423

H.M.COURTS and TRIBUNALS SERVICE
LEASEHOLD VALUATION TRIBUNAL
of the LONDON RENT ASSESSMENT PANEL
No. LON/00BD/LBC/2011/0107

Section 168(4) Commonhold and Leasehold Reform Act 2002

BETWEEN:-

PEPERCORN PROPERTY
INVESTMENTS LIMITED — Applicant

and

MARTIN WICKS — Respondent

Property:- 9,Denning Close, Hampton, Middlesex TW12 3YT

TRIBUNAL
Mr A.ENGEL M.A.(Hons.) - Chairman
Mr T.JOHNSON F.R.I.C.S.
Mrs. G.BARRETT J.P.

DECISION

THE RESPONDENT IS IN BREACH OF THE COVENANTS CONTAINED IN CLAUSES 1(i), 1(ii) AND 6 OF THE FIRST SCHEDULE TO THE LEASE

REASONS

The Property

1. The Property is a first floor flat in a block of flats. The Respondent is the (long) lessee of the Property. There is no garden. The Applicant is the Landlord and Freeholder. We have been provided with a copy of the Lease.

The Air Conditioning Units

2. In 2005 the Respondent installed an air- conditioning unit which was fixed to the exterior of the Property.

3. In June 2009, the Respondent installed a second air-conditioning unit which was also fixed to the exterior of the Property.

No.8 Denning Close

4. No.8, Denning Close is the ground floor flat beneath the subject flat. It has a garden.

5. The long lease of No.8 Denning Close was purchased by Clare Kelly in June 2009. She has not occupied the Property herself but has sub-let it.

The Application

6. By letter dated 8th November 2011, Solicitors acting on behalf of the Applicant applied to the Tribunal, pursuant to Section 168(4) of the Commonhold and Leasehold Reform Act 2002, for determinations that the Respondent was in breach of covenants contained in the Lease.

Hearing

7. A hearing was held at the Panel Offices on 5th January 2012, when the Applicant was represented by Miss Shalom of counsel and the Respondent was represented by Mr Coney of counsel.

Evidence

8. The Tribunal heard oral evidence from Clare Kelly, Stephen Nichol and the Respondent.

9. In addition, documentary evidence was adduced by both parties and we viewed and heard a short video cum audio tape made by

19. By letter, dated 14th December 2010, Vavasour Property Consultants (the Manager) wrote to the Respondent as follows:-

"Dear Mr Wicks
9,Denning Close: Hampton
Town & Country Planning Act 1990, Section 172
Appeal against enforcement notice relating to the installation of unauthorised air conditioning units

We understand that the above Appeal has been upheld and our clients now wish to address of (*sic*) Landlord's consent which is required under the lease. This will be subject to payment of our charges and that of Peppercorn for the time and attention involved to date and their solicitors' costs in drawing up the Licence. Peppercorn also require the discharge of water from the condenser routed by pipe into the rainwater pipe and not left to run down the brickwork as this will become stained by the discharge.

Subject to a formal Deed of Licence and as indicated above Peppercorn will grant a licence and you should advise your solicitors acting for you (*sic*) if you wish to be represented. Alternatively the licence will be forwarded direct to you for execution.

We look forward to hearing from you accordingly."

20. There followed further correspondence (which we have seen). We have also seen a letter from the Respondent to the Manager, dated 25th October 2009.

21. The water discharge has not been diverted because access to No.8 Denning Close is necessary for this work to be done and although the Respondent is willing to arrange for this work to be done at his expense, Clare Kelly has refused to allow access to No8, Denning Close for this work to be done – although she would allow access for the units to be removed.

22. In fact, no Licence has ever been issued. The further correspondence after the letter of 14th December 2010 (set out at

No.19 above) shows that the course of the negotiations thereafter did not lead to agreement.

23. At Paragraph 23 of his Judgement in Swanston, Judge Huskinson states:-

" For the Appellant to be prevented by waiver or promissory estoppel from relying on the relevant covenants the Respondent would need to be able to show an unambiguous promise or representation whereby she was led to suppose that the Appellant would not insist on its legal rights under the relevant covenants regarding underlettings either at all or for the time being. The Respondent would need to establish that she had altered her position to her detriment on the strength of such a promise or representation and that the assertion by the Appellant of the Appellant's strict legal rights under the relevant covenants would be unconscionable , see Halsbury's Laws 4th Ed Reissue Vol 16(2) paragraph 1082 and following."

24. In this case, there is no evidence that the Respondent has acted to his detriment and we are of the opinion that it is not unconscionable for the Applicant to assert its legal right.

25. We are also of the opinion, that the submission that the letter of 14th December 2010 (set out at No.19 above) constitutes a waiver fails on the further ground that the promise to grant a licence was conditional and accordingly, not "unambiguous".

26. Thus, we determine that there is a breach of the covenant contained in 1(i) of the First Schedule to the Lease.

Covenant 1(ii)

27. This covenant provides:-

"no additional buildings walls fences or other erections shall hereafter be constructed or maintained on the premises" (without the prior written consent of the Manager)

28. Mr Coney (rightly) concedes that the units are "other erections" but submits that air-conditioning units are not in the same generic category (ejusdem generis) as buildings, walls and fences and therefore the covenant does not extend to air-conditioning units.

29. We reject this submission. In our view, walls and fences are not in the same generic category as buildings and accordingly the air-conditioning units are to be included in the covenant.

30. Thus, we determine that there is a breach of the covenant contained in 1(ii) of the First Schedule to the Lease.

Covenant 6

31. Covenant 6 provides:-

"Nothing shall be done on the premises which will grow to be a nuisance or annoyance to the owners or occupiers of any property on the Estate."

32. The evidence as to the magnitude of the noise emanating from the units was conflicting.

Clare Kelly's evidence was that the noise was equivalent to that on the tape played at full volume. The Respondent's evidence was that the noise was no more (and possibly less) than that on the tape when played at half volume.

The (written) evidence of the Planning Inspector (who allowed the appeal referred to at No.18 above) was that when he visited the Property, both units were switched on and the noise was "little more than a background hum". We consider this evidence to be

independent, reliable and accurate and we find as a fact that when both units are switched on, the noise is just above the level of a background hum.

On occasions, dripping water adds to the noise.

33. We consider and determine that neither the aspect of the units nor the noise amounts to a nuisance or something "which will grow to be a nuisance".

34. There was no evidence that occupiers were concerned about either the aspect of the units or the noise.

35. However, there was clear evidence that Clare Kelly (the owner of No.8 Denning Close) was (and is) annoyed by both the aspect of the units and the noise – both when water is dripping and when water is not dripping. We accept this evidence and so find as fact.

36. It follows that there is a breach of the covenant contained at No.6 of the First Schedule to the Lease.

37. Further, as there is a breach of this covenant when the water is not dripping, we do not have to decide on the legal consequences (if any) of Clare Kelly's refusal to allow the Respondent access to No.8, Denning Close to stop the dripping water.

General Waiver

38. We should add that Mr Coney also submitted that there had been a general waiver of any breaches of covenant by reason of the Applicant's acceptance of rent after the installation of the units and other Properties having installed satellite dishes. However, we reject this submission having regard to Judge Huskinson's Judgement in Swanston (see No.23 above).

SIGNED: 

(A.J.ENGEL – Chairman)

DATED: 10th January 2012