

**SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL**



**Residential
Property
TRIBUNAL SERVICE**

**In the matter of Section 168(4) of the Commonhold and
Leasehold Reform Act 2002 ("the Act")**

**Re: Ground Floor Flat 97 Emmanuel Road, Hastings, East Sussex TN34
3LE ("the Property")**

CH1/2140/LBC/2009/0045

Between:

New Era Investments Limited (Applicant/Landlord)

and

Brigita Fitzgerald (Respondent /Leaseholder)

**Appearances for the Applicant: Steven Boon of Eyre & Johnson Limited
Darren Wheeler**

DECISION WITH REASONS

Date of hearing: 9th March 2010

**Tribunal: Mr. Robert Wilson LLB Solicitor
Mr. J N Cleverton FRICS**

Date of Decision: 31st March 2010

SUMMARY DECISION

1. The tribunal determines that there has been no breach of covenant by the Respondent in respect of the lease of her Property.

APPLICATION

2. The applicant seeks a determination from the tribunal that the respondent has committed a breach of her lease dated the 31st October 1988 under which she holds the Property made between Michael Richford (1) and P D Saxby and M J Wilson (2) ("the Lease")
3. The breach of the Lease that the applicant alleges the respondent has committed is a breach of paragraphs 5 and 8 of Part I of the third Schedule to the Lease.

THE LAW

4. The law relating to the matter is contained within Section 168(4) of the Act, which provides that a landlord under a long lease of a dwelling may apply to a Leasehold Valuation Tribunal for a determination that a breach of covenant or condition in the lease has occurred.
5. It follows that the function of the Leasehold Valuation Tribunal, when such an application is made, is purely that of determining the factual position and no more.

THE LEASE

6. By clause 6 of the Lease the leaseholders' covenants with the landlord are as contained in the third schedule of the Lease. Paragraph 5 of the third schedule states that the leaseholder will keep in repair her flat all fixtures and fittings therein all pipes sewers drains cables and wires exclusively serving the flat and any part of the building for which the lessee is responsible whether separately or jointly under the fifth schedule and to keep all water pipes reasonably protected against frost. By paragraph 8 of the third schedule the leaseholder covenants within two calendar months after being called upon by the lessor by notice in writing so to do, to remedy any breach of any of the lessees covenants specified in such notice. Paragraph 5 of the fifth schedule states that the repair of all windows and window frames belonging to the flat and internal decoration thereof shall be the lessee's responsibility but the external redecoration thereof shall be the lessor's responsibility.

INSPECTION

7. The tribunal inspected the subject property prior to the hearing in the presence of the parties and their representatives. The property comprises a terraced three storey house constructed in the 1850's fully rendered at the front elevation under a pitched roof covered with interlocking concrete tiles. The inspection took place in the presence of the Respondent, Mr Darren Wheeler of the Managing Agents Austin Rees and Mr. J.R.Boon of Messrs Eyre and Johnson Ltd both representing the Applicants.
8. The tribunal also inspected the basement flat in the presence of the lessees of this flat. It was noted there was damp to the underside of the bay roof in the ground floor flat and extensive damp including major disrepair to the plastering of the walls of the basement flat.
9. The property was generally in poor repair externally and in need of redecoration and where appropriate re-rendering. It was noted that there was no guttering above the ground floor bay window.

THE APPLICANT'S EVIDENCE

10. Mr. Boon commenced his client's case by informing the tribunal that the issue was that the basement flat underlying the subject property was suffering from water penetration. It was his client's case that the water was entering the building by reason of the poorly installed UPVC windows at the front of the subject property. A notice of disrepair had been served on the respondent requiring her to rectify the disrepair but she had failed to comply with that notice.

