



**FIRST – TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CAM/00KA/LBC/2014/0003

Property : 176D Beechwood Road, Luton LU4 9SA

Applicant : Mr Martin John Black

First Respondent : NNR Properties Ltd

Second Respondent : Mr Gurminder Singh Dale

Application : Application, pursuant to s168 of the Commonhold & Leasehold Reform Act 2002, to determine whether a breach of covenant has occurred.

Tribunal Members : Judge Reeder
Mr Dallas D Banfield FRICS (valuer member)
Mr David S Reeve (lay member)

Date of application : 25 February 2014

Date of inspection : 16 May 2014

Date of hearing : 16 May 2014 (Luton Magistrates Court)

Date of Decision : 24 June 2014

Date Written : 9 July 2014

DECISION

DECISION

The alleged breach of the repairing covenant

Having regard to the terms of covenant 4(c) of the lease the Tribunal finds that a breach of covenant occurred between July 2011 and October 2011 whereby the tenant failed to keep the pipework to the boiler in the kitchen and to the WC and basin in the shower room adjacent to the bedroom in flat 176D in good and substantial repair such that water leaked from the same and flooded into flat 176D and down into the ground floor below resulting in the conditions described in the Gilmartin survey report of October 2011 and by the evidence of Mr Michael Doward. The question as to who was the tenant at the date of the breach of covenant is not within the jurisdiction of the Tribunal.

The alleged breach of the alienation covenant

Having regard to the terms of covenant 4(f)(i) of the lease the Tribunal determines that there was a breach of the covenant against alienation whether the assignment took place in January 2007 or November 2012. No draft deed was presented to the landlord for approval prior to an assignment as required by the covenant. The question as to who was the tenant at the date of the breach of covenant is not within the jurisdiction of the Tribunal.

The alleged breach of covenant requiring notice of assignment

Having regard to the terms of covenant 4(f)(iv) of the lease the Tribunal determines that there was a breach of the covenant requiring notice to the landlord whether the assignment took place in January 2007 or November 2012. The question as to who was the tenant at the date of the breach of covenant is not within the jurisdiction of the Tribunal

Costs

Having regard to covenant 4 (m)(i) of the lease and to the Tribunal's determinations on the repairing and alienation covenant issues, the decision as to who is the tenant liable for the costs of this application to the Tribunal, together with the assessment of the sum of costs recoverable, can only be properly determined by the county court in forfeiture or other proceedings.

REASONS

The application, parties & premises

1. This is an application, brought pursuant to section 168(4) of the Commonhold & Leasehold Reform Act 2002, seeking a determination from the Tribunal that a breach of covenant or condition in a lease has occurred. Such a determination is required before a landlord under a long lease may serve notice of forfeiture pursuant to section 146(1) of the Law of Property Act 1925.
2. The applicant, Mr Martin John Black, is the freehold owner of 176 Beechwood Road, Luton. 176 Beechwood Road is a house converted into 4 flats comprising 176A and 176B on the ground floor, together with 176C and 176D on the first floor. The resulting layout is that 176C is situated above 176A, with 176D above 176B.
3. The first respondent is NNR Properties Ltd who have conducted this matter by their director Mr Ishwar Mistry. It appears that NNR Properties is a small holding company operated by Mr Mistry and his wife. The second respondent is Mr Gurminder Singh Dale. Both are joined as respondents as the applicant contends that one or other was the tenant of 176D Beechwood Road at the time the alleged breaches of covenants in the lease took place.
4. The application was received by the Tribunal on 25 February 2014. On 11 March 2014 Regional Judge Edgington made an order on the papers setting out comprehensive case management directions with a timetable. In accordance with that order the Tribunal has inspected the relevant premises on the morning of 16 May 2014 and conducted a hearing throughout the remainder of that day.

