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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOBA/LBC/2014/0071**
Property	:	**Flat 1, 14 Lingfield Road, Wimbledon, London, SW19 4QA**
Applicant	:	**Lingfield Road Maintenance Limited**
Representative	:	**Mr Anthony Main, Director and Secretary of the Applicant**
Respondents	:	**Mr Stephen Cahill and Mrs Candida Cahill**
Representative	:	**Peacock & Co, Solicitors**
Type of Application	:	**Declaration as to a breach of covenant – section 168(4) Commonhold and Leasehold Reform Act 2002**
Tribunal Members	:	**Mr Robert Latham** **Ms Sara Hargreaves**
Date and venue of Paper Determination	:	17 November 2014 at 10 Alfred Place, London WC1E 7LR
Date of Decision	:	17 November 2014

DECISION

(i) The Tribunal determines that for the purposes of section 168(4) of the Commonhold and Leasehold Reform Act 2009, a breach of the lease has occurred in that the Respondents have permitted a flue pipe for a condensing boiler to be attached to the front elevation of the house without

the previous written consent of the landlord as required by Clause 3(K) of the lease.

(ii) The Tribunal is not satisfied on the balance of probabilities that the said flue pipe has caused a nuisance as prohibited by Clause 3(R) of the lease.

The Application

1. By an application, dated 26 August 2014, the Applicant seeks a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2009 ("the Act") that the Respondent tenants are in breach of two clauses of their lease of Flat 1, 14 Lingfield Road, Wimbledon, SW19 4QA ("Flat 1") by reason of a flue pipe which has been erected for a new

2. On 12 September 2014, the Tribunal gave directions. The Directions Judge was satisfied that this matter should be determined on the papers.

3. Pursuant to these directions, the Applicant has provided the Tribunal with up to date Office Company Entries of both the freehold and leasehold titles to the property. On 14 September 1984, Lingfield Road Maintenance Ltd was registered as owner of the freehold interest (p.1.36). Mr Anthony Mann issued this application as joint lessee of Flat 2 and as Secretary of the Respondent Company. The Tribunal is satisfied that Mr Mann has no standing to bring the claim as tenant of Flat 2, the ground floor flat directly above the garden flat which is owned by the Respondent. Any claim would be in nuisance and would be a matter for the County Court. We are therefore treating this as an application by Lingfield Road Maintenance Limited.

4. On 11 September 1985, the Respondents were registered as leasehold owners of Flat 1 (1.34). The Office Copy Entries record that the property is charged to Barclays Bank PLC. On 23 September, the Tribunal notified the mortgagees of the application.

5. On 3 October 2014, the Applicant filed their statement of case and supporting documents. On 22 October, the Respondents filed their statement in reply including a lengthy exchange of correspondence. The Applicant has filed a Bundle of Documents.

The Law

6. Section 168 of the Act provides as follows:

(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 (c. 20) (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.

7. Strictly, all this Tribunal is asked to determine is whether the Respondents have breached a term of their lease. It is not for this Tribunal to consider whether another Court might grant relief from forfeiture.

The Lease

8. The lease is dated 3 March 1978. The lessee's covenants are set out in Clause 3. There are two specific covenants that we are required to consider:

(i) Clause 3 (K): "Not without the previous written consent of the Managers and the Lessors and then only upon payment of their proper fees and expenses so incurred including those of the their professional and other advisers to alter the construction design or elevation or architectural appearances of the demised premises and not to make any structural alterations to the demised premises nor to remove any partitions doors or cupboards or other fixtures therein and not to remove cut maim or injure or permit to be removed cut maimed or injured any of the floors walls or timbers thereof."

(ii) Clause 3(R): "Not to do or permit or suffer anything in or upon the demised premises or any part thereof which may at ant time be or become a nuisance or annoyance or cause of damage or disturbance to the Lessors or to any tenant or occupier of any apartment in the building or of any property in the neighbourhood or injurious or detrimental to the reputation of the building as private residential apartments". A number of specific examples of prohibited behaviour are then specified.

Background

9. 14 Lingfield Road is a substantial Victorian semi-detached house in a conservation area. There are four flats: Flat 1 is on the lower ground floor; Flat 2 on the first floor and Flats 3 and 4 on the first and second floors. Mr Cahill owns a share in the freehold title and is a director of the Applicant Company. He resides in South Africa.

10. Mr Cahill complains that he was not consulted as either shareholder or director before this application was issued. He suggested that the application is fatally flawed. Mr Main responds that the Articles of Association do not require notice of any meetings to be given to any director for the time being absent from the UK. Mr Cahill seems to fall within this category. In the absence of full submissions, we have proceeded on the basis that the application is properly made by the Applicant landlord.

11. On 6 March 2014, Mr Cahill installed a new boiler and flue. The old gas boiler had failed a safety check. Mr Cahill alerted Mr Main to the fact that he would be replacing the boiler. The new boiler and flue were installed by Registered Gas Services Limited ("RGS"). They seem to have been competent and qualified to execute this work.

