



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

Case Reference : **CHI/00HP/LBC/2013/0036**

Property : **Flat 5 Halcyon Court, Rectory
Road, Poole, Dorset BH15 3BJ**

Applicant : **Halcyon Court Limited**

Representative : **Mr Wayne Miller, Laing Law
solicitors**

Respondent : **Rodney Gerald Sims**

Representative :

Type of Application : **Breach of Covenant section 168(4)
Commonhold and Leasehold
Reform Act 2002**

Tribunal Members : **Judge Tildesley OBE
Mr Anthony Mellery-Pratt FRICS**

**Date and venue of
Hearing** : **27 February 2014
Kings Head Hotel, The Square,
Wimborne, Dorset BH21 1JG**

Date of Decision : **11 March 2014**

DECISION

Decisions of the Tribunal

- (1) The Tribunal determines that the Respondent is in breach of the following covenants under an underlease for a term of 999 years less 10 days from 25 March 1963, namely:
- To keep the garage and the porch in a good and substantial repair (paragraph 4 to the Sixth schedule of the lease);
 - To decorate the property internally every seventh year (paragraph 7 to the Sixth schedule of the Lease);
 - Not to make alterations to the property (paragraph 12 to the Sixth schedule of the lease).
- (2) The Tribunal finds that the Respondent is not in breach of the covenants in relation to causing nuisance or annoyance to the occupier or owner of another flat, and to paying his 20 per cent share of expenses (paragraphs 13 and 21; 22 to the Sixth schedule of the lease respectively).

The Application

1. The Applicant seeks a determination, under subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act"), that the Respondent is in breach of various covenants contained in the lease.
2. The property is one of five flats which stands alone at the top of the block comprising three levels. The other four flats are situated below the subject property with two flats at the ground floor and two on the first floor.
3. The block is of brick construction built in the early 1960's. There is no communal entrance to the block. Each flat is self contained and has its own means of access, which in the case of the subject property is gained via an external stairway comprising steep concrete steps. All the flats except the subject property have the benefit of an individual garden. There is a drive-way to the west of the block from Rectory Road which leads to the garages for the five flats.
4. The Respondent holds the property under an underlease for a term of 999 years less ten days from the 25 March 1963 and made between Arthur William Johns of the one part and Edward Owen Graham and Doris Irene Graham of the other part.

5. The Applicant holds a lease of 999 years from 25 June 1963 in respect of the land situated at the corner of Stanley Green Road and Rectory Road together with the block of flats and garages erected on that land.
6. The Second schedule to the underlease defines which parts of the block of flats are reserved to the Applicant. Essentially these are the main structural parts of the block, including the roof, foundations and the external parts excluding the glass in the windows.
7. The Third schedule to the underlease defines the extent of the subject property demised to the Respondent, which is:
 - All that flat no 5 forming part and being on the second floor of the property and known as flat 5 Halcyon Court ... and coloured pink on the plan annexed to the underlease. The Tribunal notes that the area coloured pink includes the whole of the second floor of the block including the external walkway around the flat.
 - One half part in depth of the joists between the floor of the premises and the ceiling of the flat below.
 - All cisterns tanks services drain pipes wires ducts and conduits used solely for the purposes of the subject property.
 - The land allocated to the garage.
8. The Sixth schedule to the lease details the Respondent's covenants with the Applicant.
9. The Applicant under the Seventh schedule to the lease covenants with the Respondent amongst other matters to insure the block of flats, garages, and adjoining land, and to keep the main structure of the block in a good and tenable state of repair, decoration and condition including the renewal and replacement of all worn or damaged parts.
10. The five flat owners including the Respondent are the shareholders of the Applicant with each flat owner holding one share.
11. The Respondent has been the registered proprietor of the subject property since 27 November 1987. The Respondent, however, has not been seen in the property for around 12 years and has since disappeared without trace. The Halifax Building Society which had a mortgage on the property paid the service charge for the Respondent until the mortgage was discharged in 2011.
12. The subject property has been empty for a considerable number of years with the result that it has fallen into a state of disrepair, which in

turn has affected the physical condition of the flats below it. The state of disrepair has been compounded by the Applicant's ineffective management of the block of flats, and its failure to keep the main structure of the block in good repair.

