HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

Case Reference: LON/00BB/LBC/2011/0055

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATION UNDER SECTION 168(4) OF THE COMMONHOLD & LEASEHOLD REFORM ACT 2002

Address: Flat A, 50 Dore Avenue, Manor Park, London, E12 6JU

Applicant: Meryon Properties Ltd

Respondent: Ms Shabana Hafez

Application: 20 June 2011

Inspection: 24 August 2011

Hearing: 24 August 2011

Appearances
Applicant
Mr M. Paine FPCS, MIOD, AIRPM Circle Residential Management Ltd

Respondent
Did not attend and was not represented

Members of the Tribunal
Mr I Mohabir LLB (Hons)
Mr M. Taylor FRICS MAPM

Introduction

1. This is an application made by the Applicant under section 168(4) of the Commonhold and Leasehold Reform Act 2002 (as amended) ("the Act") for an order that the Respondent has breached one or more covenants or conditions in her lease.

2. The Respondent is the present lessee of the ground floor premises known as Flat A, 50 Dore Avenue, Manor Park, London, E12 6JU ("the property"). The lease by which the Respondent holds the property is dated 22 October 2004 for a term of 99 years from 1 January 2004 ("the lease"). The Applicant is the present freeholder.

3. It was the Applicant's case that the Respondent has breached the following covenants in her lease and sought a determination from the Tribunal in those terms. These are:

   (a) Clause 5(c), by failing to keep the interior and exterior of the property in good and substantial repair.

   (b) Clause 5(d), by failing to allow the landlord access to the property to inspect the conditions thereof.

4. Although the Applicant initially sought a determination that the Respondent had also breached clause 5(e) of her lease by failing to serve a notice of subletting on the Respondent, this was withdrawn from the application at the hearing. Mr Paine, for the Applicant, accepted that the Tribunal would not be able to make a finding that the property had been sublet by the Respondent because he did not have any such evidence before it and the Tribunal had not been able to carry out an internal inspection.

5. For the same reasons, Mr Paine also withdrew the application in so far as it related to the Respondent's failure to keep the interior of the property in good and substantial repair.

6. By way of background, the Respondent had been served with an Improvement Notice dated 4 May 2011 by the London Borough of Newham to address matters concerning excess cold by fitting appropriate insulation to the walls of various rooms and the presence of rising damp in the middle bedroom and lounge. The notice required the remedial works are specified in Schedule 2 to commence no later than 6 June 2011 and to be completed no later than three months from that date. By a letter dated 5 August 2011, the Respondent confirmed that a substantial degree of works had been carried out to the property to comply with the improvement notice.

Hearing & Decision

7. The hearing in this matter took place on 24 August 2011 following an inspection of the property by the Tribunal earlier that morning. Mr Paine appeared on the half of the Applicant. The Respondents did not attend and was not represented. The evidence from the Respondent was limited to correspondence with the Tribunal in relation to the installation of a damp proof course and other internal works.

8. It should be noted that the Tribunal's inspection was limited to a general external inspection, as internal entry to the property could not be gained. The inspection, therefore, provided the Tribunal with little or no assistance.

Failure to Keep the Exterior in Repair

9. Mr Paine submitted that the Respondent had breached the covenant contained in clause 5(c) of the lease by failing to keep the exterior of the property in good and substantial repair in the following way.

10. Clause 4 of the lease states that the property is demised for a term of 99 years from 1 January 2004. Clause 5(c) requires the tenant to paint the exterior parts of the property every three years. Therefore, Mr Paine argued that if the lease was executed on 22 October 2004, then that the requirement to paint the exterior every three years would be calculated from either 1 January 2004 or 22 October 2004. He submitted that the painting of the exterior of the property had never been carried out.

