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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/29UN/LBC/2015/0013**
Property	:	**First Floor Flat, 11 Plains of Waterloo, Ramsgate, Kent CT11 8HX**
Applicants	:	**Shalom Sion & Gabriel Salem Sion**
Representative	:	**Mr Dean Thistle**
Respondent	:	**John Frederick Elsworth & Penelope Ann Elsworth**
Representative	:	**Ms Stephanie Smith**
Type of Application	:	**Determination of an alleged breach of Covenant under section 168(4)**
Tribunal Members	:	**Judge Paul Letman Mr C C Harbridge FRICS**
Date and venue of Centre		**21 March 2016, Margate Magistrates' Court**
Date of Decision	:	**18 April 2016**

DECISION

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The Application

1. The Applicants are and have been since 1988 the freehold owners and lessors of all those premises ('the Building') known as and situate at 11 Plains of Waterloo, Ramsgate (with registered title number K606674). The Respondents are the current lessees of the first floor flat therein known as 11A ('the Property') under a lease dated 23 November 1987 ('the Lease') granting a term of 99 years from 1 March 1987 (with registered title number K642250), having acquired the lease in 1998.

2. By application dated 10 July 2015 the Applicants seek a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 that a breach of covenant or condition in the lease has occurred. The breaches alleged were originally set out in the Grounds of Application, with annexures including a surveyor's report dated 28 January 2015 and Schedule of Dilapidations thereto prepared by Mr Geoff Oliver FRICS.

3. On 29 December 2015 directions were made herein providing, amongst other things, for a Response and thereafter a Reply. Pursuant to those directions Mr Elsworth filed and served a Case for the First Respondent and his witness statement both dated 21 January 2016 (the Second Respondent, his former wife, is no longer interested in the Property).

4. In summary the Respondents' Case denied any breach. The First Respondent says that he had not received any notices to inspect the premises or in relation to any disrepair. Further, that scaffold had been erected front and back to carry out external repairs, and internal decorations were also being carried out and would be completed within the next few weeks.

5. In the Applicants' Reply dated 25 February 2016 it is asserted that various notices and correspondence have been sent to the Respondents for a number of years, and the fact that scaffold had been erected was noted. With the submissions completed, the matter came on for hearing on Monday 21 March 2016 (at Margate Magistrates Court), preceded by an inspection of the Property.

The Jurisdiction

6. The relevant jurisdiction of the tribunal is under sub-section (4) of section 168 (entitled 'No forfeiture notice before determination of breach') of the Commonhold and Leasehold Reform Act 2002. The sub-section is in the following terms:

   '(4) A landlord under a long lease of a dwelling may make an application to a [First Tier (Residential Property)] tribunal for a determination that a breach of covenant or condition in the lease has occurred.'

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7. Notably, the tribunal is not determining whether any breach subsists, but simply whether 'it has occurred.' Further, the decision in *Swanston Grange v Langley-Essen* [2008] L&TR 20 confirms that the tribunal has jurisdiction to determine whether a landlord has waived a covenant or condition or is estopped from asserting a breach, say by reason of promissory estoppel, because the effect of waiver or estoppel is to suspend the tenant's obligation under the covenant, so that these matters go to whether there has been a breach or not. However, as also made clear by that case, the tribunal does not have jurisdiction to consider any question of forfeiture or waiver of the right to forfeit; so that the tribunal might indeed determine that a breach has occurred, but to little or no purpose because the breach has in fact been waived.

The Inspection

8. The inspection by the Tribunal commenced at 10.00am on 21 March 2016, beginning with the exterior of the Building, and followed by the interior of the Property. In attendance was Mr Dean Thistle, counsel for the Applicants, and the First Respondent and his counsel Ms Stephanie Smith. The First Respondent's tenant was also present, as was Mr Robert Mugatroyd, the clerk to the Tribunal.

