FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00ML/LBC/2014/0001
Property	:	Flat B1, Hatfield Court, 35 Salisbury Road, Hove, BN3 3AA
Applicant	:	Hatfield Court (Hove) Limited
Representative	:	Mr S Wright, Counsel Griffith Smith Farringdon Webb LLP
Respondent	:	Fahad Alyahya & Maha Ali N Alfaiz
Representative	:	Mr S Madge-Wyld, Counsel Bosley & Co, solicitors
Type of Application	:	Commonhold and Leasehold Reform Act 2002 Section 168, Breach of Covenant
Tribunal Member(s)	:	Judge J A Talbot Mr R A Wilkey, Surveyor Member
Date of Decision	:	6 May 2014

DECISION

Determination

The Tribunal determines that no breaches of Clause 3(2),(6),(9) or (11) had occurred.

The Tribunal records that the Respondents have admitted breaching Clause 2 and paragraph 1 of the First Schedule to the Lease by causing annoyance or nuisance to the owner of Flat A1 between September 2011 and August 2012.

The Tribunal was therefore not required to make a determination in respect of Clause 2 and paragraph 1 of the First Schedule.

Background

1. The Applicant landlord seeks a determination under subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") that the Respondent tenant is in breach of various covenants contained in the lease. In particular, the Applicant asserts that the Respondent has allowed the property to fall into disrepair, has failed to make good lack of repair, has failed to pay expenses incurred in or incidental to the preparation and service of a s146 Notice, has carried out unauthorised additions or alterations, and has used the flat in such a way as to cause nuisance or annoyance to the owners of another flat.

2. The Application, dated 02/10/2013, at section 5 of the form, is couched in different terms, focussing on a claim for damages by the tenant (long lessee) of Flat A1, Ms S R Shuker. She is of course not a party to this application. In addition to claiming that the Respondents have breached covenants in the lease, the Applicant states:

   "The Respondent has installed a unique bidet system in the bathroom of the Property, which has resulted in the bathroom being used as a wet room. Between September 2011 and August 2012, the occupants of the Property misused the bathroom, resulting in water ingress into the flat below, Flat A1. The leaseholder of Flat A1 has suffered damage to her flat, and is pursuing the Applicant for damages on the basis of breach of the quiet enjoyment and use covenant. The Applicant in turn seeks to pursue the Respondent for said damages as the Respondent caused the damage and has breached the covenants of the Lease".

3. Directions were issued on 10/01/2014 and 04/04/2014. Both parties complied with the Directions.

The Lease

4. The Tribunal was provided with a copy of the lease of flat B1, dated 18 May 1962 for a term of 999 years from 25 March 1961, between Overland Development Company Limited (now Hatfield Court (Hove) Limited) and the Lessee.

5. Insofar as is material to the application, the lease contains the following covenants by the tenant:-

   "Clause 2: ... [to] observe and perform the restrictions set forth in the First Schedule hereto;

   Clause 3 (2): to keep the interior of the Flat and all walls party walls drains pipes cables wires and appurtenances ... and the fixtures and fittings therein and all additions to the Flat in good and substantial repair and condition and in particular (but without prejudice to the generality of the foregoing) so as to support shelter and protect the parts of "Hatfield Court" other than the Flat";

   Clause 3(6): to ... make good all defects decays and wants of repair of which notice in writing shall be given by the Company to the Lessee and for which the Lessee may be liable hereunder forthwith after the giving of such Notice";

   Clause 3(9): to pay all expenses ... which may be incurred by the Company incidental to the preparation and service of a Notice under Section 146 of the Law of Property Act 1925";

   Clause 3(11): Not at any time during the said term without the licence in writing of the Company first obtained to ... make or permit or suffer to be made any alteration or addition whatsoever in or to the Flat";

   Paragraph 1 of the First Schedule:
   Not to use the Flat or permit the same to be used ... for any purpose from which a nuisance or annoyance can arise to the owners lessees and occupiers of the other flats comprised in "Hatfield Court".

6. "Hatfield Court" is defined as the building "all of which premises ... hereinafter reserved to the Company". The demise of the Flat includes at Clause 1, "one half part in depth of the concrete between the ceilings of the Flat and the floors of the Flat above it and of the concrete between the floors of the Flat and the ceilings of the Flat below it".

Inspection

7. The members of the Tribunal inspected the property immediately before the hearing, accompanied by the parties' representatives, expert witness Mr D Smith and property manager Mr S Howlett. Hatfield Court comprises a five storey, corner block of 25 purpose built flats probably constructed about 65 years ago. The main roof is flat and not visible from ground level. The elevations are brick

8. We inspected the bathroom in Flat B1 which is on the ground floor. A small section of copper pipe has been added to the water supply pipe which feeds the WC cistern. It is currently capped off and not in use. The floor covering in the bathroom has been replaced with some form of vinyl covering which has probably been laid over the original tiles.

the determination sought. The Tribunal is not primarily concerned with the future intentions of the parties.