The breaches of covenant alleged

5. The breaches of covenant alleged are -
 - (1) Breach of the covenant to keep the flat and its services and conduits in good and substantial repair.
 - (2) Breach of the covenant not to assign the whole without first obtaining a Deed approved by the landlord
 - (3) Breach of the covenant requiring the tenant to give written notice and particulars of any assignment to the landlord within one month of such assignment

The lease

6. The Tribunal is provided with a copy lease dated 5 April 2004 between Mark Hume (landlord) and Mark Fowler (lessee). The parties confirmed that this is a true copy of the lease relevant to this application. The Tribunal has considered this lease in its

entirety and with specific emphasis on the covenants which the applicant alleges have been breached. Those covenants provide (adopting the numbering of the lease) -

- 4(c) The tenant covenants with the landlord to keep the flat and all services conduits exclusively serving the flat in good and substantial repair
- 4(f)(i) The tenant covenants with the landlord not to assign the whole of the flat without first obtaining a deed in a form approved by the landlord's solicitor (and to pay the reasonable costs of the landlord's solicitor for the approval of such a deed) containing a covenant by the assignee with the landlord to pay the rent and the tenant's contribution and otherwise to comply with all the provisions on the tenant's part contained in this lease.
- 4(f)(iv) The tenant covenants with the landlord that within one month after every assignment assent transfer mortgage or underlease or other dealing of or with the flat to give notice thereof in writing with full particulars thereof to the landlord and in the event of devolution of interest of the tenant not perfected by an assent within six months after the happening thereof to produce to the landlord the probate of the will or letters of administration or other evidence under which such devolution arose and to pay to the landlord a registration fee equivalent to one quarter of the annual ground rent as at the date of such registration in respect of each such assignment assent transfer mortgage underlease or devolution.

The law

- 7. Section 168 of the Commonhold & Leasehold Reform Act 2002 sets out the Tribunal's jurisdiction and provides -
 - (1) A landlord under a long lease of a dwelling house may not serve 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 (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
 - (c) a court in any proceedings or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that a breach has occurred.
 - (3) But a notice may not be served by virtue of subsection 2(a) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.
 - (4) A landlord under a long lease of a dwelling may make an application to the leasehold valuation tribunal for a determination that a breach of covenant or condition in the lease has occurred.

- (5) But a landlord should not make an application under subsection (4) in respect of a matter which -
- (a) has been, or is to be referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (b) has been the subject of a determination by a court, or
 - (c) has been the subject of a determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

The inspection by the Tribunal

8. The Tribunal has inspected the exterior and internal retained common parts of 176 Beechwood Road, together with interior of flat 176D on the first floor. We were accompanied and assisted by the parties and their representatives.

The hearing before the Tribunal

9. The applicant Mr Black has attended the hearing and been represented by Mr Tausig of counsel . Mr Ishwar Mistry has attended for the first respondent, represented by Mr Brown of counsel. The second respondent , Mr Gurminder Singh Dale has attended and been represented by Mr Williams of counsel.
10. The parties have provided an indexed bundle of documents for the hearing, together with a number of additional documents. All have been carefully considered during the hearing.
11. The parties have convened at the hearing venue at approximately 11am following the inspection. Counsel has requested time to discuss matters with a view to settlement. Time has been permitted. Unusually, a dispute has arisen as to whether in fact a binding settlement has been reached. Counsel have requested further time to consider that issue and to seek professional advice. That has been granted. As a result the hearing has not commenced substantively until approximately 1.45pm.
12. This loss of time for no purpose is unfortunate but has nonetheless left sufficient time for the parties to present their cases, question witnesses of fact and make submissions. The Tribunal has allowed the rest of the day for the hearing, sitting late and subsequently reconvening on the first available date to make its decision.
13. The Tribunal has the benefit of formal witness statements from the applicant Mr Martin Black, from the builder engaged to inspect the property at the time of the flooding, Mr Michael Doward, from Mr Ashwar Mistry for the first respondent, and from Mr Gurminder Singh Dale, the second respondent.
14. Each of the makers of those witness statements has given oral evidence to confirm the contents of their statements and has answered questions asked of them on behalf of the other parties by their respective counsel. The Tribunal has itself put questions to those witnesses.

Preliminary issue - was a binding settlement agreed by counsel ?

