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First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/26UK/LBC/2016/0002**
Property	:	**First floor flat, 207 Vicarage Road, Watford, WD18 0HA**
Applicant	:	**Valerie Howes**
Respondents	:	**Mohammed Idris Adli and Zahida Bibi Adli**
Date of Application	:	**17th February 2016**
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)** **David Brown FRICS**

DECISION

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1. The application is dismissed as being an abuse of process.

2. No order for payment of costs or fees.

Reasons

Introduction

3. The Applicant has applied to the Tribunal for a determination that the Respondents are in breach of Clause 2(h) of a long lease i.e a requirement that the lessees shall allow access to the flat to the lessor and her surveyor or agent to view its condition.

4. The application form gave no indication of the extensive and complex history of litigation between the parties. The reasons for the application are said to be "*the insulation contractors will be engaged by the respondents to commence work as soon as possible after the 22nd February 2016, but will not allow my surveyor to examine the flooring within their property or the joists*". It is said that a letter will follow the application which was clearly intended to say that further information would be provided.

5. In making the application, the Applicant said that she considered that it could be determined on a consideration of the papers only without an oral hearing. As the issue for determination seemed fairly straightforward the Tribunal, it agreed to this and in its directions order dated 19th February 2016 it was said that the determination would not be before 14th April 2016. The parties were told that if any of them wanted an oral hearing, then this would be arranged. No request for a hearing was received.

6. The hearing bundle arrived but it did not contain the Respondent's documents which were subsequently received from their solicitors in a separate bundle. There have also been further representations and the end result of this activity is that the decision has been delayed.

The Lease

7. The Lease is for a term of 99 years from the 27th June 1984. The Applicant is one of the original landlords and she lives in the ground floor flat. The Respondents acquired the long leasehold interest in the first floor flat in 2004. They admit that they bought it as a 'buy to let' flat from the outset and there have been various subtenants occupying over the years.

8. The terms of the lease are largely unremarkable. The demise is of "*ALL THAT First Floor Flat situate at 207 Vicarage Road Watford in the County of Hertford TOGETHER with the staircase giving access thereto and the floor of the said flat and the roof space thereof*".

9. Clause 2(g) requires the lessee to pay one half of the cost of maintaining the structure of the building i.e. "*...the main structure foundations joists roof gutters walls and rainwater pipes of the building of which the demised premises form part...*". Thus it is clear that the intention of the parties was for the joists to form part of the structure and for the floor above the joists to be part of the demise.

10. Clause 2(h) is part of the lessee's covenants and says that they must "*...permit the Lessor and his surveyor or agent with or without workmen or others at all reasonable times during the daytime during the said term to enter into and upon the demised premises or any part thereof to view the condition thereof...*". This includes the floor but not the joists underneath.

The Law

11. 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 or she 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*".

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

Inspection

13. The members of the Tribunal did not inspect the property in view of the nature of the allegation but indicated in the directions order referred to

above that it would consider any request to inspect on its merits. No request was made for an inspection.

Prior and Ongoing Litigation

14. The bundles provided for the Tribunal included various court orders and a sealed copy of the transcript of an 18 page judgment given by District Judge Rhodes on the 1st May 2013 following a 3 day hearing. In essence, many allegations and cross allegations of breaches of the terms of the lease were made by both parties. They were both represented by counsel. The judge made findings on the various allegations. The findings in favour of the Applicant arose from various incidences of water ingress from the first floor flat into the ground floor flat and an award of damages was subsequently made in the total sum of £8,707.03. The court order dated 3rd July 2014 setting this out is in the bundle. The Respondents' counterclaim was dismissed and they were ordered to pay the Applicant's costs.

15. The litigation was complicated by the fact that one of the complaints made by the Applicant was that unreasonable noise was emanating from the first floor flat. The Judge says at paragraph 10 of his judgment "*I cannot conclude from the evidence that the Defendants are in breach of their covenant*". The Defendants are the Respondents to this application. There is some discussion about soundproofing works which the parties appear to have agreed should be undertaken although there is still an argument about who pays. The Judge goes on to say "*In the circumstances I can find no breach of the covenant quoted above then the solution must be that this work be carried out and that Mrs. Howes and Mr. and Mrs. Adli contribute equally towards the cost*". This does not quite make grammatical sense but the conclusion is clear.

16. The Judge then asks counsel to draw the order and such order includes the words "*Claimant and Defendant shall jointly instruct Instacoutics to carry out the work for the 208 system as detailed in their quotation dated 24th November 2011, with the Claimant and the Defendant each paying half of the cost of the works*". This was the system discussed in the main judgment.

