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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/00ME/LBC/2015/0017**
Property	:	**Flat 1,** **5 Boyn Hill Avenue,** **Maidenhead, Buckinghamshire,** **SL6 4ET**
Applicant	:	**Boyn Hill Avenue (Maidenhead) Limited** **Represented by its Managing Agent John Mortimer Property Management Company Limited and The Head Partnership Solicitors LLP**
Respondent	:	**Elizabeth Anne Allen** **Unrepresented**
Date of Application	:	**13th August 2015 (rec'd 14th October)**
Type of Application	:	**Section 168(4) Commonhold and Leasehold Reform Act 2002 ("2002 Act")** **Determination of breaches of lease**
Tribunal	:	**Judge J.Oxlade** **D. Barnden MRICS** **Ms. J. A. Hawkins BSc.**
Date and venue of Hearing	:	**27th January 2016** **Maidenhead Magistrates Court**

Attendees

Applicant	*Respondent*
Mr. Hurley, Counsel **Mr. I. Johns, Managing Agent** **Ms. J. Thompson, Director of Applicant** **Mr. N. Scarf, Director of Applicant**	**non-attendance**

DECISION

For the following reasons, the Tribunal finds that the Respondent has been in breach of the terms of her lease,

- **as to clause 3(1), by reason of the findings made in paragraph 34 below,**
- **as to clause 3(8), by reason of the findings in paragraph 39 below.**

REASONS

Background

1. The Applicant is a company ("the company") which is a party to a tripartite lease of premises known as Flat 1, 5 Boyn Hill Avenue ("the demised premises") made on 6th May 1986 between Domus Developments Limited ("the lessor"), the company, and the Respondent ("the lessee"), whose lease was assigned to her on 26th September 1997.

2. The demised premises consist of a flat ("the flat") occupying most of the ground floor of a large and imposing three-storey Victorian house ("the building"), which has been divided into six flats; there are communal gardens ("the gardens") to the rear of the building. The entrance door to the flat is located in a single storey conservatory ("the conservatory") to the right of the building, and which conservatory has a pair of French doors ("the French doors") that provides direct access onto a patio at the rear of the property, which patio area is included within the demise ("the patio area"). There is access from the patio area to the gardens via stone steps ("the steps"). The front garden of the plot is largely covered with tarmac, and so used for the parking of cars; there is a single parking space included within the demise of the flat.

Application

3. On 14th October 2015 an application was issued by the company, for findings of breach of the lease by the lessee.

4. It was said that the lessee had failed to maintain the property, as set out in the report of John C. Hemsley BSc. FRICS, dated 6th July 2015 ("the report") and that she had repeatedly failed to allow access to the premises to inspect, notwithstanding reasonable notice having been given.

5. The application recited as relevant the following covenants in the lease, wherein the lessee covenanted with both the company and the lessor to do the following:

> Clause 3(1) "to keep the demised premises throughout the term hereby granted (other than the parts thereof referred to in Part 1 of the Schedule hereto) and all walls party walls sewers drains pipes cables wires timbers floors and ceiling and appurtenances thereto belonging in good substantial and tenantable repair and condition and in particular so as to support shelter and protect the parts of the Block

other than the demised premises and in such good substantial and tenantable repair and condition yield up the demised premises at the expiration or sooner determination of the term hereby created",

Clause 3(8) "permit the lessor and company and their respective surveyors and agents with or without workmen at all reasonable times upon reasonable notice during the said term to enter upon and examine the condition of the demised premises and thereupon the lessor or the company of the demised premises and thereupon the lessor or the company may serve upon the lessee notice in writing specifying any repairs necessary to be done and for which the lessee is directly responsible under his covenants".

6. To prove breaches of clause 3(1) of the lease, the company relied on eight specific observations of disrepair, arising from his external inspection of the premises on 2nd July 2015. To prove breaches of clause 3(8) the company relied on a letter dated 19th June 2015 addressed to the lessee seeking Mr. Hemsley's admission on 2nd July 2015, and his report in which he said that he did not gain admission to the premises to undertake an internal inspection as he had been instructed to do.

