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LEASEHOLD VALUATION TRIBUNAL

Case Reference: LON/00BH/LBC/2011/0038

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATION UNDER SECTION 168(4) OF THE COMMONHOLD & LEASEHOLD REFORM ACT 2002

Address: First Floor Flat, 4 Barclay Road, London, E17 9JJ

Applicant: Ms M. Singh

Respondent: Mr S. Malik

Application: 28 April 2011

Hearing: 11 July 2011

Appearances

Applicant

Ms Singh Freeholder

Respondent

Mr Malik Leaseholder

Members of the Tribunal

Mr I Mohabir LLB (Hons)

Mr D I Jagger MRICS

Introduction

1. This is an application made by the Applicant under section 168(4) of the Commonhold and Leasehold Reform Act 2002 (as amended) ("the Act") for an order that the Respondent has breached one or more covenants or conditions in his lease.
2. The Respondent is the present lessee of the premises known as the First Floor Flat, 4 Barclay Road, London, E17 9JJ ("the property"), having purchased the leasehold interest on 26 February 2010. The lease by which the Respondent holds the property is dated 26 June 1986 for a term of 99 years from 25 March 1986 ("the lease"). The Applicant is the present freeholder and also the owner and occupier of the ground floor flat in the building.
3. By clause 2(iv) of the lease, the lessee covenanted:

" to permit the Lessor and their agents and all persons authorised by them respectively at reasonable times not more than twice in each year and upon prior appointment being made except in emergency to enter into and to examine the state and condition of the demised premises....."
4. By clause 2(x) of the lease, the lessee covenanted:

"not without the consent in writing of the Lessor (which shall not be unreasonably withheld) to carry out or permit any structural alterations to the demised premises... PROVIDED THAT nothing herein contained shall prevent the repair or replacement of the demised premises in the event of its damage or destruction."
5. It was the Applicant's case that the Respondent has breached clauses 2(iv) and (x) of the lease and by an application received on 28 April 2011, the Applicant sought the determination from the Tribunal in those terms.
6. The application initially sought a determination of breach of covenant or condition in relation to other matters. These included the alleged non-payment of the buildings insurance premium, the failure to supply an indemnity copy, negligent damage to the building, the non-payment of the landlords and surveyors fees and the non-payment of maintenance expenditure. At the hearing, the Tribunal explained to the Applicant that it did not have

jurisdiction either in this application or at all to make any determination in relation to these matters. Having done so, the Applicant withdrew the application in so far as it related to these matters.

7. Therefore, the application was limited to a determination of whether the Respondent had breached the above-mentioned covenants by failing (a) to obtain the Applicant's consent to carry out structural alterations and failing (b) to permit her to inspect the property.

Hearing & Decision

8. The hearing in this matter took place on 11 July 2011. Both of the Applicant and the Respondent appeared in person.

Failure to Obtain Consent to Alterations

9. The Respondent repeated and relied on the evidence set out in his statement of case dated 29 June 2011. The Respondent's case was that his predecessor in title had commenced structural alterations to the property which had largely remained unfinished prior to his purchase of the leasehold interest. He referred the Tribunal to his mortgagee's valuation survey prepared by a Mr J R Palmer FRICS dated 1 February 2010 which recommended the strengthening to the main roof structure as an essential repair.
10. Subsequently, the Applicant instructed his own surveyor, Mr Akhtar of The Structural Engineering and Design Consultancy, to carry out a structural survey of the property. Mr Akhtar inspected the property on 5 March 2010. At paragraph 7 of his report he noted that the Respondent's predecessor in title had removed a load-bearing wall within the flat to create a greater living area and that the timber supports that had been installed were inadequate and rendered the building structurally unsound.
11. Mr Akhtar also noted that the chimney breast to the rear half of the main building had been entirely removed. Furthermore, a gallows bracket had been inserted in the roof space to support the chimney stack in its entirety and all brickwork below the gallows had been removed down to the ceiling level

making both chimney breasts redundant. Mr Akhtar also went on to note that the new staircase installed between the first floor and the loft conversion in an attempt to convert the roof space into a habitable room contravened Building Regulations in several respects. At paragraph 7.5 of his report, Mr Akhtar set out the remedial works required to remedy the structural defects he had identified in the property and these were later carried out by the Respondent.


