



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

Case Reference : LON/00AX/LBC/2014/0055

Property : Flat 21 Osiers Court, Steadfast Road, KT1 1PL

Applicant : Osiers Court Properties Ltd.

Representative : Carter Bells LLP

Respondent : Stephen Raymond Guest

Representative : None

Type of Application : Determination of an alleged breach of covenant

Tribunal Members : Judge Dickie
Mr I Thompson, FRICS
Mr A Ring

Date of Decision : 10 September 2014

DECISION

SUMMARY

The application is dismissed.

REASONS

1. The applicant freeholder seeks a determination, under subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act"), that the respondent leaseholder is in breach of various covenants contained in the lease. In particular the Applicant asserts that in breach of the terms of the lease the Respondent has failed to keep the property in repair, has not given notice of subletting and had not provided a copy of the tenancy agreement he has entered into.

2. The Applicant is the registered freeholder of premises registered (along with other premises) under title TGL 125523 known as Osiers Court. The subject premises are a self contained two bedroomed flat within a block of 30 flats and registered as title TGL 141776. The Applicant company is owned by the leaseholders of the residential flats. The Respondent is the leaseholder of the subject premises and also holds one share in OCPL.
3. The tribunal has considered the evidence produced by both parties, including the witness statement of Richard Stuart Kay, a Director of the Applicant company and that of the Respondent.
4. The lease for Flat 21 is dated 24 November 1997. Pursuant to Clause 3 of the lease the lessee covenants to observe and perform the obligations set out in the Eighth Schedule.

BREACH OF REPAIRING COVENANT

5. The lessee covenants in Paragraph 9 of Part A of the Eighth Schedule "To repair and keep the Demised Premises and all Service installation exclusively serving the same and every part thereof ... in good and substantial repair, order and condition at all times during the said term..."
6. The alleged breach of this covenant relates to a water leak that has been occurring for around six months. The Applicant states that this application has been brought "due to concerns about the Respondent not paying the Applicant's costs that will be incurred in serving formal notices, carrying out the work and then recovering the cost of the work from the Respondent, this application process is considered appropriate".
7. The Applicant's evidence of the source of the leak in question is disputed. Various items of correspondence have been produced by both parties. The Applicant relies on the evidence of Mr Izzee Misri, trading as M&M Property Development and Maintenance, who has provided plumbing and maintenance services to the landlord since 2008. He concludes in his report dated 28 May 2014 that the leak originates from Flat 21 and is caused by either a faulty central heating PRV or the overflow from the header tank of the Gledhill water heater. No photographs or plan accompany the report and Mr Misri does not appear to have any professional qualifications.
8. The Respondent relies on a report produced by Dyno Rod dated 11 April 2014 and a further report produced by Patrick Towers Plumbing dated 20 March 2014 both of which found no evidence of a defect within the flat. It appears that there has been a breakdown in relations between the company directors and Mr Guest.
9. The tribunal has not been asked to carry out an inspection, and nor would it be appropriate to do so in order to remedy shortcomings in the

Applicant's evidence. The tribunal has considered ordering that this matter be listed for an oral hearing, but considers it unlikely on the present evidence that its decision would be different.

10. The Applicant bears the burden of producing sufficient evidence to satisfy the tribunal on the balance of probabilities that the Respondent is in breach of covenant. The tribunal finds that the Applicant's witness does not have sufficient credibility as an expert witness, and the content of the report is insufficiently persuasive given that it is disputed by another experienced person.
11. The landlord brings this application and must produce persuasive evidence to support it. The landlord will have rights of access to the subject premises and, in the absence of cooperation from the Respondent in providing it, may take legal advice on the merits of an application to the County Court for an injunction requiring such access. A suitably qualified independent expert (such as a chartered surveyor), preferably jointly instructed by both parties, should be able to establish the cause of this ongoing leak. The tribunal will not act on inadequate evidence to find a breach of a lease, which is a serious matter which can lead to a liability for costs under the lease and in some cases to an application for forfeiture.

SUBLETTING

12. The lessee covenants in Paragraph 25(a) of Part A of the Eighth Schedule "not at any time during the said term to sublet the whole or any part of the Demised Premises save that an underletting of the whole of the Demised Premises for a term of three years or less on an assured shorthold tenancy or such other tenancy as precludes the undertenant from obtaining security of tenure..."
13. The Applicant's solicitors in their legal submissions rightly infer that such a breach cannot be established on the present evidence. The landlord must produce evidence to demonstrate that the premises have been sublet on terms which breach the lease. There is no such evidence before the tribunal.

NOTICE OF SUBLETTING

14. Paragraph 27 of Part A of Schedule 8 states "Within one month after the date of any and every assignment transfer mortgage charge discharge or mortgage or charge underlease or tenancy agreement (including any immediate or derivative underlease or tenancy agreement of the Demised Premises for any term) any assignment of such underlease or tenancy agreement or any grant of probate or letters of administration order of court of other matter disposing of or affecting the Demised Premises or the devolution of or transfer of title to the same to give or procure to be given to the Lessor notice in writing in duplicate of such disposition or devolution or transfer of title with full particulars thereof and also at the same time to produce or cause to

be produced to them a certified copy of the document effecting or (as the case may be) evidencing such disposition or other matter for retention by the Lessor and also to pay or cause to be paid at the same time to the Lessor and also to pay or cause to be paid at the time of registration in each case a reasonable fee together with Value Added Tax thereon in respect of any such notice”.

15. It is the Applicant's case that this paragraph requires the Respondent to supply to the landlord a certified copy of any tenancy agreement for the premises. The Applicant's solicitors have not made submissions on the proper interpretation of Paragraph 27. The covenant begins by apparently imposing requirements arising “within one month of the date of any and every tenancy agreement of the Demised Premises for any term”. However, if the intention of the paragraph was to impose an obligation on the lessee in those circumstances to provide the landlord with notice and/or a copy of the tenancy agreement in those circumstances, its drafting is defective and to the extent that it is ambiguous must be interpreted against the grantor.
16. The covenant is to give notice in writing to the Lessor of “such disposition or devolution or transfer of title”. The granting of a subtenancy does not amount to any of such acts, and therefore there is no matter of which the lease requires the Lessee to give the landlord notice.
17. Furthermore, the requirement to provide a certified copy of a document must be complied with “at the same time”, and is therefore understood to be dependent on there being an obligation to give notice (which the tribunal finds there is not). In any event, it is not clear that a tenancy agreement is a document evidencing “such disposition or other matter”, given the use of “other matter” earlier in the provision as distinct from such a tenancy agreement (even allowing for the use of “of” instead of “or” as an obvious error). On the basis of the legal argument advanced, which does not deal with the complexities of interpreting this curiously drafted paragraph, the tribunal finds that the Applicant has failed to discharge the burden of showing that the Respondent bears or has breached the asserted duty.

Name: F Dickie

Date: 10 September 2014