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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOBA/LAC/2013/0027**
Property	:	**29 Tynemouth Road, Mitcham, CR4 2BQ**
Applicant	:	**Miss P B Miscampbell**
Representative	:	**In person**
Respondent	:	**Dino Donatto Lopez Pezzarossi and Annika Nielsen**
Representative	:	**Mr Pezzarossi**
Type of Application	:	**Determination of alleged breach of covenant or condition of a lease pursuant to Section 168(4) of the Commonhold and Leasehold Reform Act 2002 (2002 Act) and an application for determination as to liability to pay an administration charge pursuant to schedule 11 of the 2002 Act**
Tribunal Members	:	**Tribunal Judge Mr A A Dutton** **Mr L Jarero BSc FRICS** **Mrs L Walter MA**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR on 21st February 2014**
Date of Decision	:	**17th March 2014**

DECISION

DECISION

The Tribunal determines that there have been breaches of the covenants and conditions of the lease as set out in the findings section below.

The Tribunal determines that the Respondent should pay to the Applicant the Hearing fee of £190 within 28 days.

By agreement the Tribunal records the Respondent's offer to pay to the Applicant the sum of £205 in respect of the plumbing works to the Respondent's flat.

The Tribunal makes no other order as to costs.

BACKGROUND

1. These two applications were made by the Applicant on 31st October 2013. Directions were issued by the Tribunal in respect of the breach of covenant claim on 10th December 2013 which have, by and large, been followed.

2. The application under Section 168(4) of the 2002 Act alleges that the Respondents have breached clauses 2(5), clause 2(12), 2(15) and clause 2 and part 1 of the third schedule of the lease dated 28th April 1972. The brief extract from the lease relating to these clauses can be summarised as follows.

   2.5 provides for the Respondents to repair and uphold the upper maisonette during the term, including the drains, pipes, water causes etc.
   2.12 requires the Respondents to insure the upper maisonette in the joint names of the Applicant and themselves and to produce a copy of the policy or policies when requested to the Applicant.
   2.2(15) provides an obligation to observe the terms and conditions of a transfer dated 13th October 1959 referred to in the charges register of the freehold title SY234891 and in particular not to permit the upper maisonette to be used other than for the occupation of one family.
   Clause 2 and paragraph 1 of the third schedule provide for prohibitions in the regulations to the lease of causing nuisance or annoyance to the tenant of the lower maisonette or to the Applicant.

3. The Applicant's assertions contained in the application, legal submissions and the statement of case are as follows. In respect of the breach of repair the Applicant relies on an incident that happened on 7th May 2013 when water leaked from the Respondents' bathroom causing damage to the flat below which she owns, but which is tenanted. It appears that there was nobody present able to take on the responsibility of effecting emergency repairs and therefore she did so and in so doing incurred fees with an emergency plumber in the sum of £205 which she sought to recover initially as an administration charge.

4. The allegation relating to the insurance is that the policy is not in the joint names of the Applicant and Respondent and that the Respondent has on occasions refused to provide copies of the policy when requested. It was also alleged that there was no insurance in respect of the upper maisonette for a period and further that the insurance cover was potentially voidable by the insurers because there were more than four occupants living in the property and that the insurance provided for there to be occupancy during the day.

5. The third allegation related to the breach of the transfer in the freehold title which prohibited the use of the property to anything other than occupancy by one family. It was alleged that there were five males living at the property that did not constitute a family.

6. The fourth allegation related to the breach of the third schedule not to cause nuisance or annoyance. The allegation here was that the Respondents had allowed their tenants to place a large garden table in the back garden which straddled the boundary between the two areas of garden allocated to the upper and lower maisonette and that it had been removed and propped against the wall of the lower maisonette which the Applicant said would cause damp. There was also a failure to remove the garden table entirely which was therefore a continuing breach. The second element under this heading was that an exterior light had been fitted, it was said, to the exterior of the lower maisonette immediately above the rear door which said light was adjacent to the bedroom window of the lower maisonette.