24. The Tribunal's jurisdiction under s168(4) is to make a determination that a breach of covenant has (or has not) occurred. This is the sole issue. The section is limited and does not concern the issue or validity of a s146 Notice. The forfeiture procedure itself remains with the Court, including such issues as whether the landlord is prevented from using forfeiture by reason of a waiver of any breach, whether the breach is remediable or irremediable, or whether any breach has or has not in fact been remedied.

Scope of the Application

25. Mr Wright submitted that the scope of the Application should be extended from the specified period of September 2011 to August 2012, to include a later alleged breach, a further leak, in October 2013 (shortly after the Application was made). This does not appear to have been raised with the Tribunal before the hearing.

26. He further submitted that the breach of Clause 2 and Schedule 1 (not to cause nuisance) was ongoing. He argued that this mattered because of s146 and possible future arguments about waiver of continuing breaches of covenant. Pursuant to the over-riding objective, it was in the interests of justice to extend the scope of the Application so that all the alleged water leaks could be considered together.

27. Mr Madge-Wyld opposed the extension of the Application. He pointed out that the specific allegation of a further leak in October 2013 was first mentioned in Ms Shuker's witness statement dated 21/03/2014 which was not received until 7 days before the hearing. That witness statement also gave the date of the first leak as February 2010, not September 2011. He argued that it would be unfair to the Respondents to allow an extended scope of the Application at such a late stage without giving them the chance to respond, especially as the Applicant now says that forfeiture of a 999 year lease is contemplated.

Decision and Reasons

28. We were persuaded by Mr Madge-Wyld's argument on procedural fairness. The Application was very specific in its wording and was limited to the period between September 2011 and August 2012. The Applicant's statement of case repeated those dates.

29. A witness statement from Ms Mari Knowles, solicitor for the Applicant, dated 4 April 2014 – 4 working days before the hearing – states "the current position [with regard to the leak] is that Ms Shuker thinks the leak is ongoing (though she is not an expert surveyor)". The statement further alleges that "there have been further leaks since [August 2012] which the Respondent has not admitted liability for".

30. In our view, references to further and ongoing leaks after August 2012 are vague, unspecific and have not been particularised in such a way that the Respondents have been able to respond to them before the hearing, whereas the Applicant has had ample opportunity to apply to the Tribunal to amend the Application.

31. The over-riding objective (rule 3 of the Procedure Rules) requires the Tribunal to deal with cases fairly and justly. Although this includes "avoiding unnecessary formality and seeking flexibility", it also includes "dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and the Tribunal".

32. As a matter of fairness, the Respondents are entitled to know the full case against them. The Application was clear and specific; the fresh allegations were not. Whilst we see it would be convenient for the Applicant to extend scope and to raise the new point of continuing breaches, in order to address a possible waiver argument, this would almost certainly have required an adjournment, possibly the obtaining of further expert reports, and a re-hearing.

33. On the costs point, by 03/10/2013 the Applicant's costs were said to be £2,500 + VAT plus surveyor's fees of £650 + VAT and disbursement of £40. There was no updated schedule of costs but plainly they have increased since then, including counsels' fees and costs of the hearing. The Respondents' costs (in support of the strike-out) are said to be £5,860 including VAT. An adjournment would have increased costs still further and involved more Tribunal resources.

34. This seemed to us to be disproportionate to the initial primary aim of the Application, to support a claim in damages for Ms Shuker, whose estimated decoration costs were said to be £1,200 + VAT plus possible damages for inconvenience and distress, which have not been quantified but which in our view would be unlikely to be high.

35. Overall, therefore, in our view, it was in the interests of justice to proceed with the Application as originally framed and to limit its scope to the period September 2011 to August 2012.

The expert report of Mr D F Smith

36. Mr Madge-Wyld argued that the report should not be admitted. This was because the Tribunal's Directions of 10/01/2014 stated that the draft report did not appear to comply with rule 19 of the Procedure Rules and "permission to use it is not granted". Mr Smith inspected in May 2013 but The Respondents were not given a copy of the report until October 2013 and had not been provided with the instructions to the expert as required by rule 19(5)(e).

37. The Applicants did not make any further applications to the Tribunal but the version of the report in the bundle sent to us for the hearing is

not a draft. At the hearing Mr Wright submitted that the report was later signed by Mr Smith and his CV was attached, and contained a summary of the instructions, therefore remedying any prior defect.

38. A copy of the complete instructions to Mr Smith was provided at the hearing at our request. This did not take us a great deal further. We noted that although they referred to tribunal proceedings for breach of lease, they concentrated on the cause, nature and extent of damage to Flat A1, remedial works and mitigating factors for a damages claim.

Decision and Reasons

39. We admitted the report, exercising our case management power under rule 6 of the Procedure Rules to amend or set aside an earlier Direction.