7. On receipt of the application the Tribunal made Directions on 15th October 2015 for the filing of evidence, pursuant to which the company filed a bundle of documents; the lessee did not comply with directions, made no substantive response to the application, and played no part in the proceedings, save for seeking an adjournment of the inspection and hearing listed on Wednesday 27th January 2016.

Applications to Adjourn Prior to the date of the hearing

8. By an email sent to the Tribunal office by the lessee at 14:26 on Monday 25th January, the lessee said that she sought an adjournment of the inspection and hearing because she had desperately been seeking independent legal advice, and whilst she has secured an appointment with the CAB in the week, she wished to adjourn until she had received that advice. Further, she said that she did not feel mentally strong enough to deal with the matter on her own.

9. That application came was notified to Judge Oxlade and was refused on the papers at 15:16 on 25th January 2016, on the basis that the application was made late in the day, and so too late to canvass the views of the other Tribunal members and the other party in the proceedings. Further, whilst an application for findings of breach was a serious one, with potentially serious consequences, the lessee had not set out what steps she had taken to obtain legal advice bearing in mind that the application was made over 3 months before; she had not indicated how long she would need and so how long the proceedings should be adjourned. Further, the application had been made on the basis that the premises were said to be degrading, and delay could impact on the integrity of the building. In respect of the point about the lessee not feeling mentally strong enough, there was no medical evidence which accompanied the application to say that there was a recognised condition. The lessee was invited to make the application again orally at the hearing.

10. On 26th January 2016 at 14:29 the lessee sought to renew the application, in which she said that she had only heard about the Tribunal hearing in the first week of January, and whilst she took the matter seriously and had been desperately trying to obtain legal advice, the loss of her employment meant that legal advice was not readily available to her. The CAB would advise her but it would take a month before being able to give her the required help. Further, she is yet to see her GP to provide medical evidence. She indicated that it was not a refusal to inspect at a later date, but that she could not currently facilitate it because of a break-up of her relationship and death of a family member, and the continuance of an acute stress disorder. She said that she was entitled to protect her legal rights and was entitled to have a fair hearing and adequate time and facilities to prepare her case. She said that should the inspection and hearing take place on 27th January she would reserve the right to take the matter further. She asked for confirmation that the matter was adjourned.

11. At 17:20 on 26th January 2016 the Tribunal sent an email to the lessee to say that her email had been forwarded to the Tribunal members. The inspection would proceed, as would the hearing, whether or not she was present, and the application to adjourn would be considered at the outset at the hearing.

12. On the same evening the lessee sent a further email at 18:00, after the Tribunal's office had closed for the evening, which indicated that she would not attend the inspection or hearing, feeling emotionally and legally unable to do so, and that she did not consider that the Tribunal had understood her circumstances. This was not seen by the Tribunal until after the hearing had taken place.

Hearing and Inspection

13. The inspection was listed to take place at 10am, and the application was listed for hearing at 11am on 27th January 2016.

14. The inspection was attended by the Tribunal and all those persons listed as attendees. The lessee did not attend, and did not answer the door or the entry phone. Accordingly, the inspection took place in the lessee's absence; the Tribunal viewing the exterior of the demised premises from communal premises. The Tribunal's inspection focused on the eight specific observations of disrepair referred to in the report of Mr. Hemsley, and which were readily identifiable from the photographs in the report. There was no significant change in the condition of the premises from that seen in the photographs contained within his report.

Hearing

15. At the commencement of the hearing at 12:00 noon the Tribunal ensured that all parties who had reported their presence were in Court; the lessee did not attend.

16. The Tribunal checked the file, and noted that the Directions Order was sent to the demised premises on 15th October 2015, the hearing date was notified to both parties on 30th October 2015, and the hearing venue notified to the parties on 23rd November 2015; none had been returned unserved. At

our request Mr. Hurley took instructions from the Directors of the company who said that the lessee had stopped living in the demised premises in 2011 and it had been vacant since then; however, no alternative address for service of documents had been provided, and the lessee frequently attended to collect post. The Directors understood that the lessee is aged about 45, and had worked with a partner in an estate agency/lettings agency.