12. During the installation of the new condensing boiler, RGS noted that the current flue did not comply with either Gas Safety or the Baxi Manufacturing Guidelines. It was therefore necessary to raise the flue outlet termination pipe. The works did not require any structural changes to the vent. The flue outlet was already in situ some 70 cm below where it currently stands.

13. The vent, as initially installed extended about one foot above the render which runs along the front of the property at ground floor level (see 3.14.11A). The flue has subsequently been shortened so that it runs a few inches below the level of the render (see 2.11).

14. The most recent photograph of the flue suggests that the angle of the flue exit pipe had been repositioned so that the flue exhaust flows towards the front access way. In addition, the end pipe has been reversed so that the exhaust pipe exit upwards rather than dissipated by the cap on the end of the pipe. The installers, RSG Installers, have advised that this could not have been reposition by the wind.

15. Two days after the flue was installed, Mrs Main complained about the installation of the flue (at 3.14.11). She complained that it was next to the front door of the property. She also complained that it would be blocked once a wisteria comes into leaf.

16. A number of further complaints have been raised:

(a) The fitting fails to comply with building regulations. RGS has confirmed that the boiler and flue complies with all building regulations (3.14.56).

(b) There has been a breach of planning regulations. A Conservation Officer has visited and confirmed that there would be no breach were the flue to be lowered. That has now been done. The Conservation Officer has also approved in principle, an alternative location on the side wall return as long as the flue is flush with the white render. Her preferred position is the current location where the flue is hidden by the plant and is less visible, even in winter (see 3.14.27).

(c) The flue does not comply with the "Guide to the Condensing Boiler Installation Assessment Procedure for Dwellings" issued by the ODPM. Mr Main complains that the flue should not be on the front elevation and that there is a low level discharge right next to the entrance door. Mr Cahill responds that this is no more than a guide and that some flue positions are excluded from the assessment. The boiler was installed by a competent fitter. RGS have confirmed that the flue is compliant with both Gas Safety Regulations and with Building Regulations (3.14.38). RGS have also confirmed that it complies with the Guide. They add that they were unable to take the flue to 2.1m due to the requirements of the local authority (3.14.56).

17. Mr Main first raised the issue of the failure to seek consent on 4 August (see 3.14.45). The Tribunal do not believe that this issue would have been raised but for his concern about the proximity of the flue to his flat.

Our Determination

18. The Tribunal must first consider whether the Lessees were required to obtain the prior written consent of the Lessors for the installation of the flu. We accept the principle that an alteration is only effected when the construction or fabric of the building is altered. The mere installation of something new such as a telephone or additional electric wiring would not ordinarily be a breach of covenant not to alter the demised premises (A[3403] of Hill & Redman's Law of Landlord and Tenant). We accept that no structural alterations have been made in this case.

19. However, the Tribunal must have regard to the terms of this lease. Clause 3(K) extends to alterations to the "design ... or architectural appearance of the demised premises". We are satisfied that the installation of the flue would alter "the "design" and/or "the architectural appearance" of the building. However, the Tribunal does not consider this breach to be a serious one. We note that the Conservation Officer would prefer this flue to be in the current position rather than to the side of the property. Building Regulations would require any condensation boiler to have such a flue.

20. Secondly, the Tribunal must consider the issue of nuisance. Mr Main also complains that the flue has caused a nuisance because of the low level discharge of vapour right next to the entrance door. Mr Main asserts that the nuisance is "real and substantial" particularly in the winter months when vapours can collect in the porch. He also suggests that it has a detrimental influence on the value of Flat 2.

21. Mr Cahill contends that the Applicant has failed to produce any adequate evidence of nuisance. He has made inquiries from the installers, RGS, who have confirmed that the flue should not cause enough condensation to make the steps slippery (3.14.64). Mr Davidson, the managing director, states that if necessary, it would be possible to twist the top of the flue slightly away from the direction of the steps. Mr Cahill also notes that they have yet to experience winter mornings since the installation of the new boiler.

22. The Tribunal is not satisfied that any nuisance has been established. In particular, it appears that this staircase is also used by the occupants of Flats 3 and 4. Neither of these tenants has made any complaint. Mr Main has brought this application as Secretary of the Applicant Company. We suspect his primary concern is the flue below his ground floor flat. There has always been a flue in this area, albeit that Building Regulations now require it to be at a higher level. We noted the considerable steps that Mr Cahill has taken to respond to each and every complaint raised by Mr Main. These are the actions of someone who responds positively to concerns raised by a neighbour.

23. The Tribunal conclude that the Respondents have breached the covenant in Clause 3(K) of their lease a technical and minor way on the facts of this particular case.

Robert Latham

Tribunal Judge

17 November 2014