not a breach of the lease in relation to windows.

e. Installing wiring and pipe work in the loft. The Applicant says that they should not have been done without his permission because the loft remains his: it is not part of the premises. The Respondent says that while the lease does not refer to the loft specifically as being part of the premises, because it does not specify the upper limit of the premises, it must include the loft, the only access to which can be gained from the bathroom of the premises. We think that the lease is, in many respects, poorly drafted. On this particular issue it is unclear.

f. However, there seem to be 2 possible situations: -- either:

i. the loft belongs to the premises. If that were so, the installation of the wiring and pipe work in the loft would constitute work done within the premises and would not constitute any breach of the lease. If anything, such a work might be an alteration but would not in law count as such for the reasons we have set out above. Accordingly there would not be a breach of covenant; or

ii. the loft belongs to Dr. King as part of his retained freehold. It is one of the defects of this lease that there is no covenant on the part of the lessee to prevent trespass or damage to parts of the building retained by Dr. King so that there is no breach of covenant.

iii. Accordingly in either event there would not be a breach of covenant, so it is not necessary for us to decide, and we do not make any decision on the point, whether the loft forms part of the premises or not. We simply decided that there is no breach of covenant in any event.

g. Refusing to repair damaged walls and carpet. Our reasoning in respect of this is similar to that relating to the wiring and pipe work in the loft space. The walls and carpet concerned are plainly not part of the premises so the covenants in the lease do not govern any such damage and there is therefore no breach of covenant.

h. Refusing to allow 6 monthly inspections. Clause 2 (vii) of the lease, in terms, provides for the Applicant at reasonable times (except in emergency) to inspect twice a year on giving previous notice in writing. Although the Applicant certainly raised the matter of inspection in his letter to the Respondent dated 5 May, 2009, he did not actually give notice of intended inspection: he simply said that an inspection was overdue and that until it had been arranged it was not possible for him to assess various matters. The Applicant needs to be clear in giving a notice on a time and date of intended inspection but we are not satisfied on the evidence that he has done so and we therefore found there was no breach of covenant.

i. Failing to maintain the front garden. There does not appear to be a specific covenant concerning caring for the front garden but the demised premises are defined to include it, so we considered the lease to see which of the tenant's covenants touch upon its care. It appears to us that the relevant clause is clause 2 (iv) which requires the Respondent to keep the premises ... "in substantial repair". It is difficult to apply that to the needs of a garden which generally requires mowing, pruning, weeding etc. We have seen photographs of the garden, apparently taken by the Respondent's brother in about December 2009, and we also saw the condition of the garden at our inspection on 5th February 2010. The Applicant complained of it looking a mess during the Respondent's ownership and still (as 5 February, 2010) looking a mess with leaves fallen from the fuchsia. While we feel that the garden could be better tended, we are not satisfied on the evidence or from our inspection that it was in such condition as to fail to comply with a covenant to repair.

j. Failing to fit smoke alarms and provide an escape plan. There is no such requirement in the lease so there is no breach of covenant.

k. Cutting off the electrical supply. We accept that the electrical supply was cut off and adversely affected lighting of the hallway. We have no doubt that because the hallway is not part of the demise of the premises, it belongs to the Applicant and that he is responsible for its upkeep, including lighting as necessary under clause 3 (iii) (b). The Respondent is of course required to contribute to that cost but the liability for providing those facilities is clearly with the Applicant. The Applicant told us that the supply to the lighting was on the circuit of the premises. That practical situation clearly creates a problem in the Applicant complying with his covenant, but it is a problem which the Applicant has to deal with. For instance he ought to ensure that the lighting is on a circuit separate from each Flat so that he can determine the cost of electricity which would be the subject of service charges. It was for the Applicant or his predecessor to ensure that he could comply with the covenant referred to above and we found that if, as seems to have been the case, he left control of it with the premises, he is not able to complain. Furthermore, there is no covenant on the part of the Respondent either to provide that electricity to the internal common parts or to a ensure that it is maintained. For both reasons therefore we found there is no breach of covenant.

l. Failing to co-operate re external maintenance. The lease covenants require the Applicant to carry out the external maintenance subject to service charge

contribution by the Respondent. We had no evidence that the Respondent had failed to comply with any valid service charge demand, so the Applicant should comply with his covenant. Equally there are is no covenant on the Respondent to co-operate concerning external maintenance (but only to contribute towards the cost) so there can be no breach of covenant for "failing to co-operate".

m. Failing to confirm repair of leak. Whether the Applicant asked for confirmation or not, we find no covenant on which the Respondent could rely such that failure to confirm would be a breach. Nor do we understand why any non-confirmation would have adversely affected in any insurance claim. If there was a valid claim because of damage from a leak, it seems to us that claim should be paid by insurers, but we do not have any evidence that an insurance claim was made. The Applicant told us that since he gained entry to the premises, there had been no further problem which suggests that the leak had been dealt with and no further confirmation would be required anyway.

n. Failure to observe and perform covenants -- clause 3 (i). This is a clause by the Applicant to permit the Respondent to peaceably hold and enjoy the premises etc. It is not a covenant by the tenant. Therefore the tenant cannot be in breach of it.

23. The Tribunal made its decision accordingly.

[Signed] M J Greenleaves

Chairman
A member of the Southern
Leasehold Valuation Tribunal
appointed by the Lord Chancellor