7. Prior to the Hearing we had been provided with a substantial bundle of documents running to some 300 plus pages. The Applicant had provided submissions and authorities, copies of the freehold and leasehold title and a further statement with various exhibits attached. In addition there was a witness statement from a Mr Barry Demello, an enquiry agent, with photographs attached. Included was a statement from the Respondents and various exhibits copies of correspondence, emails etc. Of particular interest in the Respondents' documentation was the copy of a tenancy agreement which appears to be dated 1st June 2013 to four individuals running for a term of 12 months. In addition, a notice under the Housing Act requiring occupancy effective from 31st May 2014 was also produced. We had the opportunity of reading these documents in advance of the Hearing and do not propose to go into detail with regard to their contents as they are known to both parties.

HEARING

8. At the Hearing on 21st February 2014 Miss Miscampbell attended and was accompanied by Mr Demello. Mr Pezzarossi was also in attendance on behalf of himself and his wife.

9. Mr Pezzarossi made no admissions concerning the alleged breaches although he did accept that since June 2013 the flat had been occupied by four people and that there was no evidence of any familial tie.

10. Miss Miscampbell then spent some time detailing the circumstances relating to the leak which occurred in May 2013 and also indicated that there had been

some leaks earlier, specifically in 2005. It was apparently the lead pipe leading from a water tank to the toilet which had leaked and had caused damage to her flat. It appears that there was no one present who was able to turn off the water without restricting the supply to both the upper and lower maisonette and it was felt appropriate that an emergency plumber should be called to fix the leak. This Miss Miscampbell did and the cost of that was what appears to be a reasonable amount of £205.

11. Mr Pezzarossi said that he had offered to settle the claim but that there had been certain concerns on the part of Miss Miscampbell that if she accepted payment, which apparently included some arrears to ground rent, that this would cause problems in enforcing the breach of covenant. She told us that she had brought these proceedings to recover the monies that had been expended and to prevent the occupancy by the four individuals.

12. On the question of the occupancy Mr Demello had provided a witness statement and attended the hearing. Mr Pezzarossi confirmed that he recognised the property from the photographs but not the people as he had never met them. Mr Demello was of the opinion that they did live at the property although it is fair to say that none of the photographs actually showed the numbering of the flat and perhaps under forensic cross examination there might have been certain issues that could have been raised. It was interesting, however, to note that Mr Pezzarossi, although he had been forwarded the statement with the photographs, did not ask his managing agent to confirm whether the photographs identified the tenants and indeed had not had any contact from his managing agents about the earlier leak. He did tell us that he intended to seek possession of the property when the notice was effective requiring them to leave at the end of May but also that he was in the process of attempting to sell. We will come back to this point in due course.

13. In so far as the insurance breach was concerned, Miss Miscampbell told us that she had repeatedly requested copies of the insurance but this had not been provided and that she had concern upon seeing a copy of an insurance policy that it did not cover the property adequately. She was also concerned that prior to the latest policy being produced, there may not have been cover to deal with the occupancy arrangements. However, this was supposition she admitted on her part, although she considered that it was overwhelmingly the case that the Respondents did not have suitable cover for the number of people occupying the property prior to the amended policy.

14. Mr Pezzarossi thought the fact Miss Miscampbell's interest was noted on the policy was sufficient for the purposes of being in joint names.

15. Insofar as the nuisance and annoyance issue was concerned, we were shown a photograph of the light which is sited over the rear door to the upper maisonette sitting within the door opening. We were told that no complaint had been made to Miss Miscampbell by the tenant and it was not in fact clear that it was being used. Miss Miscampbell was concerned that having a light in this position could affect the enjoyment of the ground floor property. Mr Pezzarossi confirmed that he would have given an undertaking that the light would not be used to cause a nuisance to the occupiers of the ground floor, but that it did provide some

assistance when negotiating the rear passageway to the back door and was therefore of safety value.