9. The Building is a 2-storey property built some 150 years ago or more. It is part of a row of similar buildings on a steeply sloping road leading down to King Street, one of the four main roads leading into the centre of Ramsgate. The building is believed originally to have comprised a ground floor shop with living accommodation over, but is now divided into 2 flats. The main roof has a front parapet gable, which is rendered and colour washed. The main slopes appear to be of fibrous cement slates, there is a rear pitch with similar artificial slates and a rendered parapet running from front to rear (adjacent No.9 Waterloo Plains).

10. The main front walls are rendered and colour washed (white) at first floor level including (what Mr Oliver describes as) mock Tudor timbers painted black. These had all visibly been the subject of recent repair and repainting. Otherwise across the whole of the first floor (which forms the Property) there are picture windows, which appear to be uPVC with sealed doubled glazed units. There are no rainwater goods at the front. The main rear walls are painted blockwork, with most of the blockwork being laid flat rather than upright, and there are extensive rainwater goods and other pipework across the rear elevation, all of which again had been the subject of very recent repainting.

11. The subject property was entered by its 'front door' at the rear of the Building. Ascending the stairs leading up from the entrance, the first floor accommodation comprises to the front a lounge with dining area and a separate kitchen, whilst there is a rear left hand side bedroom and central rear bathroom (with the entrance stairs taking up the rear right hand side of the property). These rooms had all been the subject again of recent redecoration. The bedroom and lounge doors had not,

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however, been repaired, and were seen to be a poor state with various 'punch' type holes in each. Further detail of the observed condition of the exterior and interior is referred to below in relation to the specific allegations of breach made.

The Applicants' Case

12. Before the tribunal Mr Thistle realistically and helpfully limited his case to paragraph 17.04 of Mr Oliver's Report, and the alleged breaches of covenant complained of in the schedule dated 27 May 2015 annexed to the Applicant's Case (the Schedule). Still further in the course of the hearing, again for entirely proper and in our view correct reasons, Mr Thistle also conceded that the Applicant was not pursuing items 7, 10, 13, 18, 19, 22, 24, 25 and 26 in the Schedule.

13. Each of the remaining items relied upon and set out in the Schedule is alleged to be a breach of clause 5(c) of the Lease, by which in so far as is presently material imposes the Lessee covenants:

    'Subject to clause 5(h) to keep the interior and the exterior of the Property in repair (and so yield it up to the Lessor on the determination of this Lease) and if necessary to rebuild any parts that require to be rebuilt and to paint the exterior parts normally painted every three years in a colour determined by the Lessor after discussion with the Lessee and the lessee of the Shop and to carry out all this work in a proper manner. If the Lessee fails to comply with this covenant the Lessor may (but is not bound to) enter the Property and repair at the expense of the Lessee who shall repay such expenses on demand.'

    Where under clause 5(h) the Lessee covenants 'Not to carry out alterations or additions to the Property nor erect any other buildings whether temporary or permanent'.

14. On behalf of the Applicants Mr Thistle rejected the contention (see below) that they had waived or were estopped from relying on clause 5(c) unless and until reasonable notice is given. He disputed in particular that they had knowledge of the breaches, or that there was any relevant 'clear and unequivocal' representation on their part, or detriment to the Respondents. The Applicants did not though adduce any further evidence in support of the allegation that they had from time to time sent notices and correspondence regarding the any failure or breach on the part of the Respondents prior to the instant application.

15. Further, the Applicants submitted that the various other arguments (see below) and construction of clause 5(c) relied upon by the Respondents, to the effect that they were under no obligation to redecorate the interior, were wrong.

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The Respondents' Case

16. In answer to the breaches alleged (as above) the Respondents submitted firstly that the Applicants had waived reliance upon the tenant's repairing obligation under clause 5(c) of the lease or was otherwise estopped on grounds of promissory estoppel from relying thereon.

17. With reference to the decision of the Lands Tribunal in *Swanston Grange v Langley-Essen*, it was submitted on the Respondents' behalf that the apparent failure to enforce the repairing obligation since 1998 (when the Respondents acquired the leasehold interest in the Property) amounted to a clear and unequivocal representation that the lessor was no longer relying upon their strict legal rights under that clause of the lease.

