FIRST-TIER TRIBUNAL PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference :	CHI/18UE/LBC/2020/0009
Property :	108 Barton Road, Spring Park Estate, Barnstaple EX32 8NG
Applicant :	Sarum Properties Limited (the Landlord)
Representative:	Remus Management Limited
Respondent:	Caroline Patricia Williams (the Tenant)
Representative:	---
Types of Application:	Section 168(4) Commonhold and Leasehold Reform Act 2002 – alleged breaches of covenant
Tribunal Member:	Judge P J Barber

Date of Decision: 16 October 2020

DECISION

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Decision

(1) The Tribunal determines in accordance with the provisions of Section 168(4) of the Commonhold and Leasehold Reform Act 2002, that breaches of covenant have occurred, being a breach by the Respondent tenant of the obligations imposed pursuant to Clause 3(i)(c) and 4(v) of the Lease dated 25 August 1983.

(2) The Tribunal makes no order for costs.

Reasons

INTRODUCTION

1. The application received by the Tribunal was dated 2 March 2020 and was for determination of an alleged breach of covenant in regard to the erection of a "cat cage" in the rear garden of the property, and being attached to the main structure. Directions were issued variously on 28 May 2020, 1 June 2020 and 20 August 2020, providing for the matter to be determined by way of a paper determination, rather than by an oral hearing, unless a party objected; no such objections have been made and accordingly, the matter is being determined on the papers.
2. The Applicant has provided an electronic bundle of documents to the Tribunal which variously included copies of the application, the directions, statement of fact, Respondent`s statement of truth, the Applicant`s response, the Lease, Land Registry title plan, certain correspondence and photographs. By an application dated 17 August 2020, the Applicant alleged that a breach of the directions had occurred, due to no statement of truth having been received from the Respondent by the date stated in the directions.
3. 108 Barton Road, Spring Park Estate, Barnstaple EX32 8NG ("the Property") is described in the application as being a 1980s two storey detached building, comprising 8 flats with demised garden areas to the front, rear and side, and demised pursuant to a Lease dated 25 August 1983 made between Fordham Builders (Barnstaple) Limited (1) Charles Alfred Town (2) ("the Lease") for a term of 99 years from 25 August 1983.
4. In broad terms, the complaint made by the Applicant as landlord, is that the Respondent tenant has made a structural alteration or addition, and/or erected a new building, namely a "cat cage" without consent of the lessor, and in breach of clauses 3(i)(c) & 4(v) of the Lease as reproduced below:-

   "3. The Lessee hereby covenants with the Lessor as follows:-

   ...

   3(i)(c) not to make any structural alterations or structural additions to the demised premises nor to erect any new buildings thereon or remove any of the Landlord`s fixtures and fittings without the previous consent in writing of the Lessor"

   ...

   4.The Lessee hereby covenants with the Lessor and with the lessees of the other flats comprised in the Unit that the Lessee will at all times hereafter:-

...

4(v) 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 within three months after the giving of such notice"

...

5. Due to Covid 19 restrictions, no inspection was carried out in respect of the Property.

THE LAW

8. Section 168 of the Commonhold and Leasehold Reform Act 2002 (as amended by *Regulation 141 of the Tribunals and Inquiries, England and Wales Order No. 1036 of 2013) provides that :*

"168 – No Forfeiture Notice before determination of breach

(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 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 a condition in the lease has occurred.

(5) But a landlord may not make an application under subsection (4) in respect of a matter which-

(a) has been, or is to be, referred to arbitration pursuant to a post dispute arbitration agreement to which the tenant is a party

(b) has been the subject of determination by a court, or

(c) has been the subject of determination by an arbitral tribunal pursuant to a post dispute arbitration agreement

(6) For the purposes of subsection (4), "appropriate tribunal" means-

(a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) in relation to a dwelling in Wales, a leasehold valuation tribunal"

WRITTEN REPRESENTATIONS

10. The electronic bundle includes at Pages 21-25, a signed statement of fact dated 29 June 2020, in which the Applicant broadly submitted that the Property is a ground floor flat with front and rear gardens included in the demise, and referred to clause 3(c) of the Lease. The statement indicated that Sarum Properties Limited is the freeholder and that Remus is the managing agent, adding that on a site visit by the agent in 2018, it was noted that a large wooden structure enclosing the rear garden, had been erected and fixed to the main structure. A letter had been sent to the Respondent in March 2018, advising as to the breach of covenant and requesting removal of the structure within 7 days. The Applicant stated that a want of repair notice had been served in May 2018, stating that the structure had to be removed within 3 months and any defects made good to the main structure. As a result of email correspondence in June 2018, the Respondent, Miss Williams said she had seen other properties in the area with conservatories, so assumed that the structure would be permitted, apologising for her lack of awareness. The Applicant stated that Remus contacted the Respondent again, to reiterate that she needed to contact the freeholder to seek any consent. Further correspondence and discussion ensued between Remus and the Respondent in August 2018; the statement suggested that the Respondent contacted the Applicant on 22 August 2018, providing it with a proposal and drawings of the structure which she would like to erect. Remus contacted the Respondent on 5 September 2018, including a drawing of a counter proposal which could be accepted by the Applicant; however, the structure erected by the Respondent remained in place. In October 2018, the Respondent requested consent for a conservatory, which the Applicant understood was to replace the disputed cage structure which remained in place. By December 2018, the Respondent told the freeholder and Remus that she was in the process of submitting an application for planning permission for the conservatory and a licence to install the conservatory was granted by the Applicant, on 10 June 2019. By July 2019, a site inspection indicated that whilst the new conservatory had been constructed, the "cat cage" remained in place despite, the Applicant said, Miss Williams having advised that such "cat cage" would be removed once the conservatory had been installed. By 30 October 2019, the Applicant said it was advised by Miss Williams that the "cat cage" had been removed, although inspection revealed it still to be there, and time was allowed for a want of repair notice, to be complied with by 1 January 2020. The Applicant states that the "cat cage" remains in place and asserts breaches of covenants 3(i)(c) and 4(v), the latter apparently being in relation to defects and/or repair arising from attachment of the "cat cage" to the main structure of the Property. The Applicant further seeks costs in a total sum of £580.00 from the Respondent, which it says it would be unfair to pass on to the other leaseholders in the building of which the Property forms a part.

