



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

Case Reference : LON/00AE/LBC/2014/0035

Property : 546B Kingsbury Road London NW9 9HH

Applicant : Sarama Limited

Representative : Isabel Petrie of counsel
accompanied by Adam Palmer
solicitor of Colman Coyle

Respondent : Mrs V Dalia

Representative : Graham Pack Surveyor

Type of Application : For the determination of a breach
of covenant in a lease

Tribunal Members : Judge Peter Leighton LLB
Mr D Jagger FRICS

**Date and venue of
Hearing** : 11th August 2014 10 Alfred Place,
London WC1E 7LR

Date of Decision : 14th August 2014

DECISION

Introduction

- 1 By an application dated 2013 the Applicant seeks a determination by the tribunal pursuant to Section 168(4) of the Commonhold and Leasehold reform Act 2002 that the Respondent is in breach of covenant in respect of a lease of the second floor flat of premises known as 544B Kingsbury Road London NW9 9HH ("the property").
- 2 An oral hearing of the application occurred on 11th august 2014 at which Ms I Petrie of counsel appeared on behalf of the Applicant and Mr G Pack a surveyor represented the Respondent
- 3 The tribunal received oral evidence from Mr B Haimann the property manager of the Applicant and the respondent. Both witnesses were questioned by the opposing party and the tribunal and the tribunal received written submissions from the Applicant's counsel and oral submissions from both parties at the conclusion of the hearing.

Background

- 4 Sarama Limited is the freehold owner of the flat which is one of 24 flats situated on the second floor above a parade of shops in Kingsbury Road London NW9. Flat 546A is immediately below the subject property
- 5 The Applicant acquired the property in 1998 from Longridge Properties Limited who had granted the lease to Mr K Egan in 1991 for a period of 99 years from 1977
- 6 The Respondent purchased the property at auction in 2008 from Mr K Egan the original lessee for £140,000. She has never met Mr Egan either before or since the sale and has relied solely upon information provided by the agents Feldgate in the Home Information pack provided.
- 7 The property was described in the particulars as a two bedroom flat and the tribunal noted that although there was a plan showing the location of the flat in the block, there was no lease plan showing the configuration of the rooms in the flat. The demised premises are defined in Clause 1(H) and the First Schedule to the lease but this definition does not include the layout of the flat at the date of the demise. The Respondent had no idea that the property had been converted and merely continued to use the property in the condition in which she had purchased it.
- 8 In 2012 there was a leak from the Respondent's flat into the flat below and she called in a plumber to attend to it .There appears to be some dispute as to whether it was properly attended to and there was correspondence between the Applicant and the Respondent in early 2014. The Respondent believed that the leak had been attended to but was prepared to bring in another plumber to seek to ascertain the cause of the leak in the first place.

- 9 In the event the landlord instructed Mr Geoff Clark of CIRPro a building surveyor (though not a members of RICS it would appear) to inspect the property in April 2014.
- 10 In the course of his inspection he concluded that the property had been converted from a one bedroom to a two bedroom flat , that the works had been done very badly and that the property was in serious disrepair
- 11 In a witness statement which was delivered shortly before the hearing Mr Clark expressed the opinion that the conversion work to the bathroom had probably been undertaken within the last 5 to 10 years
- 12 Mr Clark was not available to be cross examined on the basis for his opinion and he did not give any reason beyond the bare assertion. As this was very contentious evidence the tribunal concluded that it had no option but to carry out its own inspection of the premises in order that it could form a view of the conversion works
- 13 On the basis of Mr Clark's report the landlord concluded that an alteration had been carried out in breach of the provisions of Clause 3(11) of the lease and further that it had been carried out to such a poor standard that the property was in a state of disrepair contrary to clause 3(4) of the lease and that there had been a failure to obtain Building Regulations approval for the conversion contrary to clauses 3 (9) and 3(10) of the lease

The Lease

- 14 The relevant clauses of the lease are set out in the appendix to this decision