18. In particular in relation to the external repairing obligation, it is submitted that such a representation may readily be inferred from the lessor's inaction in the face of readily observable disrepair. Whilst with regard to the internal condition, the Respondents relied upon the fact that clause 5 entitles the lessor to inspect on notice, so that they could not rely upon his ignorance (if it be such) of any disrepair to explain their silence and failure to enforce the repairing covenant

19. As regards reliance, it was submitted that it could be inferred from the First Respondent's reaction to the current proceedings, in carrying out refurbishment works, that he had relied upon that waiver or representation in not previously carrying out those works. Further, it was submitted that it was unconscionable for the Applicants to resile from that position without at least reasonable notice, because it laid the Respondents open to this application and potential forfeiture proceedings following on therefrom.

20. In addition to this overarching argument in defence of the allegations of breach of clause 5(c), the Respondents raised a number of other more specific arguments. Thus as regards the obligation to paint the exterior every 3 years, Ms Smith contended that time was not of the essence and that accordingly the Respondents were not in breach unless and until due notice was given.

21. Further, it was submitted that strictly construed in accordance with the approach demanded by the recent Supreme Court decision in *Arnold* v *Britain* [2015] AC 1619, clause 5(c) did not impose any obligation to repaint or redecorate internally. The express obligation to do so only extended to the exterior, and therefore so it is argued cannot cover the interior.

22. In relation to all of the allegations of disrepair, it was submitted that the Tribunal could not be satisfied on the evidence that the condition of the Property had deteriorated in any relevant respect since the commencement of the Lease given the absence of any schedule or other record of its prior condition. Further, that in

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assessing whether there was any disrepair, once the age, character and condition of the Building was taken into account the Tribunal could not so it was submitted be satisfied that any allegation was made out.

Reasons

23. As regards the overriding defence, that the Applicants have waived or are otherwise estopped from relying on clause 5(c), the Tribunal is not persuaded that this submission is made out. The tribunal does not accept that a clear and unequivocal representation not to enforce this covenant can be extracted from mere inactivity or silence on the part of the Applicants without more. It is the landlord's prerogative whether to enforce or not or to carry out a repair itself, as confirmed by the very words of the covenant itself (in parenthesis).

24. Moreover, there is no actual evidence that the landlord knew of any breach at some much earlier stage, on the basis of which it could be found, or even sensibly alleged, that they failed to enforce the covenant for any significant length of time from which to infer a representation to this effect. Yet further even if the Applicants could be shown to have acquiesced for any period in say a failure to paint the exterior, this could not relate to the obligation to paint the interior (if it arises) or to rebuild any parts that require to be rebuilt in respect of which no allegation of breach arises at all. It is impossible, therefore in our view to construct a waiver or some promissory estoppel in respect of the covenant as a whole as contended by the Respondents.

25. Further, for completeness, the Tribunal also does not accept that there is any sufficient prejudice or detrimental reliance on the part of the Respondents in not having their repairing obligations enforced that could render it 'unconscionable' for the Applicants to pursue performance without prior notice. The regime under section 168 in itself provides a form of notice, prior still to any section 146 notice, that affords a tenant ample opportunity to avoid any forfeiture proceedings. Any possible unfairness in being surprised by the section 168 application can potentially be compensated in costs, but in any event in the Tribunal's view such concerns are not sufficient to disentitle the Applicants from relying on the terms of the covenant.

26. Turning then to each of the specific allegations of breach and the other defences raised in respect of each, as set out in the paragraphs below.

External Work (front)

Item 1, gabled parapet not painted for many years with loose and flaking paint.

27. Based on the narrative in Mr Oliver's report (the photographs therein being too small and indistinct to be of any use) and the Schedule, the fact of the recent external works and the absence of any suggestion by the Respondents that they had

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complied with their tri-yearly obligation 'to paint the exterior parts normally painted', the Tribunal is satisfied that the Respondents have not complied with this part of clause 5(c).