11. The Tribunal found that the Respondent had not breached the covenant contained in clause 5(c) of the lease to carry out exterior redecorations every three years during the term for the following reasons. In paragraph 13 of the application to the Tribunal under the heading "Grounds of Application", the Applicant was invited to set out the grounds on which the application was made. The grounds stated by the Applicant were "the tenant has failed to comply with a Housing Act notice served by the local authority". The notice is the improvement notice referred to above. The application is, therefore, predicated on the notice. The work required under the notice does not fall within the repairing and maintaining obligations set out in clause 5(c). Cold, damp and mould are not items of disrepair. Indeed, the Applicant does not rely on these matters in support of this allegation of breach. Furthermore, in Circle Residential Management Ltd's letters to the Respondent dated 25 May and 6 July 2011, the alleged breach of clause 5(c) was not set out nor was the Respondent given a reasonable period of time to remedy any such breach.

12. In addition, this allegation of breach was not raised as part of the Applicant's case at the pre-trial review. At that hearing, the Applicant maintained that the Respondent was in breach because of the improvement notice. The first occasion the Applicant asserted that the Respondent was in breach of clause 5(c) was in its statement of case, but it still failed to particularise the exact nature of the breach. This was not done, in relation to the failure to paint the exterior of the property, until the hearing.

13. It was clear to the Tribunal that the Respondent had not been made aware of this allegation of breach prior to the hearing and had not been given an opportunity to respond. In any event, this was a breach of the rules of natural justice. The Tribunal, therefore, concluded that in this regard the application was premature and it made no finding in relation to this allegation of breach.

Failure to Allow Applicant Access

14. Mr Paine relied on two letters that were written by his firm to the Respondent expressly making a request pursuant to clause 5(d) of the lease requesting access to inspect the interior condition of the property. The first letter is dated

25 May 2011. The second letter is dated 6 July 2011 containing a copy of the earlier letter. Mr Paine asserted that access had not been granted and he submitted that the Respondent was, therefore, in breach of clause 5(d).

15. The request for access made to the Respondent was set out in the clearest terms possible in the letter from Circle Residential Management Ltd dated 25 May 2011. That request was again repeated to the Respondent on 6 July 2011. The Tribunal accepted the assertion made by Mr Paine that access to the property had not been granted by the Respondent as requested. Accordingly, the Tribunal had little difficulty in finding that, by failing to grant to the Applicant internal access, the Respondent had breached clause 5(d) of the lease and that breach was continuing as at the date of the hearing.

Costs

16. At the conclusion of the hearing, Mr Paine made an application for an order for costs against the Respondent in the sum of £500. The application was made under paragraph 10 Schedule 12 of the Act.

17. Mr Paine submitted that the Respondent had acted unreasonably by failing to engage in the proceedings and not complying with the Tribunal's Directions. In addition, by another letter dated 25 May 2011 from Circle Residential Management Ltd, the Respondent had been invited to admit the breach of failing to comply with the Housing Act notice served by the local authority. In support of this submission, Mr Paine also relied on three other Tribunal decisions where an order for costs had been made against other tenants for the same reasons. Mr Paine accepted that those decisions were not binding on this Tribunal.

18. In each case, any application for costs made in this way turns on its own facts as to whether a party has conducted itself unreasonably. In the present matter, the Tribunal did not make the order for costs sought by Mr Paine for the following reasons. Firstly, the invitation to admit the breach set out in the letter dated 25 May 2011 could not be admitted by the Respondent. The breach complained of in the letter was in relation to the improvement notice,

which for the reasons set out above, is not concerned with the repairing and maintaining obligations in the Respondent's lease.

19. Secondly, the Tribunal did not accept Mr Paine's assertion that the Respondent had entirely failed to engage in these proceedings. She had corresponded with the Tribunal, albeit in a limited way.

20. Thirdly, the Tribunal found that the failure to comply with Directions in itself was not a sufficient basis on which to make a finding of unreasonable conduct on the part of the Respondent, especially as she is a lay person

Dated the 5 day of October 2011

CHAIRMAN.....
Mr I Mohabir LLB (Hons)