Inspection

- 15 It became apparent in the course of the hearing that the tribunal would need to inspect the subject property. Mr Clark the Applicant's expert was not available to attend the hearing and the Respondent had not called any expert evidence.
- 16 The tribunal considered it could not make a proper determination of the nature or date of the installation and the state of alleged disrepair of the premises without a thorough inspection and decided to conduct such an inspection at the end of the hearing
- 17 The tribunal in the course of the inspection was also able to inspect Flat 546A which was immediately below the subject property and which had allegedly been adversely affected by the ingress of water from that property. In fact because of the later arrival of the key for the subject property it was possible to inspect 546A first with all parties except Mrs Dalia in attendance.

- 18 There were two areas of water damage in Flat 546A which were visible. These were in the cupboard above the bathroom , the exposed timber laths were stained and plaster was no longer visible. .The second area was in the bedroom ceiling adjacent to the cupboard where once again there was water staining to the plaster and the lessee showed the tribunal a photograph and indicated the ceiling collapsed about four years ago and has subsequently been repaired. The staining to the bedroom ceiling did not appear to be of recent origin.
- 19 There was staining to the bathroom ceiling but this appeared to have arisen from condensation in the flat rather than from any leakage or ingress of water .
- 20 There was evidence of damage to the ceiling in the airing cupboard in the kitchen but it appeared to the tribunal that there was no evidence of water damage in this location
- 21 The flat was in the original layout as stated in the surveyor's report, namely a one bedroom flat and it appeared to the tribunal that the condition of this flat was somewhat inferior to the subject flat partly due to the staining of the bedroom ceiling but also in its general condition
- 22 The tribunal then inspected 546B in the presence of the parties and noted the following features namely:
- (1) The flat had been recently decorated and it appeared to the tribunal to be in a generally reasonable condition structurally
 - (2) The fitted kitchen units appeared to the tribunal to be of some age and not less than 20 and possibly more than 30 years old. They appeared damaged in part but mainly functional
 - (3) The sanitary ware to the bathroom once again appeared to be at least 20 and possibly as much as 30 years old The bath and wash basin were stained but no significant defects were apparent
 - (4) In spite of the suggestion that the works in question were "hotchpotch" and inadequate the tribunal considered that the work undertaken to the kitchen and bathroom was of a reasonable standard
 - (5) A similar allegation was made in relation to the kitchen floor but the tribunal also found this to be functional and not leaking

Disrepair and Clause 3(4)

Evidence

- 23 The tribunal then considered the items 1-13 in the schedule which was produced by Mr Clark and appended to his statement as follows:
- 24 (a) Plumbing pipes in poor condition and leaking. The tribunal found no evidence of leakage and there was an ill fitting joint by the basin but the general condition of the plumbing appeared reasonable.
(b) A similar allegation in relation to the pipes in the kitchen. Most of the pipes were hidden but the exposed pipes did not reveal leakage or any other defect

- (c) Incomplete tiling in the bathroom with water tracking behind. The tribunal found the tiling to be complete and it appeared to be in reasonable condition and may have been rectified since Mr Clark's visit.
- (d) Plaster round the bath in poor condition. There was no evidence of this and it may have been rectified when the flat was decorated
- (e) Plaster on ceiling revealed mould in a photograph taken by Mr Clark but the tribunal found that since that time evidence of the plaster mould had been removed
- (f) Flooring in bathroom in extremely poor condition allowing water to penetrate flat below. The tribunal found dated cushion flooring but it appeared serviceable.
- (g) Kitchen in extremely poor condition. The tribunal found the kitchen fittings to be dated but serviceable
- (h) Burning to kitchen worktop adjacent to the oven. Inspection revealed that this had been repaired at the time of the inspection
- (i) Kitchen flooring in poor condition allowing water penetration to flat below. The tribunal found the flooring dated but serviceable.
- (j) Radiator in bathroom badly corroded . The tribunal found that the radiator had been repainted and was in reasonable condition
- (k) Sanitary fittings in bathroom poor condition need checking for water tightness and renewal if damaged. The tribunal found that the sanitary fittings to be functional in bathroom and tried all the taps which functioned correctly
- (l) Floor covering to bathroom not fitted to wall and allowing water ingress to flat below. The tribunal found that the cushion flooring appeared to be stuck down at the edges

- 25 Mr Pack stated in evidence that he had previously inspected the flat and that in his opinion he would describe it as "tired" but serviceable. Mrs Dalia stated that she had never received any complaints about the property and that she would not be unhappy to live there in its condition.