28. The Respondents are not assisted in this regard by their 'time of the essence' argument, which the Tribunal rejects. The clause does not require notice to be given to become effective. The lessee is in breach if it fails to re-paint every 3 years in accordance with the clear express words of the covenant.

29. In any event also the poor condition of the parapet, as indicated by the reference to loose and flaking paint, amounts in the Tribunal's view to evidence of deterioration sufficient to engage the general obligation to repair, including the requirement to paint to prevent decay.

30. Further, there is no exception under this lease for fair wear and tear, and considerations of 'age, character and condition' do not in our view avoid the requirement to remedy such deterioration, particularly where the covenant is to keep in repair, which as Ms Smith acknowledged includes the obligation to put into repair.

31. The Tribunal determines accordingly that a breach of clause 5(c) has occurred in respect of Item 1, because the gabled parapet had not been painted for more than 3 years next before the report and therefore 'every three years' and was in disrepair.

32. The Tribunal notes, however, by way of comment only, that the necessary repair and repainting work has recently been carried out so that in so far as possible it appears that that the breach has been remedied.

Item 2, the mock Tudor timbering has clearly not been painted for many years, with loose and defective paint.

33. For the same reasons given under Item 1 above the Tribunal determines that a breach of clause 5(c) has occurred in respect of Item 2, because the painted timbering had not been painted every three years and was in disrepair. The Tribunal, however, repeats its comment at paragraph 32 above.

External Work (rear)

Item 3: the brick parapet wall to the party wall line of the rear roof has exposed and open pointing.

34. On inspection it was apparent even from ground level that the said parapet had exposed and open pointing and was in a poor condition. Even without specific evidence of condition in 1987 it seems more than likely that it has deteriorated over

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the last 30 years since the grant of the Lease, exposed to the ravages of time and the elements, so as the wall is properly regarded now as in a state of disrepair.

35. In any event given that the covenant is to keep in repair and includes, therefore, the requirement to put into repair, the obligation under clause 5(c) to repair would be engaged. Certainly, as stated above (at paragraph 30), considerations of 'age, character and condition' do not in the tribunal's view avoid the requirement here to remedy such deteriorated and defective brickwork.

36. The Tribunal determines accordingly that a breach of clause 5(c) has occurred in respect of Item 3, because the brick parapet wall to the party wall line of the rear roof is in disrepair with exposed and open pointing.

Item 4, the rear external masonry has not be repainted in the last 3 years.

37. For the reasons stated at paragraph 27 and 28 above the Tribunal determines that a breach of clause 5(c) has occurred in respect of Item 4, because the external masonry was not repainted for more than 3 years.

38. The Tribunal observes again, however, that the necessary re-painting work has recently been carried out by the First Respondent so that in so far as possible it appears that the breach has been remedied.

Item 5, the external joinery comprising the fascia at eaves level, windows and back door had not been painted for a period of in excess of 3 years, with flaking paint visible.

39. For the reasons stated at paragraph 27 to 30 above the Tribunal determines that a breach of clause 5(c) has occurred in respect of Item 5, because the external joinery was not repainted for more than 3 years and was in disrepair. However, the comment at 32 is repeated, in view of the recent work done by the First Respondent.

Item 6, the rear bedroom and bathroom windows are both rotten to the point where they are beyond economical repair.

40. On the inspection the Tribunal did not find the windows to be rotten or even out of repair. True they had been recently redecorated, but they had not been replaced and were found to be in good serviceable condition, opening and closing without difficulty. In the circumstances the Tribunal find that no breach of covenant has occurred in this regard.

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Internal Work

Item 8, the walls and ceilings had not been redecorated for many years and were stained where water ingress had occurred.

