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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/22UH/LBC/2015/0003**
Property	:	**1A Station Approach,** **Theydon Bois,** **Essex CM16 7ES**
Applicant **Represented by**	:	**Malcolm Kenrick Smylie** **Phillippa Daniels of counsel (Foskett Marr Gadsby & Head LLP)**
Respondent **Represented by**	:	**Lee Anthony Bye, Terence Higgins and Mr. B.T. Higgins** **Seb Oram of counsel (Deal Wilson LLP)**
Date of Application	:	**10th February 2015**
Type of Application	:	**For a determination that a breach has occurred in a covenant or condition in a lease between the parties (Section 168(4) Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"))**
Tribunal	:	**Bruce Edgington (lawyer chair)** **Evelyn Flint DMS FRICS IRRV** **Cheryl St. Clair MBE BA**
Date and Venue for Hearing	:	**7th May 2015 at Best Western The Bell Hotel, High Road, Bell Common, Epping, Essex CM16 4DG**

DECISION

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1. The Tribunal's decision is that the first Respondent, Lee Anthony Bye, is the tenant of the property and that during his ownership of the leasehold interest, breaches have occurred of sub-clauses 2(2), 2(11), and 2(18) of the lease of the property dated 3rd June 1983 and made between Evelyn Holland and Eileen Patricia Wescott of the one part and Mary Isobel Trussell of the other part.

2. In so far as the application relates to Terence Higgins and Mr. B.T. Higgins, it is hereby dismissed as they are not tenants of the property and cannot therefore be in breach of any of the contractual lease terms.

Reasons

Introduction

3. The Applicant has applied to the Tribunal for a determination that the Respondents are in breach of those terms of the above long lease. It is also alleged that sub-clause 2(14) has been breached.

4. Sub-clause 2(2) says that the lessee must pay all rates, taxes, charge etc. for the property. Sub-clause 2(11) says that the lessee shall not "*make or suffer to be made any additions or alterations to the buildings on the demised premises without the written consent of the lessor*" or make any such additions or alterations without obtaining such planning and/or building regulation approval as may be needed.

5. Sub-clause 2(14) requires the lessee to pay two thirds of anything the lessor spends on insuring the property and 2(18) requires the lessee to give notice of any charge on the property within 30 days thereof. There is also a fee of £10 plus VAT to pay for each such registration.

6. According to copies of the entries at the Land Registry as compared on the 26th March 2015 at pages 341 and 346 respectively in the bundle of documents produced for the Tribunal, the Applicant is the freehold reversioner of the property and the Respondent Lee Anthony Bye has been the owner since 19th December 2001 of the long leasehold title which is for a term of 99 years from the 29th March 1983 at an annual peppercorn rent.

The Law

7. 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*".

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

Inspection

9. The members of the Tribunal inspected the property on a bright and reasonably warm spring morning. It consists of the 1st and 2nd floors of a faux mediaeval semi-detached property giving the impression of being of wood framed construction with brick inserts. In fact it is of modern brick/block construction under a tiled roof with uPVC double glazed windows. The ground floor is a shop but there is a separate entrance to the property at ground floor level. There is a fairly large chimney stack.

10. The stairs from the ground floor lead to a landing and a door leads to what appeared to be an open plan kitchen/reception room with another reception room off. The property was not furnished. It appeared that the chimney stack came down into the middle of these reception areas. The evidence showed that in 2013 work was undertaken to this structure when 2 fireplaces were turned into one. The evidence also reveals that a stud wall was taken out and another inserted between the kitchen and the landing. Finally, of relevance, it was asserted by the Applicant that another wall between the fire place and the front wall had been removed but this was denied.

11. The Tribunal was then asked to see 2nd floor which consists of 2 reasonable sized bedrooms and a bathroom. There was some discussion about whether the chimney stack was properly supported. The parties were then given the opportunity to speak to their respective counsel and were then asked whether there was anything else to inspect. There was nothing mentioned and the tribunal members then went to the hearing room nearby.

12. Regrettably, the Applicant did say at the hearing that he was concerned about the removal of the walls in the reception room adjoining the kitchen. He had not asked the tribunal members particularly to look at this at the inspection.

The Hearing

13. The hearing was attended by counsel for the parties, the Applicant, Terence Higgins, Colin Bye and others who were not identified. The Tribunal chair asked counsel to consider the issues. He said that it appeared reasonably clear from the papers and what had been said at the inspection that the main issue was the structural integrity of the building following the works undertaken in 2013. That was agreed. Thus, the following matters were agreed or accepted:-

- As it now appeared to be clear that Terence Higgins and Mr. B.T. Higgins were not parties to the lease, they should be removed as Respondents
- The money owed to local authority in council tax has been repaid
- The Applicant had asked Lee Anthony Bye to contribute to the insurance premium but had not served the statutory form requesting payment of a service charge and accordingly, the money was not, as yet, owed and
- The charge referred to as being in breach of sub-clause 2(18) was the registration of the charging order obtained in the county court. It was agreed that the money supporting the charging order had been paid but the charge had not been removed.

14. There was no evidence called as such and counsel made their respective submissions clearly and concisely.

Discussion

15. The hearing bundle consists of statements from the Applicant, from the first Respondent, Lee Anthony Bye and his brother, Colin Bye who is said to represent him as he lives in Spain. It is clear that there has been previous litigation over this property including a previous application to this Tribunal which was withdrawn subject to an agreement dated 25th June 2014.