Conclusion

- 26 Whilst the tribunal was not able to say that the premises had not been in disrepair at some point during 2014 and possibly at the time of Mr Clark's inspection , it was satisfied from the inspection that it was not currently in a state of disrepair
- 27 Although clause 3(4) used the phrase "well and substantially to repair" during the term , it did not use the expression " keep in repair" and the tribunal was not prepared to hold that that the landlord was required to attend the property every day, week or month of the lease to ascertain whether it was in repair. The obligation in the view of the tribunal was to put into proper repair and to remedy any disrepair when it came to the notice of the lessee.
- 28 Whilst the tribunal accepted that the covenant was a continuing obligation it had to be construed in a common sense way. . In this case the landlord had not received any complaint from the tenant living in the property prior to Mr Clark's report that the property was in

disrepair, no schedule of dilapidations had been served and the evidence suggested that whatever disrepair existed had been put right by the time the tribunal inspected the property. This is an old flat in a 1930s building and the tribunal would agree with the description that the present condition of the flat was serviceable and not in disrepair.

- 29 In the circumstances the tribunal was not prepared to hold that the respondent was in breach of clause 3(4) of the lease.

Alterations and Clause 3(11)

- 30 In order for the tribunal to find a breach of covenant 3(11) it was necessary for the landlord upon whom the burden of proof rests throughout to establish that the alterations were carried out during the currency of the lease (i.e. Since 1991)

- 31 It was not necessary as Ms Petrie had correctly submitted to establish that the breach was committed by the present lessee provided that the covenant in question touches and concerns the land and is not merely personal to the covenantor. . The authority for that proposition appears in Woodfall 16-131 where it states

“But in addition to the personal remedy against the assignee the landlord is usually entitled to the proprietary remedy of forfeiture for breach of covenant. In order to exercise this remedy the landlord needs only establish a breach of covenant or condition. It does not matter who has broken it “

- 32 The proposition is supported by **Wharfedale Linted -v- South London Building Co-operative Limited 1995 2EGLR 21** **Parry -v- Robinson Wyllie Ltd 1987 54 P and CR187** and dicta of **Nourse LJ in City of London Corporation -v- Fell 1993 QB 589**

- 33 Ms Petrie also submitted that Section 168(4) of the 2002 Act was wide enough to encompass a breach based on privity of estate which would give rise to a forfeiture and the tribunal agrees.

- 34 The issue therefore for the tribunal to determine is purely factual namely whether the landlord has established that a breach has occurred.

- 35 In the view of the tribunal there are two major obstacles to the landlord succeeding on this ground. First there is no lease plan showing the configuration of the property. It is stated by Mr Heimann that this was let as a one bedroom flat because all the flats were one bedroom except those at the end of the block.

- 36 Unfortunately Mr Heimann has no personal knowledge of this. He has been property manager for only seven months and prior to the inspection had not previously been to the flat. He relied solely upon

information given to him by Mr Berger the owner of the company and what was revealed on the file. According to him there was no record of anyone asking for permission to convert the property from a one bedroom to a two bedroom property

