S25

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/00HN/LBC/2013/0025**
Property	:	**6 Clifton Heights, 26 Clifton Road, Bournemouth, Dorset BH6 3PA**
Applicant	:	**Clifton Heights Management Company Limited**
Representatives	:	**Mrs E Rangou & Mr J Colling (Directors)**
Respondents	:	**Mr Mark Evemy**
Representative	:	**Mr Paul Mertens of Counsel**
Type of Application	:	**Commonhold & Leasehold Reform Act 2002 Section 168 – Breach of Covenant**
Tribunal Members	:	**Judge M J Greenleaves - Chairman** **K M Lyons FRICS – Valuer & Surveyor**
Date and venue of Hearing	:	**11 July 2013** **Bournemouth County Court**
Date of Decision	:	**17 July 2013**

DECISION

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1. The Tribunal determined that for the purposes of Section 168 of the Commonhold and Leasehold Reform Act 2002 (the Act) a breach of covenant on the part of the Lessee, Mark Evemy (the Respondent), has occurred in respect of Flat 6, Clifton Heights, 26 Clifton Road, Bournemouth.

2. The covenant in respect of which breach has occurred is contained in a Lease ("the lease") dated 15 October 1998 and made between Beckway Limited (1) and Jason Dean McKnight (2) Clause 6 and the Third Schedule Part I Paragraph (n) as to structural alterations. That breach is continuing.

Reasons

Introduction.

3. This was an application by the Applicant named above made by application form dated 8 April 2013 alleging breach of covenant by the Respondent in respect of his lease relating, in summary, to making alterations without landlord's consent; use of the roof void for private purposes; refusal of entry for inspection; avoidance of the current insurance cover.

4. Without amending their application, the Applicant subsequently sought to allege additional features of covenant for determination by the Tribunal. The Tribunal decided it would be contrary to justice to allow the Applicant to add allegations at a later stage and accordingly that the application would be limited to those allegations set out in the application form as referred to above.

Inspection

5. The Tribunal inspected Clifton Heights from the exterior and, apart from one or 2 slipping tiles, the property appear to be in reasonable condition for its age and character. Neither of the Applicant's representatives wished to inspect the Respondent's flat, so that inspection took place in the presence of the Respondent.

6. The flat is laid out on 2 floors: the 1st floor and 2nd floor, connected by a staircase to the side of which is a substantial storage area in the roof void. On the west side of the kitchen and toilet shown on the lease plan, the Respondent has created a passageway and, through the wall, an opening into a shower/WC partly created from the old WC and partly new areas which had previously been within the roof void. A loft ladder installed by the Respondent leads into an attic void used for storage.

Hearing

7. On the same day the Tribunal held a hearing which was attended by the Applicants representatives, the Respondent and his Counsel. The Tribunal had previously had the benefit of the case papers from both parties which it took into account together with oral evidence and submissions made by or on behalf of the parties. In coming to its decisions, the Tribunal took those into account so far as material to its consideration.

8. Refusal of entry.

a. The Applicant's case was that they were having problems with the roof and that the Respondent had complained about damp and humidity. The Applicant had decided to instruct an independent surveyor to investigate in March 2013. They had sent the Respondent an email requesting entry into his flat for that surveyor on 4 March 2013. They said that the Respondent had apparently telephoned the surveyor to tell the surveyor that there was no point in the visit because accessible roof areas on the underside of the roof had been boarded over so that it was not possible to see the condition of the timbers etc on the underside of the roof slopes. The Applicant submits that by that telephone call to the surveyor, the Respondent refused entry to his flat contrary to the lease: clause 7, Third Schedule paragraph (I) which requires the lessee "to permit the lessor and persons authorised by the lessor to enter the flat at any reasonable time (prior notice having first been given) for the purpose of examining the state of repair and condition and user thereof or of taking an inventory of the lessor's fixtures and fittings therein".

b. The Applicant did not produce that email and there was no evidence of the length of notice given in that email. The Respondent accepted that he had received an email but could not remember any reminders nor did he know the length of notice given save that he only had a small period in which to find the surveyor's number and telephone him. He thought that the entry time proposed was 9am.

c. In the absence of the email itself, the Tribunal concluded that on the evidence there had been prior notice and that the time mentioned by the Respondent was reasonable. The question remaining was whether, by his phone call to the Applicant's surveyor in the terms referred to above, he thereby refused entry. The Tribunal had no evidence from the surveyor as to the words used. For the Respondent to say there was no point in an inspection does not necessarily mean that he was refusing entry although it seems to have been taken that way by the Applicant. It was open to the Applicant to repeat the request for entry. In oral evidence it was said that it did not do so, although in its written case, it referred to "ample notification and reminders". In the absence of any evidence to the contrary, the Tribunal was not satisfied that that phone call constituted refusal and accordingly found that the allegation of breach of covenant was not proved.