11. The electronic bundle includes, at Pages 27-29, the Respondent`s unsigned and undated response, in which the Respondent said that she was unable to afford legal assistance, and wished to provide a brief background of events. In broad terms the Respondent said that before moving to the Property she had been living in Milton Keynes with her daughter and five cats, and decided to downsize when her daughter went to university. The Respondent first moved to a rented attic flat in Devon and described a stressful time whilst she secured a new job; she said that

she completed the purchase of the Property in November 2017, found a builder to carry out improvements, and finally moved in to the Property towards the end of February 2018. The Respondent described having received the first letter from Remus about the "cat cage" in March 2018, saying she called them as she "*was unaware of the implications of the lease and wanted to resolve the situation*." The Respondent referred to requesting permission retrospectively, "*but this was denied by the Freeholders*". The Respondent said she wanted to reach a compromise and made various suggestions, but communication was poor; in the event "*no-one was prepared to reach a compromise*". The Respondent said she submitted several drawings of possible solutions but received no response, adding that when the conservatory was built, she denied having said she would take down the "cat cage" or enclosure, as she had always been determined to keep the cats safe. The Respondent said that by this time she "*understood the Leasehold situation better*" and again suggested a compromise. The Respondent concluded by saying that she has added value to the flat and maintained it to a higher standard than the previous occupant and that "*I have adhered to all legal requirements as and when I became aware of them".*

12. The electronic bundle included a short letter of response from Remus to the Respondent dated 1 September 2020, largely reiterating its previous position; the bundle further contained a large volume of letters, emails and correspondence as between the parties, at Pages 50-139; these include a copy of a Licence dated 10 June 2019 entered into by the parties and in which the landlord granted consent to carry out "the Works", being such works described in the First Schedule as the "*erection of a conservatory as shown on the attached plans and documentation*". The plans show a conservatory, rather than the "cat cage". A photograph at Page 119 of the bundle appears to show the conservatory, apparently constructed inside the confines of the "cat cage", the latter being built across the width of the Property. Further similar photographs are included at Pages 129-131 of the bundle, including an aerial photograph apparently showing a substantial timber and wire mesh cage, enclosing most of the rear garden, with the "roof" of the cage passing over the top of the conservatory.

CONSIDERATION

13. The Tribunal, have taken into account all the case papers in the bundle.

14. The issue for determination under Section 168(4) of the 2002 Act, is simply as to whether breaches of covenant have occurred.

15. Clause 3(i)(c) of the Lease prohibits the erection of any new buildings without the previous consent in writing of the Lessor. In this context, the term "buildings" is not expressly defined; however, on its ordinary and natural meaning, the term "building" envisages a structure that has a roof and walls and stands more or less permanently in one place. The photographs in the bundle appear to show a substantial structure supported by a framework of solid vertical and horizontal timbers, all being covered in some form of wire mesh, and occupying most, if not all the rear garden, and of sufficient height, so as to enclose the latterly erected conservatory and to be visible from outside the demised area, over the top of the boundary walls. Whilst it is apparent from the bundle that the Applicant granted a licence to the Respondent in June 2019, that appears to have related only to the conservatory, seemingly constructed within or inside the disputed "cat cage". It is

similarly apparent from the bundle that the Applicant landlord has at no point consented to the cat cage; the Respondent refers in her statement to her repeated requests for a compromise in the matter, indicating that she was, or at least had become aware of an issue arising under the Lease regarding the erection of the "cat cage". It would appear from the evidence given by the Applicant that the "cat cage" is physically attached and fixed to the main building. The Tribunal determines accordingly, that the "cat cage" is a new building erected without the previous consent in writing of the Respondent landlord and that consequently a breach of clause 3(i)(c) of the Lease has occurred.

16. Clause 4(v) of the Lease is a covenant by the lessee to make good all defects decays and wants of repair of which notice in writing shall be given, within three months of such notice. The evidence in the bundle indicates that the Applicant served upon the Respondent a "Want of Repair" notice on 17 May 2018, requiring removal of the "cat cage" within 3 months and any defects which it had caused, to be made good. The Tribunal takes the view that the "cat cage" may not be regarded as being a "decay"; however, the Tribunal accepts that the unauthorised physical attachment of it to the main structure of the Property appears to have involved fixings to that structure which the Applicant required by the notice, as defects or repairs, to be made good. The Respondent failed to make good such defects or make repairs within the three months` notice period, despite being allowed additional time to do so. The Tribunal determines accordingly, that a breach of clause 4(v) of the Lease has occurred.

17. In regard to the Applicant`s claim for costs, the Tribunal has a discretion under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, if a party has acted unreasonably in bringing, defending or conducting proceedings. The Tribunal is not minded to exercise its discretion in regard to ordering costs in this instance.

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.