17. The litigation has continued and an interlocutory application came before District Judge Sethi at Watford County Court on the 1st February 2016 as a result of which the following order was made "*The Claimant and the Defendants are each to pay £2,000.00 to the solicitors for the Defendants by 4pm on 15 February 2016. The solicitors are to hold such monies solely for the purpose of allowing the Defendants to instruct Instacoustics Ltd. The solicitors have the authority to pay up to £3,000.00 on account to Instacoustics Ltd. That payment must be made by 4pm on 22 February 2016*". Both parties were represented by counsel.

Requests for Facilities to Inspect

18. The problem which is worrying the Applicant is that a letter enclosing quotations she produces from InstaCoustics Ltd. dated 17th October 2012 sets out the weights of the 2 alternative sound proofing systems and they say, in effect, that Mrs. Howes needs to ensure that the structure can take the weight and that such work "*will need to be ascertained by a qualified engineer or surveyor and is outside our scope of operations*".

19. A copy of this letter was received by the Respondents' solicitors in January 2013. There is also a letter from the Applicant's solicitors to the Respondent's solicitors date 18th January 2013 saying that the responsibility for the inspection of the flooring rests with the Respondents.

20. In their response dated 30th January 2013, the Respondents' solicitors point out that the property is empty to enable works to be carried out, that their clients accept that the structure needs to be checked but that the floor joists are the Applicant's responsibility. There is no refusal to allow access to look at the floor.

21. The Applicant then produces a copy of a letter from her solicitors to the Respondents' solicitors dated 21st August 2014 wherein they simply point out that the flooring of the first floor flat has not yet been inspected by a structural engineer. There is no specific request made. A subsequent e-mail challenges whether an inspection is actually needed and there is then a letter from the Applicant's solicitors dated 23rd March 2015 which simply points out that the inspection is needed because part of the other 'evidence' in the litigation is that floor boards in the first floor flat are deflecting which may be due to dry or wet rot and this needs to be investigated in case it affects the ability of the structure to take the weight.

22. An e-mail from the structural engineer involved in the litigation on behalf of the Applicant is in the bundle and this confirms that an inspection of the property needs to be put in hand to ensure that the joists are up to the task of accepting the weight of the sound proofing proposed.

23. There is some subsequent correspondence in e-mails between the solicitors which discusses how the inspection could be undertaken with the Applicant setting out conditions as to who pays for the inspections should damage to the joists be discovered, which is not accepted. Finally, there is an e-mail from the Applicant's solicitors with a hand written date of the 11th June 2015 which says that the Applicant "*will also be seeking counsel's advice on this issue and your client's failure to allow access for inspection of the structure between the flats*". There is no reference as to when or by what means access was requested or refused.

Discussion

24. 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 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"

25. Thus it is clear that the only issue for this Tribunal to determine is whether access to inspect the floor has been refused. In considering this the Tribunal has looked at the evidence to support a request for an inspection as well as evidence of any refusal. It has to look at the obvious point that the demise only includes the floor, not the joists below. This is relevant because the only inference to be drawn from the evidence from InstaCoustic Ltd. and from the structural engineer is that the area which must be looked at closely is that below the floor itself i.e. the joists. It is not open to the Applicant under the terms of the lease to insist that the floor is taken up to inspect the joists. That would be a matter for the court to give a mandatory injunction if the Judge thought that such an order was appropriate.

Conclusions

26. For the following reasons the application is dismissed as being an abuse of process:-

- The clause in question does not allow the Applicant to insist upon the floor being taken up to inspect the joists
- The Applicant has not produced any clear evidence to show that a specific, unconditional request for access has been made and/or refused. Clause 2(h) does not provide for the lessor to impose conditions on a request for access.
- The law says that section 168 is to be used in cases where the alleged breach of covenant is to support a notice under section 146 of the **Law of Property Act 1925.** There is no suggestion in the Applicant's representations that she is contemplating service of such a notice.
- The method of achieving what she wants to be achieved is clear i.e. sit down with the Respondents, agree a date and time for the inspection by a structural engineer - who should provide a report - with the cost being shared.
- If that fails, the Applicant must seek the court's assistance. She cannot use this Tribunal as an appeal process against the court's determination on this very issue i.e. the process by which the sound proofing is to be installed.

27. As far as costs are concerned, the Applicant has asked for an order that her expenses in respect of this application be reimbursed by the Respondents. That order is not thought to be in the interests of justice as the application is misconceived.

28. It is also worth saying that a statement has been filed at the last minute from the Respondents dated 18th April 2016. Quite why no statement was filed beforehand is not mentioned. This statement concludes with the words *"I have now delayed the sound proofing works for a short period to allow the Applicant and her surveyor to inspect, if they so wish"*.

29. It is a great pity that this was not conveyed to the Applicant immediately the Respondents knew of this application. It may have enabled the application to be withdrawn.

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Bruce Edgington
Regional Judge
22nd April 2016

ANNEX - RIGHTS OF APPEAL

i. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to

the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

iii. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.