9. Alterations

a. The directors of the Applicant had not been into the Respondent's flat but believed that he had made alterations and extensions to it. The Respondent accepted that he had made alterations but that they were not structural; that in respect of those alterations he had received a Building Regulations Certificate of compliance dated 25 April 2013 which shows the extent of the works. The certificate shows the description of work as "removal of internal wall and insertion of steel beam. Extension of flat hallway at 2nd floor,

relocation of WC and installation of shower". The Respondent also said that insertion of the steel beam above the opening had not been necessary but it was done on his instructions although the wall is not load-bearing: he had had an engineer's report which was overwhelming in that respect and he too is a mechanical engineer.

b. The Respondent had also created the storage area in the roof void but the hatch in the ceiling had existed previously: he had not created it.

c. In respect of the store on the stairs, he said that was part of his flat because as a condition of his purchase he had required a deed of variation to include it in his lease. He referred the Tribunal to a letter from his solicitors to the seller's solicitors indicating that he was ready to exchange contracts having approved a draft deed of variation so that it was legally part of his flat. He said he had not carried out structural alterations to that area.

d. The Applicant's evidence was that they were unaware of any request for a deed of variation and the freehold title land registry entries which they have obtained earlier this year (and shown to the Tribunal) did not disclose any deed of variation.

e. The covenant in the lease is at clause 6 and Third Schedule paragraph (n) and is in the following terms: "not to make any structural alterations or additions to the flat or without the previous consent of the lessor to remove or alter any of the lessor's fixtures".

f. The allegation in this matter relates to making of structural alterations without consent. First, the Tribunal is satisfied that the true construction of that clause is that it should be read in two parts and that any question of previous consent relates only to the removal or alteration of any of the lessor's fixtures: it does not relate to the making of structural alterations or additions to the flat: that is an absolute covenant.

g. The questions then remain whether there have been alterations, whether any alterations are structural and whether they relate to the flat.

h. The lease defines the flat as "the flat situated on the first and second floors of the building and known as flat number 6 and shown edged blue on Plan B...". The plan shows the extent of the flat prior to alterations as being the parts on the first and second floors and the connecting staircase. It does not include the staircase store nor the additional area created by the Respondent on the second floor as referred to above. In relation to the attic above the second floor of the flat, the Tribunal noted paragraph 5 of the Fifth Schedule to the lease which says that "the beams and timbers of the ceiling of the top floor flat shall be deemed to be part of the roof repairable by the lessor. That plainly indicates that the upper limit of the flat is its ceiling. The Tribunal was satisfied therefore that the attic was not part of the flat.

i. Despite the Respondent's evidence concerning the deed of variation relating to the staircase store, the documentary evidence produced in the form of the land Registry title to the freehold does not show any such variation registered. In the absence of registration, it is not effective and the Tribunal concluded that the staircase store is not part of the flat.

j. Accordingly the Tribunal found that the extent of the flat to which the covenant concerning structural alterations relates is as shown on plan B to the lease, so excluding all the areas taken in by the Respondent for use with his flat. To the extent that the Respondent has carried work to those excluded areas, the work is not to his flat and any such work, structural or otherwise is not a breach of this covenant. Therefore the only relevant alteration in this case is the Respondent opening an entrance through the wall which then gives access on to his newly created shower and WC.

k. The next question is whether that constitutes a structural alteration. The Tribunal has not seen engineer's calculations but it does note the building certificate and that a steel beam was inserted above the opening. While the Respondent says that beam was unnecessary the Tribunal considered he would not have carried out that work and incurred that expense unless it had been required for some support of the structures above.

l. However, the Tribunal anyway does not consider the word "structural" as used in the covenant necessarily indicates a load-bearing structure but simply that it is intended to prevent any alteration to the flat itself involving, in particular, walls. Accordingly, the Tribunal found that the Respondent opening part of the wall of the flat constitutes a structural alteration and accordingly he is in breach of covenant in relation to it.

10. Insurance

a. The Applicant did not produce the buildings insurance policy and did not know whether the alterations carried out by the Respondent had affected the insurance cover. Specifically in its written statement of case the Applicant said "as the lessor has no detail of the structural alterations made by Mr Evemy, we are unable to determine whether the insurance cover of the building remains valid and would cover any potential fire hazard arising from these alterations".

b. The terms of the covenant are set out in the Third Schedule to the lease, paragraph 8: "not to do or suffer to be done any act or thing which may render void or voidable any policy of insurance in respect of the building or any part thereof or cause an increased premium to be payable in respect thereof". It should be noted that this does not relate just to activity related to the flat: it extends to the entire building.

c. The Applicant's case is essentially the Respondent's work may affect the buildings policy. While the Tribunal considered that any activity might conceivably affect the insurance, the Applicant has produced no evidence of

the terms of the policy. The Tribunal is satisfied that work carried out by the Respondent, whether to his flat or the additional areas he uses, was properly carried out and it was unlikely that it would affect the insurance policy. On the balance of the evidence there were insufficient grounds for the Tribunal to find that the work carried out by the Respondent, either to his flat all the additional areas, "may render void or voidable" the insurance. The Tribunal accordingly found there was no breach of covenant in this respect.

11. Use of the roof void

a. On the basis that the Tribunal found that the attic did not form part of the Respondent's flat, there is no covenant against the use of the attic.

The Tribunal made its decisions accordingly.

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. 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.

3. 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.

4. 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.

M J Greenleaves (Judge)
Chairman