17. The Tribunal provided Mr. Hurley with copies of the emails referred to in paragraphs 7-10 herein and invited him to respond to the application to adjourn. The company opposed the application. He made the following succinct points: there was no evidence to show medical grounds to support an argument as to inability to attend, and there had been ample time to obtain legal advice, if it was to be obtained; there was general deterioration in the demised premises and the lessee had failed to participate at all.

18. Having adjourned to deliberate the point, including the question of urgency arising from the risk of damp penetration to the building/ admission of intruders arising from the poor integrity of the rear French windows/door at the rear of the demised premises, the Tribunal refused the application to adjourn, having regard to regulations 34 and 3 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. In accordance with regulation 34(a) the Tribunal was satisfied that the lessee had been notified of the hearing date almost 12 weeks before the hearing; the Tribunal rejected the lessee's suggestion that she had only been informed of the proceedings at the beginning of January. Further, having regard to the overriding objective we considered that it was in the interests of justice to proceed: there was no medical evidence on which the Tribunal could conclude that the lessee was not medically fit to attend; there was no clarity as to the attempts the lessee had made to obtain advice, nor what advice would be available and when; the adjournment was proposed to an uncertain time in the future; there was the credible risk of damp penetration to the rear of the premises, which could have implications for the block generally.

19. Accordingly, we proceeded in the lessee's absence.

Issues

20. The Tribunal indicated that it regarded as a serious matter the request to make findings of breach of a lease as a preliminary to forfeiture of a lease, and particularly in light of the lessee's absence, would anxiously scrutinise the allegations and the evidence contained within the bundle to prove the allegations.

21. Mr. Hurley was invited to specify the obligations in the lease in relation to the eight specific observations of disrepair in the report which were itemised 1-8.

22. The company conceded that of the eight specific observations of disrepair in the report, observations in 1, 4, 6, and 7 were not breaches of the lease by the lessee, because they were the responsibility of the company. The following reasons were given:

- in respect of item 1 (rainwater guttering of the lean-to conservatory), this fell to the company as forming part of the "property", as defined in

- recital 1, and with clause 1(a) Part III of the schedule (page 22 of the lease) within the company obligation to "maintain, repair, redecorate, and renew" the "external wall and structure and in particular the main load bearing walls and foundations roof chimney stacks storage tanks *gutters* and rain water pipes...",
- in respect of item 4 (protection of the glass roof of the conservatory in the event of a snow avalanche from above) this fell to the company in accordance with clause 1(a) Part III of the schedule (page 22) as forming part of the "property", as defined in recital 1, and so within an obligation to "maintain, repair, redecorate, and renew" it along with the "external wall and structure and in particular the main load bearing walls and foundations *roof...*",
- in respect of item 6 (the steps), which fell to the company in accordance with clause 1(a) Part III of the schedule (page 22) as forming part of the "property", as defined in recital 1, and more particularly Part IV (h) of the Schedule, being an obligation to "maintain the garden shown hatched green", on the plan marked as including this area, and under clause 1(c) of Part III of the schedule (page 22), being "all other parts of the property so enjoyed or used or capable of being enjoyed or used by the lessees in common..",
- in respect of item 7 (uneven paving which wrapped around the conservatory area to steps down to the communal gardens) which fell to company under clause 1(c) of Part III of the schedule (page 22), being "all other parts of the property so enjoyed or used or capable of being enjoyed or used by the lessees in common".

23. As for the remaining alleged breaches 2, 3, 5 and 8, the application was progressed on the basis of submissions made by Mr. Hurley. The following points were made.

24. In respect of item 2 (external joinery to the conservatory) this was damage to the wooden cill, which had broken off in two places, exposing bare wood, which itself was rotten. This did not fall within the company's obligations within clause 1(a) Part III of the schedule (page 22) because it was not an "external wall and structure". As it remained part of the demise it fell within the lessee's obligation to maintain the demised premises in clause 3(1).

25. In this context the Tribunal asked Mr. Hurley about the company's decorating liabilities in accordance with Part IV (5) of the Schedule, and he conceded that the company was liable to paint the external parts of the property. This had last been done by the company in 2008.

