



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

Case References : CHI/23UB/LBC/2013/0039
CHI/23UB/LBC/2013/0041.

Property : 90A Suffolk Road, Cheltenham, GL50
2SZ.

Applicant : Mr. Mark Steven Gould.

Representative : In person.

Respondent : Mr. Paul David Sutor and Mrs.
Caroline Ann Sutor.

Representative : In person.

Type of Application : Determination of breach of covenant,
S168(4) Commonhold and Leasehold
Reform Act 2002.

Tribunal Members : Judge J G Orme (Chairman)
Mr. P E Smith FRICS (Member).

**Date and Venue of
Hearing** : 11 February 2014.
Determination on written
submissions.

Date of Decision : 14 February 2014.

Decision

For the reasons set out below, the Tribunal determines that the Respondents, Mr. Paul David Sutor and Mrs. Caroline Ann Sutor have breached the terms of a covenant in their lease dated 14 January 1983 of the Maisonette known as 90A Suffolk Road, Cheltenham, GL50 2SZ in that there has been a breach of paragraph 5 of the sixth schedule to the lease because they failed to give at least 48 hours notice in writing to the Applicant Mr. Mark Steven Gould of their intention to enter upon other parts of the property at 90 Suffolk Road on 29 October 2013 in order to carry out repairs which they were required to carry out under the terms of their lease.

Reasons

Background

1. The Applicant, Mr. Mark Gould, is the freehold owner of the property known as 90 Suffolk Road, Cheltenham GL50 2SZ ("the Property").
2. The Respondents, Mr. Paul Sutor and Mrs. Caroline Sutor, are the leasehold owners of the maisonette on the first, second and third floors at the Property ("the Maisonette").
3. On 3 December 2012, Mr. Gould applied to the Tribunal for a determination under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 (as amended) ("the Act") that Mr. and Mrs. Sutor had acted in breach of the terms of their lease of the Maisonette. The application alleged breaches of the following covenants in the 6th schedule to the lease of the Maisonette:
 - 1) Paragraph 5 – Failure to provide at least 48 hours notice of intention to enter to carry out works;
 - 2) Paragraph 5 – Causing damage and not making good;
 - 3) Paragraph 10 – Causing damage and inconvenience to Mr. Gould;
 - 4) Paragraph 3 - Failure to keep the Maisonette in good and tenantable repair;
 - 5) Paragraph 5 and 10 – Entering the reserved property without permission.
4. On 9 December 2013, Mr. Gould applied to the Tribunal for a further determination under section 168(4) of the Act that Mr. and Mrs. Sutor had acted in breach of the terms of their lease of the Maisonette. The application alleged a breach of paragraph 8 of the 6th schedule to the lease in that Mr. and Mrs. Sutor had failed to allow Mr. Gould access to the Maisonette to inspect the condition.
5. The Tribunal issued directions on 9 December 2013. The applications were to stand as Mr. Gould's case. Mr. and Mrs. Sutor were to prepare a statement in reply by 6 January 2014. Mr. Gould was given

permission to send a reply by 20 January. Notice was given that the Tribunal intended to determine the applications on the basis of written representations without a hearing. No party has applied for a hearing. The parties have filed written submissions in accordance with the directions.

The Law

6. Section 168 of the Act provides:
- 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 (c20) (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 appropriate 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 a determination by a court, or*
 - c. *has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.*
 - 6) *For the purposes of subsection (4), "appropriate tribunal" means-*
 - a. *in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and*
 - b. *in relation to a dwelling in Wales, a leasehold valuation tribunal.*

The Lease

7. The Tribunal had before it a copy of a lease dated 14 January 1983 made between Lawrence Ross McLeod Hawkins as lessor and Brigid Zohra Waite as lessee ("the Lease"). The Lease was subsequently amended by a deed dated 27 October 1989 made between Lawrence Ross McLeod Hawkins and Heidi Heather Stone.

8. By the Lease, the lessor demised the Maisonette to the lessee for a term of 999 years from 31 December 1982 at a yearly rent of £30. The Lease has been subsequently registered at HM Land Registry under title number GR107938.
9. The premises demised by the Lease are defined in the 3rd schedule (as amended by the deed dated 27 October 1989). The demise includes all "*sewers drains pipes wires ducts and conduits used solely for the purposes of the said maisonette*".
10. The Estate is defined by the 1st schedule as the whole of the Property.
11. By clause 2 of the Lease, the lessee covenants with the lessor to observe and perform the obligations set out in the 6th schedule to the Lease. The following are the paragraphs of the 6th schedule on which Mr. Gould relies:
 3. *The Lessee shall to the reasonable satisfaction in all respects of the Lessor's Surveyor keep the Premises and all parts thereof and all fixtures and fittings therein and all additions thereto in a good and tenantable state of repair decoration and condition throughout the continuance of this 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 determination of the demise in such good and tenantable state of repair decoration and condition and in accordance with the terms of this covenant in all respects.*
 5. *The Lessee shall before repairing any joist or beam to which is attached the ceiling of any other part of the Estate and before carrying out any repairs or works which the Lessee is required to carry out hereunder and for the carrying out of which the Lessee requires access to any other part of the Estate give reasonable notice (and except in cases of extreme urgency) at least forty eight hours' notice in writing to the Lessor or other the occupier of that part of the Estate the ceiling of which is attached to that joist or beam or to which the Lessee requires access as the case may be. The Lessee shall on giving such notice be entitled to repair that joist or beam or carry out those repairs or works and in doing so to have any required access to that other part of the Estate but shall act carefully and reasonably doing as little damage as possible to any part of the Estate and making good all damage done.*
 8. *The Lessor may with or without workmen and others at reasonable times after giving seven days notice of his intention (with prior appointment except in emergency) enter upon and examine the condition of the Premises and may thereupon serve upon the Lessee notice in writing specifying any repairs or works necessary to be done for which the Lessee is liable*