40. We took into account that the formal defects (lack of signature and CV) were minor and had been rectified in the copy provided to us. The factual content of the report was helpful, in that it shed light on the overall condition of the bathroom of Flat B1 in 2013, which had changed by the time of our inspection. The contents were not controversial or indeed disputed. The Respondents had sight of the report in October 2013 and had ample time to obtain their own report if they so wished. Neither party had objected to Mr Smith's attendance at our inspection (attended by both Counsel) or at the hearing.

Admission by the Respondents

41. It was not initially clear from the papers provided to the Tribunal whether the Respondents had made any admissions, and if so, what these related to: whether a tortuous liability in damages for nuisance, or breaches of covenant under the lease. We therefore issued additional Directions for this to be clarified, along with copies of correspondence between solicitors referred to in the Applicant's statement of case.

42. In its statement of case, the Applicant stated (para.29): "the Applicant has attempted to resolve this dispute with the Respondent extensively in correspondence but the Respondent has failed to admit liability". This was also stated in Mr Smith's report.

43. However, the Respondents' original statement of case in reply (para.10) stated: "The Applicant has not informed the Tribunal of its open position between the parties confirmed by its solicitors on 1 May 2013: 'Furthermore, we will be relying on your open letter dated 10 October 2012 in which you admit liability'.

44. These two letters, however, do not seem to be a clear, unequivocal admission or acceptance of liability. The Respondents' letter of 10/11/2012 simply states: "There was a standard mini hand held shower attached to the toilet unit which needed some slight alteration and the matter has now been remedied" and put the Applicant to proof of the damage to Flat A1.

45. Following the disclosure of further correspondence and the Respondents' skeleton argument and further submissions, it emerged that the Respondents' solicitors had written on 17 February 2014: "our clients deny a breach of the lease with the exception that on limited occasions, no later than August 2012, a leak from Flat B1 caused nuisance or annoyance to the owner of Flat A1".

46. The Respondents' statement of case dated 15/02/2014, para.16, is more comprehensive: "The Respondents admit that on limited occasions, and no later than August 2012, the Respondents' tenants used the bathroom in a way so as to cause the owner of Flat A1 nuisance or annoyance, insofar as the tenants caused, through the use of the bathroom, water to enter into Flat A1 below".

47. For the avoidance of doubt, Mr Madge-Wyld confirmed in his skeleton argument and at the hearing that the Respondents admitted breaching Clause 2 and paragraph 1 of the First Schedule.

48. There were no admissions in respect of the other alleged breaches, so to these we now turn.

Clause 3(2) and 3(6)

49. It is convenient to take these together, as the Applicant alleges both that that the Respondents have failed to keep Flat B1 in good and substantial repair and also to remedy any defects or lack of repair of which they had notice.

50. The Application and statement of case referred to drains, pipes, fixtures and fittings, and the obligation to provide "support and shelter" and to protect other parts of Hatfield Court. The Respondents denied the breach and argued that the Applicant had failed to particularise how the pipes, drains or fixtures had ceased to be in repair.

51. At the hearing, Mr Wright suggested that defective sealant and grouting to wall and floor tiles amounted to disrepair. He referred in his skeleton argument to Mr Smith's report which in summary also described defective sealant and tiles. He could not specify any lack of repair to pipes or drains. He further argued that there was a failure to provide support, shelter and protection to Hatfield Court.

52. Mr Madge-Wyld argued that the Applicant had failed to particularise in what respect the interior of the Flat was not in good or substantial repair or condition and that no evidence of disrepair had been produced in either the witness statements or the expert report. The evidence pointed to water ingress to Flat A1 causing nuisance or annoyance but this did not in itself amount to disrepair.

Decision and Reasons

67. Mr Madge-Wyld argued that the type of alteration or addition envisaged by this Clause must be structural. He referred to legal authority that the structure means: "those elements of the overall dwelling house which give its essential appearance, stability and shape" as opposed to "the various ways in which the dwelling house will be fitted out, equipped and generally made to be habitable" (*Irvine v Morgan* [1992] HLR 1, as approved by the Court of Appeal in *Grand v Gill* [2011] 1 WLR 2253).

68. He submitted that the Applicants had not shown that the installation of the "bidet system" had affected the structure, and that even the installation of a new bathroom was not an alteration, because it would not involve changing the appearance, stability or shape of the property.

Decision and Reasons

69. Again we agreed with Mr Madge-Wyld that the alterations or additions requiring prior written consent envisaged by this Clause would be structural and significant.

70. In this case, we are not looking at the installation of a new bathroom or even a bidet in the usual sense of the word, but simply a short piece of copper piping connected to the cold water supply to the toilet cistern. This does not even come close to being a structural alteration or addition. The question of whether or not prior written consent was obtained does not arise.

71. Again we observe that the problem, and the real dispute between the parties, lies with the use of the copper piping and hand-held shower.

72. We therefore found no breach of Clause 3(11) had occurred.

Tribunal Judge J A Talbot

Dated: 6 May 2014

RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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