16. Insofar as the table was concerned, we were shown a photograph of this propped against the lower maisonette wall, although it seems that it had been placed there by Miss Miscampbell. The table is certainly substantial but again there was no suggestion from Miss Miscampbell's tenants that they had any problems with regard to the table being positioned in the rear garden straddling the unmarked boundary.

17. In final submissions Miss Miscampbell relied on a couple of cases which had been included within her submissions. The first was *Lambert vs Co-operative Insurance Society Limited 1 1975* Court of Appeal case dealing with failure to disclose material facts in respect of insurance and the second was the case of *Barton and others vs Reed* a 1930 case relating to restrictive covenants and possible use of the property as a residential letting which could equate to business use. This was not in fact an argument that she put to us at the Hearing.

18. We were invited to consider that the pre-June insurance cover was not adequate for the use of the property and that as the Respondents had deliberately withheld providing copies of the cover it should enable us to draw an adverse inference. She invited us to accept her evidence and that Mr Pezzarossi's had been inconsistent, that he had been uncooperative and that he was an unreliable witness.

19. She had sought to recover the inquiry agent's fee of £1,144.80, they being costs incurred prior to or as part of forfeiture proceedings as provided for at clause 2.10 of the lease which required the Respondents to pay costs and charges and expenses incurred by the lessor in or in contemplation of any proceedings under Section 146 and 147 of the Law of Property Act 1925. She was of the view that the inquiry agent's statement was essential in proving the existence of the four or five persons at the property.

20. Mr Pezzarossi said he did not know he had four people living at the property until he was told this in July of 2013. It appears that this information was passed to him by Miss Miscampbell. However, the bulk of his evidence was that in fact the use and occupation of the premises was handled by his letting agents and that he had little or no knowledge as to what went on at the property. He admitted that he owed the £205 for the plumbing works. No application for costs had been made by either party but Miss Miscampbell thought a refund of the application fee for the administration charge claim of £125 and £190 for the hearing fee was apprpriate. Mr Pezzarossi did not think he should have to pay these fees as he had tried to settle. The response to this by Miss Miscampbell was that she had not issued the application until the end of October and had tried to resolve issues before then. It was only when she received an indication that the Respondents were intending to sell the property that she issued the proceedings to protect her position.

THE LAW

21. In respect of breach of covenant provision, this is contained at Section 168 of the 2002 Act and enables a landlord to seek a decision from the Tribunal under Section 168(4) as to whether or not a breach of covenant or condition has arisen. It is not our responsibility to determine what might be done if such finding is made by us as that is a matter for the County Court. Insofar as the administration charges are concerned, those are set out at schedule 11 of the 2002 Act and are considered on a similar basis to the determination of service charges and must be reasonable.

FINDINGS

22. We will deal with each of the breaches in order. Firstly the allegation of the repairing breach. We do not find that this is a breach of covenant. This was a one off event that was not in our view foreseeable. The fact that there may have been lead piping in situ does not of itself mean that there was bound to be a leak and there was no evidence that there had been problems with the property before nor indeed after. In those circumstances we find that a one off leak of this nature could not properly be constituted a breach of covenant. We do, however, accept that the leak did happen, although Mr Pezzarossi seemed to be sceptical. It seems to us that Miss Miscampbell acted wholly appropriate in trying to resolve matters and Mr Pezzarossi has agreed to pay the £205 that she incurred in what we considered to be very reasonable costs for an emergency plumber who attended in the middle of the night. If the Respondents do not pay this sum then we suspect that Miss Miscampbell will have to commence proceedings in the County Court but if it is any help in that regard as we have indicated we make a finding of fact that the leak did happen and on the evidence produced to us the course of action adopted by Miss Miscampbell was wholly reasonable and within the terms of the lease and the cost reasonable.