15. The Tribunal's decision on this issue has been given on the hearing day with short oral reasons. This is a summary of that decision and reasoning.
16. The parties have convened at the hearing venue at approximately 11am following the inspection. Counsel has requested time to discuss matters with a view to settlement. On five occasions during the morning the Tribunal has granted further time at counsels' request. Counsel have spent between 11am and 12.55pm negotiating. At the end of the period Mr Brown for the first respondent has forcefully submitted that negotiations between counsel at the inspection and outside of the hearing room have produced a concluded settlement between the parties to the effect that the second respondent rather than the first respondent was the relevant lessee at the time of the alleged breaches of the repairing covenant. Mr Williams for the second respondent supports that submission. Mr Tausig for the applicant states in terms that he has not formally conceded anything nor reached any settlement.
17. When questioned by the Tribunal counsel have been unable to provide a cogent oral account of what precisely is said to have been agreed let alone why any such agreement should be treated as concluded and so binding on the Tribunal to determine the issues before it on the application. Nothing has been defined and reduced into writing in any form. The Tribunal has pointed out that the jurisdiction drawn by section 168 of the Commonhold & Leasehold Reform Act 2002 is for the Tribunal to determine whether a breach or breaches of a covenant or condition in a lease has occurred.
18. Having regard to the circumstances the Tribunal has determined that no concluded agreement has been reached on the issues before it on the application which bind the parties and cause the Tribunal to be *functus officio*. There is an extant dispute which requires determination. The jurisdiction of the Tribunal is clear from the statutory wording : to determine whether a breach or breaches of a covenant or condition in a lease has occurred. That is what the Tribunal will proceed to do.

Preliminary issue - should the second respondent be granted an adjournment ?

19. Mr Dale for the second respondent has applied for an adjournment of the matter on the ground the second respondent has not come prepared to argue whether a breach of the repairing covenant has occurred as alleged. The Tribunal's decision on this issue has been given on the hearing day with short oral reasons. This is a summary of that decision and reasoning.
20. The Tribunal refuses to adjourn the hearing. The application was made in February 2014 and includes both respondents as the applicant had been made aware of the purported assignment from the first respondent to the second respondent or his family in party correspondence prior to the application being made. The alleged breaches of covenant are clear from both the application itself and the preceding party correspondence.
21. The witness statements from Mr Mistry for the first respondent dated 10 April 2014 and from the second respondent himself dated 16 April 2014 are consistent in that

both state that the second respondent is the lessee at the time that the applicant alleges a breach of the repairing covenant occurred. In the circumstances there is no proper basis to adjourn the hearing. The second respondent has always known or should have known that breach of the repairing covenant in 2011 is alleged. He has certainly always known or should have known whether he is the tenant at relevant the time. The application is before an expert Tribunal which itself has been readily able to identify and consider that issue in its pre-reading time which is no longer than that available to the parties representatives. Neither the law nor the factual issues relevant to this application are onerous in their complexity or scale. The Tribunal determines that it is neither reasonable nor proportionate to adjourn the hearing of this application in such circumstances.

22. In relation to both of these preliminary issues, whilst the Tribunal respects counsels' duty to pursue their clients' interests, it expects them to do so in an appropriate manner proportionate to the issues in dispute and with due respect for the Tribunal's time which is funded by the public purse. This requires adequate analysis and preparation prior to the hearing day, together with appropriate conduct on the hearing day. The Tribunal takes the view that the entire morning of the hearing day beyond 11am has been wasted by conduct which falls short in both regards.

