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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/12UB/LBC/2016/0015**
Property	:	**54 Hanover Court, Cambridge, CB2 1JH**
Applicant	:	**Cambridge City Council**
Respondent	:	**Pamela Ynir Wesson**
Date of Application	:	**5th August 2016**
Type of Application	:	**For a determination that a breach has occurred in a covenant or condition in a lease between the parties (Section 168(4) Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"))**
Tribunal	:	**Bruce Edgington (lawyer chair)** **David Brown FRICS**

DECISION

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1. In respect of the Lease of the property dated 3rd September 1990 wherein the Applicant is the current freehold reversioner and the Respondent is the current long leaseholder, the determination of the Tribunal is that:-

   (a) The Respondent has failed to "*use and occupy the flat solely and exclusively as a self contained residential flat in one family occupation only*", in breach of clause 2(15) of the Lease
   (b) The Respondent has failed to "*keep the flat* (save for the kitchen and bathroom) *including the passages thereof substantially covered with carpets*", in breach of clause 2(20) of the Lease
   (c) The Respondent has made "*an alteration or addition...to the flat*" without the Applicant's permission, in breach of clause 2(10) of the Lease.

Reasons

Introduction

2. The property is a 6th floor, 2 bed roomed flat in a purpose built block of 78 flats built in 1968 or thereabouts. 28 of the flats have been acquired under the right to buy provisions and the remaining 50 flats are occupied by secure council tenants. The long leasehold interest in this property is from

the 3rd September 1990 until 22nd May 2113 and the Respondent acquired her interest on the 14th October 2011.

3. On the 7th July 2016, Carol Amos, Home Ownership Manager of the Applicant, who has filed a statement dated 23rd August and a copy attendance note dated 21st September 2016, noted that the flat was being advertised for holiday lets on the airbnb website. The entry on the website indicated that it was let for virtually the whole of August, September and October. On the 20th July 2016 she visited the property, on notice, and found that it was being occupied by a family who had booked the flat for 6 nights.

4. Whilst at the flat, Ms. Amos noted that some floors other than the kitchen and bathroom had laminate covering rather than carpets and that the balcony had been enclosed with windows. Permission for this latter alteration or addition had been refused by the Applicant in November 2013.

5. The law as it stands is that the only task of this Tribunal is to say whether there has been a breach. The Upper Tribunal case discussed below makes it clear that this is the case even if the breach had been rectified so that there was no longer a breach at the date of the determination. The reason for that is that this Tribunal is not determining whether to grant relief against forfeiture. That is a matter for the court.

6. A directions order was issued by the Tribunal on the 11th August 2016 which timetabled the case to a final conclusion. The Tribunal indicated that it would be content to deal with the case on a consideration of the papers only without a physical inspection of the property but would not do so before 28th September 2016. However, it would consider any request for an inspection on its merits. It would also set up an oral hearing if requested to do so by either party. There has been no requested either for an inspection or a hearing.

7. A letter was received from solicitors instructed by the Respondent dated 6th September. This suggested that the parties had agreed to a general extension of time to enable planning permission and building regulation approval for the enclosure of the balcony. It was said that this was the only 'live' ground for the application. The response from the Tribunal Judge pointed out the **Forest House Estates Ltd.** case referred to below, said that it was not happy just to let the case 'drift' indefinitely but would allow a delay of 2 weeks to enable any further statements to be filed in time for the bundles to be delivered by 3rd October 2016.

8. A statement from the Respondent dated 23rd September 2016 was filed in which she has said that (a) the flat was let to a 'family' when Ms. Amos visited but she has now removed the listing from Airbnb, (b) she has now carpeted the flat save for the kitchen and bathroom although the laminate flooring was laid over underlay to help prevent the transmission of noise and (c) she has applied for retrospective permission in respect of the enclosure of the balcony. She confirms that she does not use the flat as her principal residence.

