461

BIR/00CN/LBC/2012/0009

HM COURTS & TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

of the

MIDLAND RENT ASSESSMENT COMMITTEE

In the matter of an application under section 168(4) of the Commonhold and Leasehold Reform Act 2002

Between:

MRS MICHAL BENVENISTE

("the Applicant")

- and –

MISS JESSICA RAINBOW

("the Respondent")

relating to

Flat 1, 76 Church Road, Moseley Birmingham, B13 9AE

("the Property")

DETERMINATION

Before Mr R Healey LLB, Solicitor and Mr D Satchwell FRICS

on 27 November 2012

Summary of the determination

The Tribunal determines the Respondent to be in breach of a covenant contained in a lease dated 10 December 1981 made between Langland Securities (Birmingham) Limited of the one part and Patrick Malcolm McDonough of the other part ("the Lease") by reason of her failure to maintain and repair the front window of the Property as required by clause 2(8) of the Lease. The Tribunal makes no award of costs against the Respondent.

Reasons for the determination

Introduction

1 This is a determination on an application under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") made to the Leasehold Valuation Tribunal by Mrs Michal Benveniste ("the Applicant") for a determination that Miss Jessica Rainbow ("the Respondent") as leaseholder has breached a covenant contained in her lease of Flat 1, 76 Chuch Road, Moseley, Birmingham, B13 9AE ("the Property").

2 By the present application, the Applicant seeks to commence the necessary preliminary stage to the statutory forfeiture procedure, which was introduced by section 168 of the 2002 Act.

3 Section 168 (so far as material) provides as follows:

(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 ... 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 . . . .
...

(4) A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for determination that a breach of covenant or condition in the lease has occurred.

4. In the present application the Applicant seeks such a determination from the Tribunal.

Background

5. The relevant lease is dated 10 December 1981 made between Langland Securities (Birmingham) of the one part and Patrick Malcolm McDonough of the other part ("the Lease") whereby the Property is leased for a term of 99 years from 25 March 1981.

6. Directions were issued by the Tribunal on 2 October 2012.

7. In accordance therewith Ms Carol Mason MIRPM on behalf of the Applicant filed her statement of case incorporating a statement of truth with the Tribunal. Messrs John H Cranmer & Co on behalf of the Respondent made submissions by letter dated 21 November 2012.

Inspection

8. By prior arrangement with the parties the Tribunal attended at the Property for inspection on 27 November 2012. Mr Diamandis attended on behalf of the Respondent. The Applicant was not present. The Tribunal was unable to gain admission to the rear of the Property and their inspection was limited to the external front elevation. The Property comprises a ground floor flat with hard standing to the front. The front window appears in need of repair or replacement. It further appears in need of repainting.

Paper Determination

9. The Tribunal's Directions gave notice in accordance with the provisions of Regulation 13 of the Leasehold Valuation (Procedure) (England) Regulations 2003 of its intention to determine the application without an oral hearing and no request being made by either of the parties for such, the Tribunal proceeded to determine the application by way of a paper determination on 27 November 2012.

Applicant's submissions

10. The Applicant produced a Land Registry extract to show the Applicant as the registered proprietor of the freehold land known as 76 Church Road Moseley Birmingham.

11. The Applicant produced a Land Registry extract to show the Respondent registered with a leasehold title as more particularly described within the Lease.

12. The Applicant referred the Tribunal to clause 2(b) of the Lease which reads

"*2. The Lessee hereby covenants-*

(8) To maintain uphold and keep the whole of the Flat and all walls timbers sewers drains pipes cables wires and appurtenances thereto belonging apart from those items which are the Lessors responsibility in accordance with the Lessors covenant in that behalf hereinafter contained in good and tenantable repair and condition damage by any risk against which the Lessor shall have insured (save where the insurance monies shall be irrecoverable by reason of any act or default of the Lessee or his family servants or agents) nevertheless excepted and to replace from time to time all Lessors fixtures and fittings and appurtenances the Flat which may be or become beyond repair at any time during the said term".

13. As a result of a contractor attending at the Property to quote for external redecoration of the Property, the Applicant's managing Agent, Circle Residential Management Limited, became aware that a breach of covenant had occurred in that the Respondent had failed to maintain and repair the windows comprised within the Property.

14. Circle Management Limited by letter dated 30 April 2012 wrote to the Respondent alleging that she had failed to maintain the windows of the Property as required by the Lease. The Respondent was invited to admit the breach and in the absence of such the Respondent was informed that the Applicant intended to apply to the Tribunal for a determination that a breach of covenant in the Lease has occurred.

15. The Applicant refers to a telephone conversation which took place between Rhianna Waugh and the Respondent on 2 May 2012. The Respondent asked for details of the Applicant's requirements for replacement of the window. The Respondent said "Ok, I'll sent the letter back to admit it is my concern and take steps to getting it sorted out."

16. The Respondent refused to admit that a breach of covenant had occurred and has failed to rectify the alleged breach.

17. The Applicant made the present application on 13 July 2012.

18. The Applicant submits that the Tribunal has no jurisdiction to consider waiver or estoppel once a breach of covenant has occurred.