The alleged breach of the repairing covenant

23. Covenant 4(c) provides "the tenant covenants with the landlord to keep the flat and all services conduits exclusively serving the flat in good and substantial repair".
24. The applicant contends that in late 2011 flooding from services and/or conduits in flat 176D caused water to flood into that flat, and into flat 176B and the common parts below, and that the same constitutes a breach of covenant 4(c) in the lease.
25. As the Tribunal has noted above it has the benefit of formal witness statements from the applicant Mr Martin Black, from the builder engaged to inspect the property at the time of the flooding, Mr Michael Doward, from Mr Ishwar Mistry for the first respondent, and from Mr Gurminder Singh Dale, the second respondent. Each of the makers of those witness statements has given oral evidence to confirm the contents of their statements and been asked questions on behalf of the other parties by their respective counsel. The Tribunal has also asked some questions.
26. The hearing bundle includes a survey report from Messrs Gilmartins dated 12 October 2011 which describes the state of 176 Beechwood Road at that time. It also includes invoices from Messrs Northwell UK Ltd dated November 2011 and January 2012 which describe the works carried out. It also includes a letter from the applicant to the second respondent (page 74 in the bundle) detailing what is said to be the resulting damage from the flooding. Mr Doward was formerly a director of Northwell UK Ltd. His statement dated 24 April 2014 details what he found on inspection of 176 Beechwood Road in October 2011. He states that he was able to gain entry to all four flats in the building. He states that the conditions he saw are consistent with what is recorded in the Gilmartin survey report.
27. Mr Ishwar Mistry's evidence is that he assigned the lease in January 2007. It follows that he claims no knowledge of events in 2011. Mr Gurminder Singh's evidence is that 176D Beechwood Road was unoccupied after 2009 (according to his witness statement) or February 2011 (according to his oral evidence) and was visited only

periodically after that time. No direct evidence of the existence or detail of such visits is before the Tribunal.

28. Mr Black's evidence is clear. He visited 176 Beechwood Road twice in July 2011 and the building was generally dilapidated but showed no signs of water damage and the type of conditions recorded in the Gilmartin survey carried out in October 2011 or seen by Mr Doward. He states that he was made aware of serious water damage in October 2011 and immediately instructed Gilmartins and Mr Doward.
29. Having regard to the evidence before it the Tribunal determines that the water flooding and resulting damage occurred at some time between July 2011 and October 2011 and took the form recorded in the Gilmartin survey report dated October 2011 and as described by Mr Doward in his witness statement and oral evidence to the Tribunal.
30. The Tribunal has then considered the source of the water which flooded and caused the damage. On inspection the roof and external rainwater goods to 176 Beechwood Road appeared to be in good condition. No party has suggested that any of these elements have been replaced or materially altered since 2011. Indeed no party has suggested that the water emanated from those sources. Further, none of the evidence dating from 2011 records any water damage to the ceilings of the upper floor flats. There is no evidence nor suggestion that the building was affected by penetrating, traumatic or rising dampness entering at ground floor level. It follows that the potential sources of the water are the upper flats, 176C and 176D. The documentary evidence records the majority of damage as being to ground floor flat 176B which is situated directly below flat 176D. Mr Doward's evidence is clear, being that he gained access to both upper floor flats and found the source was 176D, and that the water was continuing to flood down into 176B but not into flat 176A, both of which he was able to enter. For the reasons set out above neither respondent have presented any evidence to contradict this account.
31. Having regard to the evidence before it the Tribunal determines that the water flooding and resulting damage emanated from within flat 176D.
32. The Tribunal has then considered the cause of the water flooding which resulted in the damage described. Mr Doward's witness statement dated 24 April 2014 and his oral evidence is cogent and consistent. He found two sources of water flooding ; pipework to the combi boiler in the kitchen cupboard, and the T joint in the pipework to the WC and sink in the shower room adjacent to the bedroom. He describes the plasterboard, floorboards and brickwork as "soaked". He describes flat 176D as looking as if it had been "uninhabited for many years". He describes flat 176B below as very badly damaged with the ceiling part collapsed and floors ruined. He recounts that damp and mildew had established and that he installed dehumidifiers. Mr Doward's oral evidence has not been challenged on behalf of either respondent during questioning of him by counsel. He has been released after giving evidence with the approval of all parties.
33. It has only been when the second respondent, Mr Gurminder Singh Dale, has given evidence subsequently that he has disputed that pipework to a boiler in the kitchen could be one of the causes, because he states that there was no boiler in the kitchen or indeed in flat 176D at all. In his witness statement dated 16 April 2014 he merely states "the property was in reasonable condition and therefore a suggestion that it was in need of the works outlined by the applicant's surveyor is fabricated and/or is exaggerated". Whilst Mr Doward's witness statement dated 24 April 2014 post dated

that of Mr Gurminder Singh Dale both were in the hearing bundle served in or around 8 May 2014 and so all parties have had ample time to see the evidence of others prior to the hearing on 16 May 2014. Mr Dale's oral evidence that there was no boiler is unconvincing. The Tribunal accepts Mr Doward's evidence on this issue.

