564

First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/22UN/LBC/2013/0008-12**
Property	:	**26, 30, 34, 38 & 42 Romford Court, Fairlop Close, Clacton-on-Sea, Essex CO15 4UU**
Applicant	:	**Danesdale Land Ltd.**
Respondents	:	**Paul Andrew Clover and Tracey Ann Clover (26) Julie Lesley Ann Macrae (30) Mr. P E & Mrs. M W Morris (34) Paul James Townend (38) and Mr. J A & Mrs. I E Slark (42)**
Date of Applications	:	**16th December 2013**
Type of Applications	:	**For a determination that the Respondents are in breach of covenants or conditions in leases between the parties (Section 168(4) Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"))**
Tribunal	:	**Bruce Edgington (lawyer chair) David Brown FRICS**

DECISION

---

1. The Applicant applies to withdraw applications relating to 34 and 42 Romford Court and the Tribunal consents to these withdrawals.

2. The names of the remaining Respondents are varied as stated above as the Applicant provided incomplete and, in one case, wrong names.

3. The Tribunal's decision is that the remaining Respondents are not in breach of clause 3(1)(d) of the leases of the properties.

Reasons

Introduction

4. The Applicant has applied to the Tribunal for a determination that the Respondents are in breach of sub-clause 3(1)(d) of their long leases.

The application form states that sub-clause 3(1)(d) is, in each case, a lessee's covenant in the following terms:-

> *"To permit the Lessor and its Surveyor and Agents with or without workmen and others at all reasonable times to enter into and upon the demised premises or any part or parts thereof to view and examine the state and condition thereof...".*

5. Whilst this is a correct quotation, it is not complete. The remainder of the sub-clause says:-

> *"...and the Lessee will make good all defects decays and wants of repair of which notice in writing shall be given by the Lessor to the Lessee and for which the Lessee may be liable hereunder forthwith after giving notice of such and if the Lessee shall not within 30 days after the service of such notice commence and proceed diligently with such works as mentioned in the said notice it shall be lawful for the Lessor to enter upon the demised premises and execute and carry out the same and the costs thereof shall be a debt due from the Lessee to the Lessor and forthwith recoverable by action".*

6. The forms of application said that the Applicant was content for this matter to be dealt with on a consideration of the papers only. The Tribunal agreed and in the directions order made by the Tribunal chair on the 17th January 2014, it was said that the Tribunal considered that it could deal with this matter on paper with the necessary written representations from the parties on or after the 14th March 2014.

7. The parties were informed that they could request an oral hearing. No such request was received.

The Law

8. Section 168 of the 2002 Act introduced a requirement that before a landlord of a long lease could start the forfeiture process and serve a notice under Section 146 of the **Law of Property Act 1925,** he must first make *"...an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred".*

9. On 1st July 2013, the Leasehold Valuation Tribunal was subsumed into this Tribunal which took over that jurisdiction.

Discussion

10. The alleged facts are set out in statements from Wendy Garth and Paul Alexander Church FCA in behalf of the Applicant. Ms. Garth does not say what connection she has with the Applicant. She produces just the first page of letters posted to the lessees of flats 26, 30 and 38 dated 11th November 2013 which give notice that Mr. Church will be examining their respective flats on the 21st November 2013. It is said that this provides the lessees with 10 days' notice which is not, of course, the case. A letter sent by first class post is deemed to be delivered on the second working day after posting i.e. 13th November ion this case, which gives just 8 days' notice.

11. The letters say that this is just a routine examination to consider two things. The first reason has nothing to do with clause 3(1)(d) and the second reason is to "*view and examine the state and condition of individual flats*". There is nothing on the first page of the letter to suggest any urgency or any suspicion that the state and condition of the flat was causing any particular concern to the Applicant. By contrast, there is a specific assertion in paragraph 2 of Mr. Church's statement that there were suspicions of breaches in the terms of the leases "which were serious and could, at the very least put the insurance at risk". Why this was not set out in the letter is not explained. Unless there were major structural repairs (which would be the Applicant's responsibility in any event), it is difficult to see how a breach of the lessee's repairing obligations could put the insurance at risk.

12. Mr. Church is an accountant, not a surveyor. According to sub-clause 3(1)(d) of the leases, the inspection can only have been for the purpose of viewing the state and condition of the flat with a view to establishing wants of repair. If there were such wants of repair, the lessee would have been given an opportunity to put them right and then the Applicant landlord would have been able to gain access to effect repairs itself. Mr. Church would not appear to have the necessary qualifications or experience to enable him to either consider these matters or prepare what would amount to a Schedule of Dilapidations. He certainly does not say in his statement that this is what he was intending to do.

13. In any event, Mr. Church confirms that he turned up at the flats on the 21st November and could not gain access. His statement makes no mention of any suspicions about the individual flats or their condition.

14. The Respondents' cases can be summarised as follows:

Flat 26 – Mr. Clover has filed a statement saying that he acknowledges that the appointment to inspect was given and apologises that his subtenant did not allow access. He says that he owns 2 flats in this development. His other sub-tenant gave access but the one at this flat did not. He points out that the flat is now vacant.

Flat 30 – there are statements from Ms. Macrae herself and 2 people from her letting agents called The Letting Shop. That business arranges the sublets for Ms. Macrae and, indeed, the Applicant knew that Ms. Macrae's address was care of The Letting Shop. That business had moved and only became aware of the letter giving notice of the proposed inspection on the 19th November. They made enquiries and found that the sub-tenant would not allow access but would be moving out in about 2 months' time. They telephoned the Applicant and told them.

Flat 38 – Mr. Townend's statement says that he did not receive the letter of the 11th November. He says that he is a shift worker and started work at 4.00 am on the morning of Mr. Church's inspection. He says that he is more than happy to allow access and, quite

reasonably, asks for details of the alleged breaches because he is concerned about the possible risk to insurance.

Conclusions

15. It is clear that the right to inspect set out in sub-clause 3(1)(d) of the leases is restricted in its effect. It can only be used for the purpose of establishing the condition of the flat with a view to any breach in the repairing covenants being dealt with. The sub-clause must be interpreted as a whole.

16. The Tribunal infers from the evidence that, on balance, this was not the purpose of the inspections and therefore there is no breach in failing to allow access.

17. The Tribunal would only add the following in order to assist the parties. Firstly, the fact that a flat is sublet, does not mean that the long lessee can just blame the subtenant if an inspection is foiled. It is the long lessee who has the responsibility to allow the inspection and a key to the flat and an appropriate clause in the assured shorthold tenancy agreement (as there is with flat 30) are essential.

18. Secondly, if a landlord is worried about a serious breach in the repairing covenants which could lead to insurance being "at risk", then swift action should have been taken to either obtain injunctive relief or, as soon as the Applicant became aware that the Respondents were prepared to allow access, to arrange a new and urgent appointment to inspect. The fact that no action appears to have been taken apart from this application only casts further doubt on the Applicant's true intentions.

19. Thirdly, Ms. Garth, on behalf of the Applicant says that she does not see why she should have provided notice of these proceedings to mortgage companies. She has clearly not read the Tribunal's directions where the Applicant was told, in no uncertain terms, to notify the Tribunal if there were mortgagees. She failed to do so. They are clearly interested parties who would suffer substantial losses if the leases should be forfeited. If the buildings insurance is void or voidable, and the Applicant knows this, then there is probably a duty of care to the mortgagees. In view of the Tribunal's decision, this case has not been delayed further whilst specific notice was given to them. However, the Applicant would be wise to re-consider its position.

.....

Bruce Edgington
Regional Judge
14th March 2014