11. Mr. Boon contended that the respondent was in breach of her covenant to keep the window in repair and in breach of her covenant to remedy such repair within two calendar months after being called upon so to do.
12. Mr. Boon confirmed that the applicant relied on the evidence of Mr. Darren Wheeler surveyor of Austin Rees the managing agents of the property and he called Mr. Wheeler to give evidence.
13. Mr. Wheeler stated that in February 2009 he was called to the basement flat because of severe damp penetration. On the day of his inspection he could see liquid water coming through the exterior of the building due to cracks in the render. It was his opinion that the water was originating from the UPVC windows installed by the respondent. He told the tribunal that the problem was that the windows themselves had been incorrectly installed. The frames were designed to channel water out to the exterior of the building. However in this case the weep holes were below the level of the render and therefore the water could not escape to the exterior of the building but instead percolated into the interior of the building.
14. He felt that the problem had got worse in recent months because of the black seals around the rim of the windows of the respondent's flat had shrunk leaving noticeable gaps at the corners of each window. It was his contention that these gaps would allow water to get into the building and down into the basement flat. In short it was his considered opinion that the window of the subject property was the cause of the damp to the basement flat, and the damage was being caused because the windows of the subject property had been incorrectly installed.
15. Mr. Wheeler accepted that the external elevations of the property were in poor repair and were due to be attended to last year. He also accepted that the basement flat windows were also in poor repair and needed attention.
16. Mr Wheeler told the tribunal that he had discussed the problem with his colleague who was a chartered surveyor and he agreed that problems to the basement flat were caused by the defective installation of windows in the subject property.

THE RESPONDENTS EVIDENCE

17. The respondent told the tribunal that she had moved into the property in 2003 and the windows had already been installed at that time. She did not dispute the fact that it was her responsibility to repair the windows if they were faulty but she did not accept that they were. She disagreed with the opinion of Mr. Wheeler that the cause of the damp to the basement flat was her windows. She told the tribunal that there was no damp to her flat.
18. She had instructed an impartial builder and window installer to view her windows and give their opinion. She pointed to two letters in her evidence from these people and in particular the conclusions reached by both that the windows themselves were not the cause of the problem of damp to the basement flat.
19. She also pointed in her evidence to an invoice of works carried out to the basement property in 2006, which showed that the basement flat had historically suffered with problems from damp. At that time there was no suggestion that the damp problems were caused by her windows being in disrepair.
20. She told the tribunal that her builder had recently carried out works to the windows and in particular had applied some mastic to the area between the building and the window frames. She therefore denied that her windows were in disrepair.

21. In conclusion she told the tribunal that she did not accept that the evidence of Mr. Wheeler was definitive as it was only his opinion. It was her contention that the applicants must obtain an appropriately qualified opinion, which concluded in no uncertain terms that her windows were in disrepair. This they had not done.

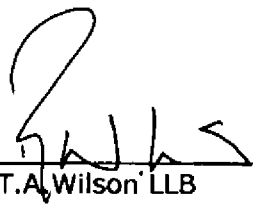
THE TRIBUNAL'S DECISION

22. The applicant's evidence as to the alleged breaches comes exclusively from one source namely the statement of Darren Wheeler. In paragraph 3 of his statement he states that in February 2009 he inspected the property in response to a complaint by the leaseholders of the basement flat that water was penetrating their flat. "As a result of such inspection, I've formed the view that the cause of the water penetration was the badly fitted windows in the front of the ground floor flat." In paragraph 4 of his statement he states "the rubber seals around the glass in the UPVC windows are not completely water tight. Accordingly, the frames are designed to allow rainwater to drain to the exterior of the building."
23. In paragraph five of his statement he states "examination of the windows fitted at the front of the ground floor flat reveal that the base of the frame is embedded in masonry sub sills thus covering the weep holes in the frame. As a result, rainwater entering the frame is draining into the masonry structure of the front bay instead of draining to the exterior of the building. In paragraph 6 he states the problem is "exacerbated by the condition of the windows. The black rubber seals around the window glass have receded leaving noticeable gaps at the corners of each window." In paragraph 9 of his statement he states "in my opinion the only solution to this problem is complete replacement of the windows with correctly fitted windows."
24. The respondent's case is simply to refute that her windows are in disrepair or are the cause of the water penetration to the basement flat. In support of this position she relies upon a letter from JD Commercial Builders and Decorators dated 27th January 2010. This letter states, "I am of the opinion that the problem is not caused by the windows in the flat but by the cracks and holes on the bay roof of the main property. I feel this is having a major bearing to the situation and if dealt with would rectify the damp problem that is occurring in the flat".
25. The respondent also points to a letter to her from Crestshield Windows dated 15th September 2009. In this letter the author, Mr Carter states "I have not retracted my statement, at this time I stand by what I said as I strongly believe the windows are not the cause of the water damage."
26. In summary the respondent contends that the applicant has failed to submit an independent expert opinion to demonstrate that her windows are incorrectly installed. She contends that to prove their case, the applicants must tender evidence of an appropriately qualified surveyor rather than Mr. Wheeler who is not a chartered surveyor. In the absence of this evidence she invites the tribunal to dismiss the application.
27. Having reviewed the evidence the tribunal reminded itself of its jurisdiction. Its jurisdiction is to determine whether or not there has been a breach of a covenant or condition in the lease. Its function therefore is purely to determine the factual position and no more. In this case, the question to be answered is, has the respondent failed to keep her front bay window in repair? It is not of material significance whether or not the condition of the window is the cause of the water penetration to the basement flat.
28. The tribunal had inspected the property on the day of the hearing and could detect no obvious sign of disrepair to the window. The tribunal was perplexed as to how the alleged disrepair to the ground floor window could be the cause of so much