34. Neither respondent has challenged the evidence that pipework to the shower room adjacent to the bedroom was also a cause of the water leak and flooding. It is apparent from the evidence of Mr Ishwar Mistry and Mr Gurminder Singh Dale that during the period July 2011 and October 2011 there was no reasonable system in place to ensure that the unoccupied flat 176D was maintained in good and substantial repair.
35. Having regard to all of the evidence and information before it relevant to the issue of 'source' the Tribunal determines that the source of the water flooding was the pipework to the boiler in the kitchen and to the WC and basin in the shower room adjacent to the bedroom.
36. Having regard to the terms of covenant 4(c) of the lease the Tribunal finds that a breach of covenant occurred between July 2011 and October 2011 whereby the tenant failed to keep the pipework to the boiler in the kitchen and to the WC and basin in the shower room adjacent to the bedroom in flat 176D in good and substantial repair such that water flooded into flat 176D and down into the ground floor below resulting in the conditions described in the Gilmartin survey report of October 2011 and by the evidence of Mr Michael Doward.

The alleged breach of the alienation covenant

37. Covenant 4(f)(i) of the lease provides that "the tenant covenants with the landlord not to assign the whole of the flat without first obtaining a deed in a form approved by the landlord's solicitor (and to pay the reasonable costs of the landlord's solicitor for the approval of such a deed) containing a covenant by the assignee with the landlord to pay the rent and the tenant's contribution and otherwise to comply with all the provisions on the tenant's part contained in this lease."
38. In their respective documentation the respondents contended that this covenant is satisfied if a Deed is entered into at some time after an assignment has been completed. Unsurprisingly, counsel did not develop that argument to any material degree. Having regard to the language of the covenant and to the context of the lease the Tribunal is satisfied that this covenant is a prohibition on assignment without first obtaining the landlord's approval to a deed which binds the intended assignee on the covenants in the lease.
39. It is not in dispute that NNR properties acquired the lease in November 2006. It is not in dispute that the applicant Mr Black acquired the freehold interest in the whole of 176 Beechwood Road in July 2011.
40. On behalf of NNR Properties Mr Ishwar Mistry states that he assigned his leasehold interest in January 2007. In his witness statement he states in terms that he assigned it to the second respondent, Mr Gurminder Singh Dale. In his oral evidence he states instead that he assigned it to the late Mr Balbir Singh Dale who passed away in June 2008 and is the father of Mr Gurminder Singh Dale. In response to questions Mr Mistry states that this was not an open market transaction. The lease was not marketed. No agent was involved. No solicitor or conveyancer was involved in the

assignment. No correspondence was generated. The only documentary evidence he relies upon as evidencing an assignment at that time relates to the cancellation of buildings insurance relating to 176D Beechwood Road in January 2007 (hearing bundle pages 87 & 91 of the bundle), and to a handwritten endorsement on a bank statement which he states records the proceeds of sale being applied to another property purchase (hearing bundle page 89).