23. On the question of the insurance, we accept that there has been a breach. The policy was not produced to Miss Miscampbell when she requested it and it is not in the joint names of herself and the Respondents. The mere fact that the interest of Miss Miscampbell is noted is not in our finding sufficient. Accordingly we find that there are two breaches in that regard. We are not, however, prepared to find that the policy was inappropriate. No evidence was produced by Miss Miscampbell that the cover available prior the amended policy being produced was deficient nor is there any evidence to show that there was no insurance cover. It would seem to us strange for the Respondents not to insure the property. There is no reason for them not to do so and every reason for them to make sure there is cover in force. The burden of proof rests with Miss Miscampbell and we do not believe she has met that burden.

24. Insofar as the occupancy is concerned, it was admitted by Mr Pezzarossi that four single people were occupying the property and therefore it is in breach of the 1959 transfer. Whether there are five people living there is unclear. The inquiry agent's report is over a week and it is possible one of the men photographed may have been a guest. The tenancy agreement relates to four adults and we accept that is the case but we do not find as a matter of fact that

there are five males living at the property, but we accept that it is not occupied by one family.

25. Finally, we turn to the nuisance allegation. With respect to Miss Miscampbell we cannot see that a use of the garden table in the rear garden, which it appears was capable of being used by both the upper and lower maisonette tenants and for which there had been no complaint by the lower maisonette tenants, could reasonably be constituted as a breach of covenant causing a nuisance. Miss Miscampbell did not live at the property and her tenants have not complained.

26. Insofar as the exterior light is concerned, again we do not find that this is a breach. The extent of the property is described in the lease and includes the entrance, passage and staircase leading from the ground floor. It is, therefore, a moot point as to whether the opening into which the door to the rear entrance is fixed is part of the demise of the upper maisonette or not. Whether it is or is not, again we cannot see that the installation of a rear light which affords some security and safety to anyone using the rear could be classified as a nuisance. Again, no evidence was produced to show that the tenants of the lower maisonette had suffered any nuisance as a result of the installation of this light and indeed there was some doubt as to whether it was actually in use. In those circumstances, therefore, we are reluctant to find that this is a breach of covenant or condition of the lease. However, we have found that there are at least breaches in relation to the insurance and the occupancy issues.

27. Insofar as the claim for the recovery of the inquiry agent's fee as an administration charge is concerned, we are of the view that this was not reasonably incurred. The inquiry agent's report shows that he attended the property on 20th June 2013 and again on 25th, 26th and 27th June. We are not wholly convinced that the use of the inquiry agent could be said to be costs incurred in contemplation of proceedings under the 1925 Law of Property Act. As it happens, although the respondents were somewhat late in engaging properly with Miss Campbell in their statement lodged on 11th January they produced copies of the tenancy agreement which clearly shows that it is occupied by four people and Mr Pezzarossi accepted that this was the case. We think this is an unreasonable expense. Miss Miscampbell was aware of the identity of the letting agents and we believe should have made a greater attempt, having been in contact with the Respondents from July 2013, to have obtained copies of the tenancy agreement which would have clearly shown the position. We accept that there is a responsibility on the Respondents to provide the documentation as quickly as possible, but it seems to us that to go the expense of incurring in excess of £1,100 on inquiry agent's fees was over-egging the pudding. We conclude, therefore, that such a charge is unreasonable. We do find that the Respondents should pay the Hearing fee because they could have, and should have, admitted more regularly the breach in regard to the occupancy and the breach in relation to the insurance was patently obvious to them. They could, therefore, have avoided the need for the Hearing and it is reasonable therefore that that fee should be refunded.

28. Following the Hearing we were contacted by Miss Miscampbell who told us that the Respondents had sold their property, apparently a few days before the Hearing. Why Mr Pezzarossi did not deem it necessary to tell us this at the

hearing is beyond us. His behaviour in this regard is somewhat unreasonable and the question as to whether or not Miss Miscampbell makes any application for costs we leave with her. We do, however, express the concern that if the Respondents are now residing in the United States of America and have sold their leasehold interest in Tynemouth Road, the enforcement of any award may be difficult and further action in that regard may achieve nothing other than a pyrrhic victory for Miss Miscampbell.

Judge: *Andrew Dutton*

A A Dutton

Date: 17th March 2014