12. The Respondent submitted that he had not breached clause 2(x) of the lease because he did not require the Applicant's consent to carry out the remedial works recommended by Mr Akhtar in his report. He was simply putting the property in repair because of the structural defects caused by his predecessor and for which he did not require consent under the terms of his lease.
13. In the alternative, with the Respondent contended that, in answer to pre-contract enquiries, the Applicant stated that there were no breaches of the lease of which she had been aware. Therefore, he submitted, that the Applicant was now estopped from relying on the breaches committed by his predecessor in title of which she was ought to have been aware. In short, the breaches had been waived by the Applicant.
14. In reply, the Applicant accepted that the Respondent's predecessor in title had carried out the structural alterations identified in Mr Akhtar's report. Nevertheless, she submitted that the Respondent had "inherited the breaches" and, therefore, he was obliged to remedy them. The Applicant also submitted that the remedial works carried out by the Respondent should also have been done with her consent which had not been granted.
15. It appeared to be common ground between the parties that the Respondent's predecessor in title had carried out the structural alterations identified in Mr Akhtar's report without the consent of the Applicant. The Tribunal, firstly, considered whether the Respondent could be held liable for those breaches even though he had not carried out those alterations in the first place. The issue was essentially a legal one.

16. Section 23(1) of the Landlord and Tenant (Covenants) Act 1995 provides that where as a result of an assignment (of a lease) a person becomes bound by all entitled to the benefit of any covenant, he does not have any liability or rights under the covenant in relation to any time falling before the assignment. It follows that, as a matter of law, the Respondent cannot be held liable for the breach committed by his predecessor in title by carrying out the various structural alterations to the property without the Applicant's consent. Accordingly, in this regard the Tribunal found that the Respondent was not in breach of clause 2(x) of the lease.
17. The Tribunal then considered whether, by carrying out the remedial works to the property without the consent of the Applicant, the Respondent had committed a separate breach of clause 2(x) of his lease.
18. The Tribunal had particular regard to the earlier survey reports prepared by Mr Palmer and Mr Akhtar. It is beyond doubt that both reports concluded that the structural alterations carried out by the Respondent's predecessor in title had resulted in a number of potentially serious structural defects primarily affecting the property. The Tribunal accepted the evidence of the Respondent in that the subsequent works carried out by him went no further in scope than the remedial works recommended by Mr Akhtar in his report to put the property in repair. Indeed, this was confirmed in a letter dated 24 May 2010 from SPS Consulting Engineers who had been instructed by the Applicant to inspect the property. The Tribunal found that in so doing, the Respondents did not require the consent of the Applicant, as expressly exempted in clause 2(x) of the lease. Moreover, the Tribunal also found that the cosmetic work carried out by the Respondent by the replacement of the kitchen and bathroom fittings were not structural alterations within the meaning of clause 2(x) and could not amount to a breach of this clause. It follows that it was not necessary for the Tribunal to go on to consider any arguments in relation to estoppels raised by the Respondent. Accordingly, the Tribunal concluded that the Respondent had not breached clause 2(x) of his lease by carrying out the structural remedial works that he did after his purchase of the flat.

Failure to Permit Inspection

19. The Applicant contended that she had made a number of verbal requests to the Respondent to allow her access to the property in order that she could carry out an inspection. She asserted that she had not been allowed to do so. When asked by the Tribunal, she stated that none of these requests had been made by her in writing and there was no written confirmation to this effect. Materially, she conceded that her own surveyors had no difficulty in gaining access to the property on 26 April and 19 May 2010.
20. The Respondent contended that he had never received any requests from the Applicant, whether verbal or otherwise, to allow her to inspect the property. Moreover, the Applicant's friend, Mr Patel, had free access to the flat whilst the remedial works had been carried out.
21. The Tribunal found the Respondent to be an honest and credible witness. It, therefore, accepted his evidence that he had not received an oral or written request directly from the Applicant to carry out an inspection of the property. Having regard to the correspondence that took place between the firms of solicitors respectively instructed by the parties and, in particular, to the correspondence that took place between 20-28 April 2010, the Tribunal was satisfied that any written requests made for the Applicant's surveyors to inspect the property had been complied with by the Respondent. Accordingly, the Tribunal found that the Respondent had not breached clause 2 (iv) of the lease.
22. In conclusion, the Tribunal determined that the Respondent had not committed the breaches of the lease as alleged by the Applicant.

Dated the 5 day of September 2011

CHAIRMAN.....
Mr I Mohabir LLB (Hons)