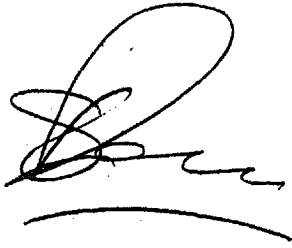
41. In his witness statement Mr Gurminder Singh Dale clearly purports to be the assignee who took the lease from NNR Properties in 2007. In his oral evidence he too now suggests instead that it was in fact his late father. He has been unable to produce any documentary evidence evidencing an assignment at that time.
42. This account of assignment in January 2007 given by the respondents is not supported by the Land Registry documents in the hearing bundle. The LR AP1 document (bundle pages 103-108) is dated 10 December 2012 and registers an assignment to the second respondent, Mr Gurminder Singh Dale. The LR TR1 document (bundle pages 113-115) appears to record an assignment date of 1 November 2012 and again records the assignee as the second respondent. The LR Office Copy Entry of Title (bundle pages 111-112) records the assignment as being made on 1 November 2012 and the assignee as the second respondent.
43. Whether the assignment took place in January 2007 as the respondents claim, or November 2012 as the LR documents record, it is accepted by counsel for both respondents and by both Mr Ishwar Mistry and Mr Gurminder Singh Dale that no attempt was made to provide a draft Deed to the landlord in accordance with covenant 4(f)(i).
44. The respondents contend that it was impossible to do so as the identity of the landlord was unknown and could not be obtained. In January 2007 the landlord was either Mark James Hume who is named in the 2004 lease produced by the parties (bundle page 17) or the Crown pursuant to a confiscation order. The applicant Mr Black gave cogent and compelling evidence that he was able to contact Mr Hume in 2011, confirm that the freehold interest had been made subject to a confiscation order, contact the Crown agents and thereby pursue his purchase of the same in July 2011.
45. In November 2012 the landlord was the applicant Mr Black who had acquired the freehold interest in July 2011. His details were readily ascertainable from the Land Registry and would have been obtained by normal conveyancing procedures. On their own account normal conveyancing procedures were not employed by the respondents and no actual attempt was made to identify the landlord.
46. Having regard to the evidence and information before it the Tribunal does not accept that it was impossible for the tenant to comply with the alienation covenant whether in January 2007 or November 2012. In the event the Tribunal need not and does not determine the issue of when that assignment took place and leaves this factual dispute to be determined within any forfeiture and/or other proceedings before the county court which may follow.
47. Having regard to the terms of covenant 4(f)(i) of the lease the Tribunal determines that there was a breach of the covenant against alienation whether the assignment took place in January 2007 or November 2012.

The alleged breach of covenant requiring notice of assignment

48. Covenant 4(f)(iv) of the lease provides "the tenant covenants with the landlord that within one month after every assignment assent transfer mortgage or underlease or other dealing of or with the flat to give notice thereof in writing with full particulars thereof to the landlord and in the event of devolution of interest of the tenant not perfected by an assent within six months after the happening thereof to produce to the landlord the probate of the will or letters of administration or other evidence under which such devolution arose and to pay to the landlord a registration fee equivalent to one quarter of the annual ground rent as at the date of such registration in respect of each such assignment assent transfer mortgage underlease or devolution".
49. The reasoning of the Tribunal in relation to breach of the alienation clause applies to this alleged breach also.
50. Having regard to the terms of covenant 4(f)(iv) of the lease the Tribunal determines that there was a breach of the covenant requiring notice to the landlord whether the assignment took place in January 2007 or November 2012.

Recovering the costs of the proceedings before the Tribunal

51. The lease includes one covenant relevant to this issue which provides -
- 4(m)(i) The tenant covenants with the landlord to pay on demand all proper costs charges and expenses (including legal costs on a full solicitor and client own basis and surveyors fees on usual professional scales) of and incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court.
52. It is apparent from the pre-application party correspondence including the draft s146 notice served (bundle page 14) that this application was pursued in contemplation of such proceedings.
53. Moreover, s168 of the Commonhold & Leasehold Reform Act 2002 makes it clear that a determination of breach by this Tribunal is required before a landlord under a long lease may serve notice of forfeiture pursuant to section 146(1) of the Law of Property Act 1925.
54. However, liability for costs attaches only to the tenant under the lease. The issue as to which of the respondents is the tenant at the date of the breaches of covenant now proven will need to be determined by the county court if it cannot now be agreed by the parties.
55. Given its findings the Tribunal can see force in both respondents bearing some respective responsibility for the costs incurred to date by the applicant landlord.
56. In the circumstances the issue of who is liable for those costs, and the assessment of those costs, can only be properly determined by the county court in forfeiture or other proceedings.

A handwritten signature in black ink, appearing to read 'S. Reeder', with a horizontal line underneath.

Stephen Reeder
Judge of the First-Tier Tribunal
Property Chamber

9 July 2014