hereunder and require the Lessee forthwith to execute them and if the Lessee does not within two months after the service of that notice proceed diligently with the execution of those repairs or works then the Lessor may enter upon the Premises and execute them and the cost shall be a debt due to the Lessor from the Lessee and shall be recoverable forthwith by action.

10. The Lessor 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 other the occupier of the ground floor flat or whereby any insurance for the time being effected on the Estate or any part thereof (including the Premises) may be rendered void or voidable or whereby the rate of premium may be increased and shall pay all costs and expenses incurred by the Lessor in abating a nuisance in obedience to a notice served by a competent authority.

The Evidence

12. Both parties have filed written submissions accompanied by copies of documents on which they rely which mainly consist of extensive exchanges of emails between the parties. The directions issued by the Tribunal on 9 December included a statement that the Tribunal would reach its decision on the basis of the evidence produced to it and that the burden of proof rests with the Applicant.

Conclusions

13. Having considered the lengthy and, at times, acrimonious exchanges of emails between the parties, the Tribunal is of the view that it would have been helpful if the parties had obtained some legal advice on their respective rights and obligations under the Lease before the applications were made.
14. The dispute revolves around the repair of a soil vent pipe (SVP) at the rear of the building. It appears to be accepted by the parties that it forms part of the demise and is the responsibility of Mr. and Mrs. Sutor to keep it in good repair. In order to repair it, Mr. and Mrs. Sutor require access to the garden at the rear of the Property. It is not clear from the evidence whether the garden forms part of the demise of the ground floor flat (if there is such a demise) or whether it forms part of the reserved property as defined by the Lease. However, the garden clearly forms part of the Estate as defined by the Lease.
15. Mr. Gould says that it was drawn to the attention of Mr. and Mrs. Sutor that the SVP required repair in 2012, that attempts were made by Mr. and Mrs. Sutor to carry out the repairs then (during the course of which Mr. and Mrs. Sutor's contractor gained access to the garden without permission), that the repairs were not successful and that Mr. and Mrs. Sutor were asked to carry out further repairs in 2013. The applications arise out of Mr. and Mrs. Sutor's attempts to carry out those repairs in 2013.

16. The terms of the Lease are clear. Mr. and Mrs. Sutor are responsible for keeping the Maisonette in good repair. If Mr. and Mrs. Sutor require access to the Estate in order to carry out repairs, they must give reasonable notice of at least 48 hours (except in the case of extreme urgency) to Mr. Gould as occupier of the remainder of the Estate. Having given that notice, Mr. and Mrs. Sutor have the right (granted by the Lease) to enter to carry out the repairs. They do not have to obtain Mr. Gould's further permission to enter. Obviously, it would be preferable for the parties to agree access between them but the Lease gives Mr. and Mrs. Sutor a legal right to enter. Mr. and Mrs. Sutor must act carefully and reasonably and do as little damage as possible and make good all damage done. Mr. Gould is not entitled to be present when the work is carried out, he is not entitled to see a specification of the work to be carried out and he is not entitled to stipulate the contractor who carries out the work on behalf of Mr. and Mrs. Sutor.
17. **Failure to give proper notice.** Mr. Gould's evidence is that he notified Mr. and Mrs. Sutor of the need to carry out further work to the SVP in August 2013. Mr. Sutor arranged for a contractor to inspect the SVP and to quote for repairs. On 21 October Mr. Sutor sent an email to Mr. Gould asking when it would be convenient for the work to be carried out. There followed an exchange of emails. On 29 October Mr. Sutor asked if his builder could "*come around tomorrow and Thursday weather dependant.*" Mr. Gould replied that either Mr. or Mrs. Sutor would have to be present to supervise the works. On 29 October Mr. and Mrs. Sutor's contractor entered the garden and carried out the repair work. Mr. and Mrs. Sutor say that their contractor acted without their authority.
18. Neither of the emails from Mr. Sutor dated 21 or 29 October amounted to the giving of notice sufficient to satisfy paragraph 5 of the 6th schedule. They were asking for permission to access rather than giving notice of intention to enter. Even if the email dated 29 October amounted to notice, it did not give 48 hours notice. Mr. and Mrs. Sutor's contractor entered before proper notice had been given and there was a breach of covenant to that extent.
19. **Causing damage and not making good.** Mr. Gould informed Mr. Sutor by email on 30 October that in carrying out the repair work, the contractor damaged a stone step and an air vent. He said that he would arrange for remedial work to be undertaken by another contractor at Mr. and Mrs. Sutor's expense. In a further email dated 12 November he said that Mr. and Mrs. Sutor's contractor was not permitted to enter the Property. Mr. and Mrs. Sutor accept that some damage was caused and have expressed a willingness to make good in emails dated 22 and 25 November. In the email dated 25 November, Mr. Sutor told Mr. Gould that he had arranged for a different contractor to complete the work and asking when it would be convenient for him to do the work.