16. The Respondent Lee Anthony Bye had previously agreed (a) that the property would be vacated, (b) that he would supply full details of any work undertaken at the property, (c) that he would supply evidence of payment of rates to Harlow Council and (d) that he would contribute to insurance and water rates.

17. As far as any work to the property is concerned, Mr. Colin Bye sets out a list of works most of which involve replacing things which were already

there such as a kitchen, bathroom and gas boiler. There was some general maintenance and work described as "*knocking two fire places into one by the removal of a non-structural dividing wall*". He then refers to Mr. Higgins and states that he "*did remove a stud wall made of plasterboard and breeze block in or around March 2013 which was located in the hallway of the property to provide more space*". The only documentary evidence of the work is said to be a Regularisation Certificate from Harlow Council, a letter dated 15th May 2014 from McCarthy Electrical Services Ltd., a Gas Installation/Safety Record Certificate and architects drawings. It is said that these have been produced to the Applicant.

18. As far as the charge against the property is concerned, Mr. Oram did seek to persuade the Tribunal that the charge to support the charging order was not a charge which breached the terms of the lease because it did not result in a devolution of the property title. The wording of the relevant clause is that within 30 days "*...after any assignment transfer underlease mortgage or charge of the demised premises or of any death or other event resulting in a devolution of the demised premises or any part thereof to give notice in writing thereof to the lessor...*". A modest fee must also be given to the Applicant.

19. Mr. Oram's interpretation really depends on this wording. His view was that the key words are "*or other event resulting in a devolution*" which were intended to apply to all the words beforehand to include "*charge*". The Tribunal disagrees. The key words are "*or of any death or other event resulting in a devolution*". In other words, 'devolution' in this context only relates to a death or other event. The prior words are disjunctive and a simple charge to support a charging order is included.

20. In the case of **Forest House Estates Ltd. v Al-Harthi** [2013] UKUT 0479, LRX/148/2012, Peter McCrea FRICS considered the matters which should be determined by this Tribunal in cases such as this where a breach had been remedied before the hearing. He said, at paragraph 30,:-

> "*The question of whether a breach had been remedied by the time of the LVT's inspection was not an issue for determination by the LVT. Questions relating to remedy, damages for breach and forfeiture are matters for the court. The LVT was entitled to record the fact that the breach had been remedied by the time of its inspection, but that finding was peripheral to its main task under section 168(4) of the 2002 Act. The LVT should have made an explicit determination that there had been a breach of covenant, notwithstanding that the breach had subsequently been remedied at the time of the LVT's inspection*"

Conclusions

21. There is clear evidence before the Tribunal that council tax was not paid on time and that was a breach of covenant. Such breach has been remedied. Despite the assertions made by counsel for Mr. Bye, there was an additional breach of covenant in not registering the subsequent charge

with the Applicant. Having said that, the council tax has apparently been paid and someone could and should insist on the charge being removed.

22. The alleged breach of covenant in respect of the failure to contribute to the cost of insurance or water rates has not been established as no proper demand for payment has been made which complies with section 21B of the **Landlord and Tenant Act 1985** or section 47 of the **Landlord and Tenant Act 1987**.

23. This just leaves the alleged breach relating to the alterations to the demised premises without consent. The alterations have been admitted by Colin Bye and that admission has been accepted by Lee Anthony Bye. Neither seek to establish that permission was sought and the breach of the terms of the lease were accepted at the hearing.

The Future

24. It is clear to this Tribunal that this dispute has become completely out of hand. No doubt the parties will be paying large sums of money to their respective lawyers to resolve a case which this Tribunal thinks can be resolved with little extra cost.

25. The Applicant wants to be sure that the works undertaken to the property to remove wall(s) and those having any connection with the chimney stack have not jeopardised its structure. He said at the hearing that if he can be satisfied about this, he would grant retrospective permission for those works. The other works, such as the replacement of the bathroom and the kitchen and the re-wiring etc. can have done nothing but replace old fixtures and fittings which can only have enhanced the property.

26. There may well have been invitations for the Applicant to inspect the works with his surveyor, but the Tribunal has some sympathy with his view that, for example, the installation of metal beams can only be checked after further and intrusive investigation. Apart from anything else, there are commercial premises below and a collapse of the structure could result in a very large action for damages which may be rejected by insurers.

27. What really needs to happen, as was said by the Tribunal at the hearing, is that the builder who undertook the work needs to look out the invoices for the purchase of the materials and then attend at the property with the Applicant's structural engineer. He or she will then be able to see them and ask questions about what was done and undertake such tests by borehole or otherwise as are necessary. Whether the chimney has been cut down or changed from the 2nd floor to the 1st floor can be ascertained by the simple use of a tape measure.

28. The respondent sought to argue that the Regularization Certificate at page 334 was sufficient evidence that the building was structurally sound, but neither the certificate, the application for same, nor the accompanying paperwork in the bundle, makes any reference to steel beams inserted somewhere into the chimney breast

29. Because this problem was caused by Mr. Bye's licensee, he is responsible and would have to meet the cost of this investigation initially. He may be able to recover from Mr. Higgins. If it is undertaken speedily and with goodwill on both sides, it should not be too expensive.

30. Goodwill does not seem to have been in abundance so far. As an example, it may be that no proper demand has been submitted for the insurance premium. However, it is always open to a tenant to waive strict compliance and to just pay as a gesture of goodwill to, as it were, 'oil the wheels'.

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Bruce Edgington
Regional Judge
8th May 2015