13. The Applicant engaged Castleford Management as its managing agent until around 2012. The remaining shareholders, however, were reluctant to spend monies on major works to keep the block of flats in a good state of repair. Since the departure of the managing agent, the Applicant has not put in place proper arrangements to manage the block of flats and the adjoining land. It would appear that there has been no attempt to collect the service charge. The shareholders have confined their activities to the payment of the insurance for the block of flats.
14. The Applicant has brought this application as a precursor to proceedings before the County Court for forfeiture of the Respondent's lease. The Applicant is hoping that the cost of the necessary repairs to the block of flats would be offset by potential proceeds from the sale of the Respondent's lease.
15. The Tribunal is concerned solely with the question of whether the Respondent has breached the covenants in the underlease. The question of what the Applicant may do if a breach is found is not a matter for the Tribunal.
16. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

17. The Applicant was represented by Mr Miller of Laing Law solicitors at the hearing. The Applicant called the following witnesses:
 - Mr Jason Watts, Principal of JM Watt, commercial property agents: Mr Watts gave evidence about the steps taken to trace the Respondent.
 - Mr Jon Holt of Jon Holt Associates who produced a schedule of dilapidations for the subject property dated 5 August 2013.
 - Mr Shaun Stockley, the leaseholder of Flat 4 Halycon Court.
18. The Respondent did not appear. On 6 December 2013 the Tribunal having been satisfied that all diligent enquiries had been made to trace the Respondent's whereabouts waived the requirements under the 2013

Procedure Rules to send or deliver any document to him¹. In this regard the Tribunal took account of the witness statement of Jason Watts dated 5 December 2013 which set out the steps taken by the Applicant to trace the Respondent.

19. The Tribunal decided to proceed in the Respondent's absence in accordance with rule 34 of the 2013 Procedure Rules. The Tribunal was satisfied that reasonable steps had been taken to notify the Respondent of the hearing which included sending a notice to his last known address, and that it was in the interests of justice to proceed.
20. Prior to the hearing the Tribunal inspected the property in the presence of the Applicant's representative and witnesses.

The Findings on the Purported Breaches

To Keep the Property in Good Repair

21. Paragraph 4 of the Sixth schedule of the lease provides that

“The lessee shall keep the premises and all parts thereof and all fixtures and fittings therein and all additions thereto in good and substantial state of repair decoration and condition throughout the continuance of the demise including the renewal and replacement of all worn or damaged parts and shall maintain and uphold and whenever necessary for whatever reason rebuild reconstruct and replace the same and shall yield up the same at the deterioration of the demise in the said state.”

22. The Applicant relied on the findings of Mr Holt's Schedule of Dilapidations dated 5 August 2013 to substantiate its assertion that the Respondent had allowed the property to become dilapidated and uninhabitable and, therefore, in breach of his covenant to keep the property in good repair
23. The Tribunal finds that the deterioration complained of to the property in respect of the roof, window frames, and lintels formed part of the reserved property which was the Applicant's responsibility to maintain and repair.
24. The Tribunal is satisfied that the porch was in significant disrepair. The timber window frames were rotten, and the plastic roof was no longer watertight. The Tribunal accepted that the Respondent was responsible to maintain the porch because it was an addition to the property within the meaning of paragraph 4 to the Sixth schedule.

¹ Rule 16(11) of the Tribunal Procedure Rules 2013

25. The Tribunal finds that the garage belonging to the property was in a state of structural collapse which was a result of many years of neglect. Under the terms of the underlease the land allocated for a garage was part of the demised premises. This means that the garage fell within the definition of addition and part of the Respondent's repairing covenant under paragraph 4 to the Sixth schedule.
26. The Tribunal, therefore, decides that the Respondent breached his covenant under paragraph 4 to the Sixth schedule by his failure to keep the porch and the garage in good repair.

Decoration of the Property

27. Paragraph 7 of the Sixth schedule of the lease provides that

"The lessee shall in every seventh year of this demise and in the last three months thereof paint with two coats of good oil paint in a workmanlike manner all the wood and iron and other parts of the premises usually or which ought to be painted and shall in addition varnish distemper wash stop whiten and colour all such parts as are usually or as ought to be so treated and repaper the parts (if any) now prepared with suitable paper of as good quality as that now in use".

28. The Tribunal was unable to inspect the interior of the property. Mr Holt, however, had gained access to the interior when he carried out his survey. The Tribunal accepted his evidence of the decoration being significantly aged, and that the property had not been decorated for about 15 years.
29. The Tribunal, therefore, finds that the Respondent breached his covenant under paragraph 6 to the Sixth schedule by not decorating the property every seventh year.