The Lease

9. A copy of the Lease was produced to the Tribunal and the term and the relevant clauses are stated above.

The Law

10. Section 168 of the 2002 Act introduced a requirement that before a landlord of a long lease could start the forfeiture process and serve a notice under Section 146 of the **Law of Property Act 1925,** he must first make "*...an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred*".

11. In the case of **Forest House Estates Ltd. v Al-Harthi** [2013] UKUT 0479, LRX/148/2012, Peter McCrea FRICS said, at paragraph 30,:-

> "*The question of whether a breach had been remedied by the time of the LVT's inspection was not an issue for determination by the LVT. Questions relating to remedy, damages for breach and forfeiture are matters for the court. The LVT was entitled to record the fact that the breach had been remedied by the time of its inspection, but that finding was peripheral to its main task under section 168(4) of the 2002 Act. The LVT should have made an explicit determination that there had been a breach of covenant, notwithstanding that the breach had subsequently been remedied at the time of the LVT's inspection*"

Discussion

12. In essence, the breaches seem to be acknowledged by the Respondent. However she does go on to add comments that, perhaps, suggest that she may wish to resile from this. The hearing bundle does include 2 case reports which have presumably been put there by the Applicant and they both deal with the clause 2(15) point as to the occupation of the flat namely the Court of Appeal case of **Caradon District Council v Paton and Bussell** [2000] WL 544212 and the High Court case of **Walker v Kenley** [2008] EWHC 370 (Ch).

13. As the Respondent makes it clear that the property is not her residence but she is committed to remedy any breach, this issue does need to be discussed. The inference seems to be that she will continue to let the property. In the **Caradon** case, the wording of the relevant clause was more restrictive than in this case in restricting occupation to "*a private dwelling house and no trade or business or manufacture of any kind*". There was evidence before the court below that the properties in question were being used as holiday lets. The judge determined that the properties were being used as private dwelling houses and the freeholder appealed, successfully.

14. Lord Justice Latham gave the lead judgment and said, at paragraph 36, "*both in the ordinary use of the word and in its context it seems to me that a person who is in a holiday property for a week or two would not describe that as his or her home. It seems to me that what is required in order to amount to use of a property as a home is a degree of permanence, together with the intention that it should be a home, albeit of a relatively short period, but not for the purposes of a holiday*". Lord

Justice Clarke then added at paragraph 43 "*It appears to me that the concept of using a property as a private dwelling house involves the use of it at least in some way as a home....A person renting a holiday house for, say, one or two weeks is not using it in any sense as his home...In these circumstances a person taking a holiday let is not, in my judgment, using the property as a private dwelling house*".

15. In the **Walker** case, Philip Sales QC, sitting as a Deputy High Court Judge had to consider the meaning of the words 'residential flats' in a different context to the one in this case. He said, in paragraph 15, "*the term 'residential flats' does not include holiday apartments...it was a term limited to flats which could be sold for use as permanent residences*". He added, in paragraph 16(5) "*I consider that the natural meaning of the composite expression 'residential flats' is that it refers to flats which the occupier would regard as their residence, which would not be a natural description of a holiday apartment*".

16. These cases are not, of course, directly on point and unfortunately, the Applicant has not indicated to the Tribunal which passages are relied upon and for what purpose. However, the natural inference is that the Applicant is attempting to establish that the term 'residential flat in one family occupation only' would not encompass using the property for holiday lettings. This Tribunal agrees with that.

17. It is not clear what point is being made about floor covering. The clause is clear in its wording and there was a breach. The fact that the laminate flooring was put onto underlay is not relevant. As to the enclosure of the balcony, this was undertaken in the knowledge that the Applicant did not agree with it and, again, was a clear breach.

Conclusions

18. As far as the alleged beaches are concerned, the Tribunal finds that they were all breaches. The flooring has now been remedied and the advertising on the website has stopped. There is still a question mark over what the Respondent intends to do with the flat and what will happen if the Applicant still refuses permission for the windows around the balcony.

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Bruce Edgington
Regional Judge
12th October 2016

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.