- 37 Secondly the tribunal is unable to accept the opinion contained in the late statement of Mr Clark delivered the day before the hearing and not supported by his presence at the hearing.
- 38 The tribunal is an expert tribunal and from its own inspection of the premises concluded that there was no possibility that the dated sanitary fittings would have been installed within the last ten years. It is impossible to state with any accuracy when they were installed but it is quite possible that the conversion was undertaken between twenty and thirty years ago.
- 39 The tribunal concludes therefore that the landlord cannot establish on the balance of probabilities that the conversion was undertaken after 1991 the date of the commencement of the lease
- 40 In addition even if it could be established that the conversion took place after 1991 three other flats in the building have been converted from one bedroom to two bedroom flats. so there is no evidence that if consent had been requested that it would have been refused
- 41 For all the above reasons the tribunal does not find that a breach of clause 3(11) of the lease has been established

Building Regulations Approval Clauses 3(9) and (10)

- 42 Ms Petrie in her submissions states that this is a subsidiary breach. Mr Clark makes reference to the size of the waste pipe, but there is no evidence from the local authority as to what the building regulations actually require and what regulations were in force at the time when the conversion was carried out. . If the local authority were to serve a notice then clearly Mrs Dalia would need to comply but there is no evidence that she has failed to comply with any building regulations and having regard to the tribunal's finding that this installation took place a considerable time ago and no issue has been raised by the local authority these allegations cannot be sustained

Conclusion

- 43 The tribunal is not persuaded that the landlord has established any breaches of covenant for which it would be justified in serving a notice under section 146 to forfeit the lease. The property is in reasonable and habitable condition and has been recently decorated. It appeared to the tribunal to be in significantly better condition than Flat 546A below in respect of which there is no complaint
- 44 The tribunal does not know whether the landlord proposes to add the costs of this application to the respondent's service charge. If so the

tribunal would be minded to make an order under Section 20C of the Landlord and Tenant Act 1985 in respect of such costs.

- 45 If the Applicant wishes to add the costs to the service charge it must indicate in writing to the tribunal by no later than 2nd September setting out written representations as to why such an order should not be made and the tribunal on receiving any response from the Respondent will consider the matter further. If no application is made by the date specified, an order under Section 20C will stand.

Signed Peter Leighton

Date 14th August 2014

APPENDIX

The landlord relied upon four alleged breaches of the lease based on the following clauses;

By clause 3(4) the lease provided

“From time to time and at all times during the said term well and substantially to repair cleanse maintain amend support uphold and keep the demised premises and any reconstruction thereof and all additions made to the demised premises and all chimneys , conduits and fixtures therein exclusively used or enjoyed by the owner or occupier for the time being thereof damage by any risk against the lessor maintains insurance except in so far as such insurance is not vitiated by the act or default of the lessee his servants licensees visitors or sub lessees. Provided that before repairing any conduits the lessee will give notice to the surveyor stating the nature of the defect or the damage thereto and in repairing the same will comply in all aspects with the requirements of all local and statutory bodies having jurisdiction in the matter

Clause 3(9) provides

“That the lessee will at his expense execute and do all such works as may be directed in pursuance of any statutory enactment or otherwise by any national or local or public authority or body to be executed or done at any time during the said term upon or in respect of the demised premises whether by the lessor or the lessee thereof.

By Clause 3(10) the lessee covenanted to *“obtain at his own expense all licences permissions and consents and execute and do all works and things and bear and pay all expenses required or imposed by any existing or future legislation in respect of any works carried out by the lessee to the demised premises or any part thereof or any user thereof during the said term and will pay the reasonable fees costs and charges of the respective solicitors and surveyors for the time being of the lessor in relation to any planning application inspection or approval or otherwise in connection therewith and*

will keep the lessor indemnified in respect of any breach or non observance thereof

By clause 3(11) the lessee covenanted :

“Not at any time during the said term without the licence in writing of the lessor which shall not be unreasonably withheld first obtained to make any alterations in or additions to the plan elevation or appearance of the demised premises or in any of the party walls or the principal or bearing walls or timbers or iron steel or other supports thereof not to alter connect to or extend or otherwise interfere with any heating or plumbing installation nor shall the lessee do or fail to do any act deed or thing which could adversely affect the support repair maintenance cleanliness or enjoyment of the flat in the said building .”