Mr. Gould replied on 28 November saying that he would be arranging for the work to be carried out.

20. Mr. and Mrs. Sutor's obligation under paragraph 5 of the 6th schedule is to do as little damage as possible and to make good any damage done. Mr. and Mrs. Sutor say that their contractor was prepared to return to make good the damage but that Mr. Gould refused access. They subsequently tried to arrange for an alternative contractor to carry out the remedial work. The Tribunal accepts that Mr. and Mrs. Sutor are ready and willing to carry out any remedial work that may be necessary and are not satisfied that there has been a breach of covenant in this respect.
21. **Causing damage and inconvenience.** Mr. Gould says that the damage caused as a result of the repair work is a breach of paragraph 10 of the 6th schedule. In his reply he says "*Mr. and Mrs. Sutor and their contractors' actions have caused distress and have been nuisance, not for the first time. Since the works were undertaken the process of rectifying the problem has been very frustrating especially due to the number of people involved. Given the circumstances Mr. Gould does not believe allowing access to Mr. Walkett to finish works and undertake repair works is a reasonable solution.*" The Tribunal is not satisfied that the facts relied upon by Mr. Gould amount to a breach of paragraph 10 of the 6th schedule. The correspondence shows that Mr. and Mrs. Sutor have been attempting to repair the SVP in a reasonable manner and that it is Mr. Gould who has been obstructing those attempts. Mr. and Mrs. Sutor have made it clear that they are prepared to make good any damage caused, as they are obliged to do.
22. **Failure to keep in good and tenable repair.** In the application, Mr. Gould says that Mr. and Mrs. Sutor have failed to provide a pressure test to prove that the SVP was not leaking. Mr. and Mrs. Sutor say that they have arranged for repairs to be carried out to the SVP and that their contractor assures them that the work has been carried out satisfactorily. It is for Mr. Gould to provide evidence to satisfy the Tribunal that there has been a breach of paragraph 3 of the 6th schedule. Paragraph 3 requires Mr. and Mrs. Sutor "*to the reasonable satisfaction in all respects of the Lessor's Surveyor*" to keep the Maisonette in good repair. Mr. Gould has not provided to the Tribunal any evidence from his surveyor that the SVP is not in repair. The Tribunal is not satisfied that the covenant has been breached in this respect.
23. **Entering the reserved property without permission.** As already stated, Mr. and Mrs. Sutor have a right to enter the other parts of the Estate in order to carry out repairs to the Maisonette. They are required to give reasonable notice of their intention to do so. The Tribunal has already found that Mr. and Mrs. Sutor were in breach by failing to give notice but Mr. Gould's further allegations do not amount to a further breach.

24. **Failure to allow access to the Maisonette.** On 1 December 2013 Mr. Gould sent an email to Mr. Sutor saying that he would like to inspect the interior of the Maisonette as it had been empty for some time and asking when he would be able to provide access. Mr. Sutor replied on 10 December offering access at weekends which was refused. He then offered 27 or 30 December as he had no holiday available. Mr. Gould says in his reply that access was given on 14 January 2014.
25. Paragraph 8 of the 6th schedule gives Mr. Gould the right to inspect the Maisonette on 7 days notice but expressly states that it is "*with prior appointment except in emergency*". There is no suggestion that access was required for an emergency. Whilst there was a delay in gaining access, there is no evidence before the Tribunal that Mr. and Mrs. Sutor were refusing to allow access. They may have been a bit slow in arranging an appointment but the evidence is that they were trying to accommodate Mr. Gould's request. The Tribunal is not satisfied that there has been a breach of covenant in this respect.
26. In summary, the Tribunal determines that there has been a breach of covenant only in respect of the failure by Mr. and Mrs. Sutor to give reasonable notice of their intention to enter the garden to carry out repairs on 29 October 2013.

Right of Appeal

27. Any party to this application who is dissatisfied with the Tribunal's decision may appeal to the Upper Tribunal (Lands Chamber) under section 176B of the Commonhold and Leasehold Reform Act 2002 or section 11 of the Tribunals, Courts and Enforcement Act 2007.
28. A person wishing to appeal this decision must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with this application. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit. The Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal and state the result the party making the application is seeking.
29. The parties are directed to Regulation 52 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 SI 2013/1169. Any application to the Upper Tribunal must be made in accordance with the Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010 SI 2010/2600.

J G Orme
Judge of the First-tier Tribunal
Dated 14 February 2014