41. In this regard the Tribunal is not persuaded that properly construed clause 5(c) excludes any obligation to paint or redecorate the interior. In the Tribunal's view properly construed the requirement to repaint the exterior is in addition to the principal obligation to repair, rather than detracting from the same.

42. As to the obligation to repair itself, as a matter of construction in our view this must include a degree of decoration; sufficient to cover such painting as is necessary for the prevention of decay or to remedy specific damage such as the reported staining from water ingress, but not say painting for mere ornamentation. Indeed if repair of the interior does not extend to the former work the obligation would have little if any application at all.

43. On the basis of Mr Oliver's report the Tribunal finds that the kitchen walls and ceiling were stained and their condition deteriorated, such that these parts of the Property are properly regarded as having fallen in to disrepair. Accordingly, the Tribunal determines that a breach of clause 5(c) has occurred under Item 8 in these respects.

    Item 9, the lounge has not be redecorated for many years, with loose paper, impact damage to plasterwork and staining above windows where water ingress had occurred.

44. The Tribunal accepts and duly finds that the interior decorations of the lounge were out of repair as reported by Mr Oliver and stated above. Thus, for essentially the same reasons as are set out at paragraphs 41 and 42 above, the Tribunal determines that a breach of covenant under clause 5(c) of the Lease has occurred in respect of Item 9 because the interior decorations were out of repair as alleged.

    Item 11, the prefinished sapele faced flush door has serious impact damage.

45. The First Respondent's evidence in this regard was that when he acquired the Lease there were very poor quality doors to both the bedroom and lounge, comprising little more than framed board, and that at his own expense he replaced these items with the better quality doors now hanging. Thus, whilst the obvious impact damage to these doors is admitted, the First Respondent contends that the doors are his and, therefore, not within the scope of the repairing covenant under clause 5(c).

46. The Tribunal accepts the unchallenged evidence of the First Respondent in this regard, but nonetheless rejects the defence that the replacement doors remain chattels and the property of the First Respondent. The Tribunal unhesitatingly

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concludes that the degree of annexation of the replacement doors to the demise, fixed as they are with standard hinges and screws, means that they became and are part of the realty so as to be caught by clause 5(c).

47. Further, given the significant damage to both bedroom and lounge doors there can be no question that they are out of repair, and the Tribunal accordingly determines that a breach of covenant has occurred as alleged under this Item.

Item 12, the bedroom has not been redecorated for many years with areas affected by mould.

48. The Tribunal accepts that the interior decorations of the bedroom were out of repair as reported by Mr Oliver and stated above, and so finds. Thus, for essentially the same reasons as are set out at paragraphs 41 to 43 above, the Tribunal determines that a breach of covenant under clause 5(c) of the Lease has occurred in respect of Item 12, because the bedroom decorations were out of repair as alleged. Again though the recent redecoration works carried out by the First Respondent would appear to have remedied this complaint.

Item 14, the prefinished sapele faced flush door has serious has serious impact damage.

49. For the reasons set out under Item 11 (at paragraphs 45 to 47 above) the Tribunal determines that a breach of covenant has also occurred as alleged under this Item.

Item 15, the dado rail is damaged on the right hand side

50. On close inspection of the dado rail the Tribunal was able to observe a minor irregularity in the profile of the dado rail to the right hand side on entering the bedroom. However, it was not apparent that this was actual damage. Indeed in this regard the Tribunal accepts the Respondents' point that there is no evidence of deterioration to show that the dado rail was in any better condition at the date of the lease.

51. Equally, it seems to the Tribunal that having regard to the age, character and condition of this old building the condition of the dado does not amount to disrepair in any event.

52. Moreover, in the Tribunal's view the purely ornamental and de minimis nature of the complaint here means that it is outside the scope of the repairing obligation under clause 5(c), in accordance with the proper construction of this covenant discussed at paragraphs 41 to 43 above. In conclusion, the Tribunal is satisfied that no breach of covenant has occurred in this respect.

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Item 16, the bathroom has not been redecorated for many years.