19. The Applicant submits the Tribunal has no jurisdiction to consider whether the Applicant has suffered any loss or prejudice as a result of a breach of a tenant's covenant in the Lease.

Costs

20. The Applicant invites the Tribunal to consider an award of costs against the Respondent and refers the Tribunal to its jurisdiction to award costs which is contained in paragraph 10 of Schedule 12 to the 2002 Act as follows –

(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—

(a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
(b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

...

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.

18. The Applicant submits that the Respondent has acted unreasonably in connection with the proceedings "by continuing with an application where the outcome should have been known by the Respondent prior to the hearing".

19. The Applicant in support of its submission refers the Tribunal to the case of Halliard Property Company Limited v Belmont Hall and Elm Court RTM Company Limited LRX/130/2007 and LRA/85/2008 in which his Honour Judge Huskinson said –

> "So far as concerns the meaning of the words "otherwise unreasonably" I conclude that they should be construed eusjdem generis with the words that have gone before. These words are "frivolously, vexatiously, abusively, disruptively, or otherwise unreasonably." The words "otherwise" confirm that for the purpose of paragraph 10 [of this decision] behaviour which was frivolous or vexatious or abusive or disruptive would properly be described as unreasonable behaviour. The words "or otherwise unreasonably" are intended to cover behaviour which merits criticism at a similar level albeit that the behaviour may not fit within the words frivolously, vexatiously, abusively, disruptively . . . Thus the acid test is whether the behaviour permits a reasonable explanation".

20. The Applicant also refers the Tribunal to the decision in the matter of Shuttleworth Management Co Ltd v Ms C Richards (CHI/21LC/LSC/2007/0047) where fees were reimbursed and costs awarded as the Lessee had failed to reply to correspondence and failed to engage in the Tribunal process. The Applicant submits that the Respondent's failure to seek legal advice was unreasonable and by compelling the Applicant to make the present application constitutes a failure to "engage in the process".

The Respondent's submissions

21. The Respondent's case is sat out in a letter from John H Cranmer FRICS dated 21 November 2012.

22. The Respondent produces a copy letter dated 7 May 2012 sent to Circle Residential Management which reads –

> *"Further to your letter dated 30th April and our subsequent telephone call to your offices. On Friday 4 May I wish to seek clarification as to whether I can replace the windows in question with UPVC.*
> *I have a contractor ready to fit the said window and await clarification as soon as possible."*

which by letter dated 10 October 2012 the Applicant denies having received.

23. The Respondent submits that she has declined to admit the breach as she is awaiting approval from the Applicant for the replacement of the window

as is required by the Lease. She confirms that she has arrangements in hand to attend to the repair but considers that she is not legally entitled to do so in the absence of permission from the Applicant.

24. Mr Cranmer on behalf of the Respondent submits "It would seem that [the Applicant's] fixation with repeatedly attempting to obtain admission of a breach of tenant's covenant may well be motivated by the fact that once this has been admitted it then automatically opens the door for a variety of costs and fees which will then accrue to the freeholders and their agents. We would further invite the Tribunal to consider why, if the agent were discharging their primary task of ensuring satisfactory management and maintenance of their freeholder client's investment, they do not simply give formal permission for work to be carried out (and if they so desire place a timescale upon this). Miss Rainbow will, as confirmed in her letter of the 22 October, be pleased to comply with as she already has a contractor in place to undertake the necessary work."

Findings by the Tribunal

25. The Tribunal finds that there is a failure by the Respondent to maintain the windows in good and tenantable repair and condition as required by the Lease.

26. The Tribunal finds that the letter of 7 May 2012 was sent by the Respondent to the Applicant.

27. The Tribunal finds that a telephone discussion took place between the parties on either 2 or 4 May 2012 in which the Respondent asked for permission to repair the window.

28. The Tribunal finds that the Applicant has concentrated on the desire to secure an admission or finding of breach of covenant rather than give consent for a repair to be done.

29. The Tribunal has carefully considered the Applicant's request for costs. The Tribunal accepts that the words "otherwise unreasonably" must be construed eusjdem generis. In the present case the Tribunal finds that the Applicant has failed to properly consider the Respondent's request for permission to repair the window. The Tribunal therefore does not find that the Respondent's actions do not permit of a reasonable explanation. For these reasons the Tribunal does not consider the decision mentioned in paragraph 20 above to be relevant.

Determination

30. The Tribunal determines the Respondent to be in breach of clause 2(8) of the Lease by reason of her failure to maintain the windows in good and tenantable repair and condition.

31. The Tribunal does not find that the Respondent has acted in any way

unreasonably and has not behaved in any way which would permit an order for costs to be made against her. Accordingly no award of costs is made against the Respondent.

32. For the reasons set out in the preceding paragraph the Tribunal does not make any order for reimbursement of the Applicant's fees.

33. The Tribunal has no jurisdiction within the present application to determine administration costs which may arise out of this determination but may form the basis of a separate application to this tribunal.

.....

Roger Healey
Chairman

DATED: 11 DEC 2012