water penetration to the basement flat. However as mentioned above it is not necessary to establish a definite causal link between the disrepair of the window and damage to the basement flat.

- 29.** The tribunal could see that the weep holes in the frame of the window had been embedded in the masonry. In these circumstances the tribunal does make a finding of fact that the windows have been poorly installed. However the tribunal did not detect any obvious defects in the black rubber seals.
- 30.** The tribunal notes that the windows were installed some time ago before the respondent purchased the property in 2003. Bearing in mind the length of time that these windows have been in place it is therefore surprising that the problems to the basement flat have not manifested themselves before now. The tribunal also notes that the respondent's flat apparently has no water damage whereas the basement flat has a history of bad water penetration going back to at least 2006. Mr. Wheeler accepts that the basement flat windows are also in a poor state of repair and further accepts that some of the damage to the basement flat is likely to originate from its own defective windows. In the tribunals opinion it is not yet possible to conclude that the windows are in disrepair simply by pointing to the water penetration to the basement flat. There are a number of other causes which might be responsible for or contributing to the damage to the basement flat, and in the opinion of the tribunal further investigation is necessary.
- 31.** The tribunal also rejects the applicant's assertion that the faulty installation of the window in itself amounts to disrepair. The leading authority on landlord and tenant law "Woodfall on landlord and tenant" does not support this view. In paragraph 13.029 of the latest edition it is stated that before liability can arise under a covenant to repair, the subject matter of the covenant must be out of repair. Disrepair cannot exist unless the subject matter of the covenant is in a condition worse than it was at some earlier time. The disrepair connotes deterioration from some previous physical condition. The test is not merely one of functional effectiveness, for part of a building may be functionally ineffective and yet not be in disrepair. For example, an external door may fail to perform its function of keeping out the rain, yet not be in disrepair. By analogy a window may fail to perform its function of keeping out of the rain, yet not be in disrepair. In this case whilst the tribunal finds that the front window to the subject flat has been poorly installed there is insufficient evidence for it to conclude that the window is in disrepair as opposed to it having been incorrectly installed.
- 32.** In so far as it is relevant, the tribunal is also not persuaded that Mr Wheeler is right in his opinion that the faulty installation of the window is causing damage to the basement flat. We accept that Mr. Wheeler honestly holds this opinion but agree with the respondent that his opinion should be supported by an appropriately qualified person. In this case an appropriately qualified person would be a chartered building surveyor. A chartered building surveyor would have the appropriate expertise to determine whether or not the window is in disrepair. In the opinion of the tribunal such a surveyor should carry out further investigation before it can be reasonably concluded that the window is indeed in disrepair. For the same reasons the tribunal is not persuaded by the evidence presented by the respondents namely the two letters. The authors of these letters were not at the hearing to answer questions or defend their conclusions. Accordingly little weight can be attached to these.
- 33.** Furthermore although Mr. Wheeler alleges that the black seals of the UPVC windows are defective, this was not apparent to the tribunal at the time of its inspection and on the current evidence we are not able to conclude on the balance of probabilities that the seals are defective and that the window is thus in disrepair.

- 34.** No other evidence was presented to the tribunal on which it can properly conclude that the respondent is in breach of the covenant in her lease to keep her windows in repair. Accordingly for the reasons stated above, the tribunal determines that there has been no breach of covenant in relation to the repair of the windows.

Chairman  _____
R.T.A. Wilson LLB

Dated 31st March 2010