Alteration to the Property

30. Paragraph 12 of the Sixth schedule of the lease provides that

"The lessee shall not make any alterations in the premises or exhibit any notice in any of the windows of the premises and shall not park vehicles of any kind upon the land hatched green on the said site plan".

31. The Tribunal finds that a porch had been added to the property. The Applicant did not know the precise date when the porch was constructed. Having inspected the porch, the Tribunal, however, accepted the Applicant's evidence that the age of the porch did not go beyond the start of the Respondent's ownership of the property on 27

November 1987. The Applicant stated that it had not given consent for the erection of a porch to the property.

32. The Tribunal decided that the Applicant's evidence was derived more from informed supposition rather than hard fact. The Tribunal, however, acknowledges the physical existence of a porch and its likely age, were in the absence of evidence to the contrary sufficient to establish the Respondent's breach of the covenant under paragraph 12 to the Sixth schedule to the lease.

Nuisance or Annoyance/Cause Damage or Inconvenience

33. Paragraph 13 of the Sixth schedule of the lease provides that

"The lessee shall not do or permit or suffer to be done in or upon the premises anything which may be or become a nuisance or annoyance or cause damage or inconvenience to the lessor or the head lessor or to the owner or occupier of any flat....."

34. The Applicant relied on Mr Stockley's evidence that his flat had a large hole in the ceiling which was due to water ingress from the subject property. Mr Stockley also said that the subject property had become infested with birds, the noise of which was unwelcome and obtrusive to the senses. On his internal inspection Mr Holt discovered that the toilet had been overflowing due to a defective ball valve.
35. The Tribunal having regard to its inspection considers the most likely cause of the water ingress and the bird infestation was the Applicant's failure to maintain the structure of the property, in particular the roof and the window frames. The Tribunal, therefore, decides that the Respondent was not in breach of the covenant under paragraph 13 to the Sixth schedule to the lease.

Failure to Pay 20 per cent Share of the Applicant's Expenses

36. Paragraph 21 and 22 of the Sixth schedule of the lease provides that

"The lessee shall keep the lessor indemnified from and against 20 per cent of all costs charges and expenses incurred by the lessor in carrying out its obligations under the Seventh schedule hereto except its obligations to pay the rent reserved by the Head Lessor".

"The lessor shall be entitled to apply to the lessee for and receive quarterly advances on account of the lessee's obligations under the last preceding clause".

37. The Applicant relied on the fact that the Respondent had not made any contribution to its expenses since 2011 when the Halifax Building Society ceased making payments on the Respondent's behalf. The Applicant, however, adduced no service charge demands, and no documentary evidence of expenditure since 2011. The Applicant's evidence under this heading was limited to Mr Stockley's testimony that he had recently made a contribution towards the insurance for the block of flats.

38. The Tribunal considers the mere fact that the Respondent has made no contribution since 2011 was not sufficient to substantiate a breach of his covenants under paragraphs 21 and 22. In the Tribunal's view, in order to establish a breach there must be reliable evidence that the Applicant has incurred or was likely to incur expenditure during the relevant period, and that a demand had been issued to the lessees of the flats. There was no such evidence. The Tribunal, therefore, finds that the Respondent has not breached his covenants under paragraphs 21 and 22 of the Sixth schedule to the lease.

Appendix of relevant legislation

S168 of Commonhold and Leasehold Reform Act 2002

No forfeiture notice before determination of breach

(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (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 the breach has occurred.

(3) But a notice may not be served by virtue of subsection (2)(a) or (c) 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 First-tier Tribunal for a determination that a breach of a covenant or condition in the lease has occurred.

(5) But a landlord may 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 determination by a court, or
- (c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement

The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

16 (11) The Tribunal may waive a requirement under these Rules to send or deliver a notice or other document to a person or make an order for provision by alternative

method (whether by advertisement in a newspaper or otherwise) as the Tribunal may think fit if that person—

- (a) cannot be found after all diligent enquiries have been made;
- (b) has died and has no personal representative;
- (c) is out of the United Kingdom; or
- (d) for any other reason a notice or other document cannot readily be sent or delivered to that person in accordance with these Rules.

Hearings in a party's absence

34. If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal—

- (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
- (b) considers that it is in the interests of justice to proceed with the hearing.