26. In respect of item 3 the French doors were part of the demise. As they were neither "the main entrance" nor "separate flat entrance door" within clause 1(c) of Part III of the schedule (page 22), they did not fall within the company's maintenance obligations; albeit being one of the "external parts" within by virtue of Part IV of the Schedule, the company had an obligation to paint it at least once every three years, but not to repair or maintain the wood of which they French doors were constructed.

27. In respect of item 5 the timber decking was added by the lessee over the patio area, who had an obligation to maintain "timbers" within the demise in accordance with Clause 3(1) (page 6).

28. In respect of item 8 the patio area fell within the demise and the lessee's obligation to maintain. It was uneven, albeit it was accepted that the occupier of the flat would be the main user of it, unless workmen were using it to access other parts of the building.

29. As to the alleged failure to provide access to the company, and so a breach of 3(8) of the lease, the company would rely on a copy of the letter dated 19th June 2015 seeking access on 2nd July 2015, and the report saying that he tried to but could not obtain access that day. There was a follow up letter dated 7th July to the lessee in which the condition of the premises was highlighted, and the complaint of lack of access was made - to which the lessee did not respond. The lessee has not denied that she was notified of the request to grant access.

30. The point about the lack of access to inspect, was that it was not a conditional right, but an absolute right to enter, and here the company was very concerned by the potential for damage to the demised premises and building generally by the incomplete French doors.

31. At the end of the hearing the Tribunal reserved its decision, until a better copy of the lease was filed. Albeit far from a clear copy of a marked plan, the copy subsequently filed was sufficient for the purposes of this application.

Relevant Law

32. Section 168 of the 2002 Act 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,
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> (b) the tenant has admitted the breach, or
>
> (c) a Court in any proceedings... has finally determined that a breach has occurred.
>
> (3) ....
>
> (4) A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred".

Findings of Fact and Reasons

33. The Applicant's case rests on the report, and correspondence dated 19th June and 7th July 2015. The Tribunal finds that there is a breach of both clause 3(1) and 3(8) of the lease, for the following reasons.

34. In breach of clause 3(1) the Tribunal finds that the lessee has failed to keep in good and substantial tenantable repair and condition

- The cill of the conservatory, seen at point 2 of the report,
- The French doors, seen at point 3 of the report,
- The wooden decking at point 5 of the report.

35. The cill of the conservatory is not structural, as it does not support the conservatory; rather it forms part of the window frame, and so under the terms of the lease responsibility for its condition remains with the lessee. It is apparent from a combination of the photographs contained within the report, the opinion of Mr. Hemsley, and from our inspection, that the cill has rotted through and broken off in two places; the cill which remains in situ is rotten. It's condition leads us to conclude that there has been historic neglect by the lessee.

36. The Tribunal has noted the condition of the French doors; one bottom panel is entirely missing, and the lower parts of both are disintegrating; this means that the building is not wind and water tight, and it also accessible to vermin; further, despite what looks to be a cupboard moved in front of the doors, there is a potential for intruders. It's appearance leads to the conclusion of historic neglect by the lessee. There has to be a concern that the ingress of water though the door over time may lead to damage to joist and structural parts which could affect other parts of the building. The door is neither a "main door", nor "structure" and so does not fall to the company to maintain.

37. The wooden decking is a superficial addition to the patio area, which appears to have covered the paving. It has not been maintained, is disintegrating, and there are holes in it so that any workman needing to access the exterior of the building could be compromised in doing so. It could also house vermin.

38. From the Tribunal's inspection of the paving stones, we did not note unevenness. There is no suggestion that any works have been done to the patio area since the report was commissioned, and nothing from our inspection suggested that. The Tribunal does not find that there is a breach of the lease arising from the condition of the patio.

39. As to 3(8), the Tribunal is satisfied that the lessee failed to comply with her obligation to grant access on 2nd July 2015, having been given reasonable notice, and that no reasonable excuse has been given. In view of the apposite concerns arising from the deterioration of the French Doors, the company's desire to further investigate the matter, the lessee's failure to grant access as required by the lease is not an insignificant or trifling breach.

.....

8th February 2016

Judge Oxlade

Judge of the First tier Tribunal (Property Chamber)