53. In the absence of any complaint here that the decorations are damaged or deteriorated the Tribunal does not accept that the bathroom decorations were in a state of disrepair. Mere tiredness of decorations does not suffice. In this regard the Tribunal rejects, therefore, the allegation that a breach of covenant of condition has occurred. Noting also for completeness that the room has now been fully redecorated as with the rest of the Property.

Item 17, many of the wall tiles to the bathroom are either missing or very uneven where tiles have been applied over the top of other tiles.

54. The First Respondent's evidence in this regard was that the present state of the tiles is very much as he found them on purchasing the Lease. That of course is not the key date, but neither does the Tribunal have any evidence that the layout and condition of the tiling was actually any different in 1987 when the Lease was granted.

55. In the absence of any specific or observable evidence of deterioration in this regard the Tribunal is bound here to reject the allegation of disrepair, and determines accordingly that no breach has occurred in relation to the bathroom tiling.

Item 20, the boiler cupboard in the bathroom is full of badly stored personal items with makeshift shelving loosely propped on makeshift supports.

56. In the Tribunals' view this is not a complaint about any part of the demised premises, but rather in relation to a chattel. The Tribunal has no hesitation in determining accordingly that no breach of covenant or condition has occurred in this regard.

Item 21, the hall, stairs and landing have not been decorated for years and much of the plasterboard wall and ceiling surfaces are badly affected by previous damp penetration including mould growth and distortion of plasterboard.

57. On inspection the Tribunal did not see distorted plasterboard, or evidence that this had actually been replaced other than by the door. However, the Tribunal does accept Mr Oliver's evidence that the wall and ceiling surfaces were badly affected by damp penetration, as described in greater detail at paragraph 17:04 of his report. Certainly, there was no challenge to this evidence on the part of the Respondents, and more generally Ms Smith confirmed that the Respondents did not question the veracity of Mr Oliver's evidence.

58. In the light of these findings and essentially as set out at paragraphs 41 and 42 above, the Tribunal determines that a breach of clause 5(c) has occurred under Item 21, in that the wall and ceiling surfaces were affected by damp penetration and

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subject to mould growth so as to be in a state of disrepair. Although again on inspection these elements of the Property had recently been refurbished and redecorated so as to remedy the same.

Item 23, the electricity installation is extremely dated and includes rewireable fuses that have been redundant for probably 40 years.

59. In respect of this item the Tribunal accepts the submission made by the Respondents that the mere antiquity of the installation is not enough to constitute disrepair. Thus in the absence of any evidence of actual deterioration the Tribunal concludes that this complaint does not amount to disrepair and accordingly no breach of covenant has occurred in this regard. Nonetheless, the Tribunal notes that the fuse box has now been replaced with new.

Decision

60. For the reasons set out above (under Reasons) the Tribunal determines for the purposes of section 168 of the Commonhold and Leasehold Reform Act 2002 that a breach of covenant or condition under clause 5(c) of the Lease has occurred in respect of Items 1, 2, 3, 4, 5, 8, 9, 11, 12, 14 and 21 as more particularly set out above.

61. For the avoidance of doubt a breach has not occurred in respect of Items 6, 15, 16, 17, 20 and 23 (nor for that matter in respect of Items 7, 10, 13, 18, 19, 22, 24, 25 and 26 in the Schedule that properly were not pursued by the Applicants).

Appeal

62. Pursuant to rule 36(2)(c) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (SI 2013/1169) ('the Rules') the parties are duly notified that they have a right of appeal against the decision herein. That right of appeal may be exercised by first making a written application to this tribunal for permission to appeal under rule 52 of the Rules. An application for permission to appeal must be sent or delivered to the tribunal so that it is received **within 28 days** of the latest of the dates that the tribunal sends to the person making the application (a) written reasons for the decision or (b) notification of amended reasons for, correction of, the decision following a review (under rule 55) or (c) notification that an application for the decision to be set aside (under rule 51) has been unsuccessful.

Dated 18 April 2016

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