

614



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : CHI/21UC/LBC/2014/0014

Property : Flat 2 Ravens Court
St. Johns Road
Eastbourne
East Sussex
BN20 7HY

Applicant : Ravens Court (Eastbourne) Limited

Representative : Mr. R. Henry

Respondents : Mr. D. and Mrs K. Wood

Representative : Unrepresented

Type of Application : Breach of Covenant
Section 168(4)
Commonhold and Leasehold Reform Act
2002

Tribunal Members : Judge R. Norman (Chairman)
Mr. B.H.R. Simms FRICS

Date of Consideration : 22nd September 2014

Date of Decision : 13th October 2014

DECISION

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Decision

1. There has been a breach of the covenants contained in clauses 3(12), 3(19)(b) and 3(19)(c) of the lease.

Background

2. Ravens Court (Eastbourne) Limited ("the Applicant") is the freeholder of Ravens Court, St. Johns Road, Eastbourne, East Sussex BN20 7HY and Mr. D. and Mrs. K. Wood ("the Respondents") are the lessees of Flat 2 which forms part of Ravens Court.

3. The Respondents installed new uPVC framed windows and patio doors in Flat 2. The Applicant considered that that installation constituted a breach of clauses 3(12), 3(19)(b) and 3(19)(c) of the lease and made an application to the Tribunal for a determination of that matter.

4. The relevant clauses in the lease provide as follows:

"3. THE Lessee HEREBY COVENANTS with the Lessor as follows:-

...(12) Not to alter nor in any manner interfere with the construction of the Flat or cut alter or injure any of the walls partitions or floors thereof or the drains wires or pipes therein

...(19) (a) In this sub-clause "the Planning Acts" mean and include the Town and Country Planning Acts 1962 to 1963 or any statutory modification or re-enactment thereof from time to time in force and any regulations or orders made thereunder

(b) At all times during the said term to comply in all respects with the provisions and requirements of the Planning Acts and all licences consents permissions and conditions (if any) granted or imposed thereunder so far as they relate to or affect the Flat or any part thereof or any works done therein or the use thereof

(c) At the expense of the Lessee to obtain from the appropriate Authorities all such licences consents and permissions as may be required under the Planning Acts and local bye-laws for the carrying out in the Flat of any works or the change or continuance of the use thereof which may constitute development within the meaning of the Planning Acts PROVIDED ALWAYS that the Lessee shall not commence such works or make any change in the use of the Flat or make any application for Planning Permission hereunder without the previous consent in writing of the Lessor and the Trustees of the Chatsworth Settlement and shall pay to the Lessor a fee of Five pounds twenty five pence for the approval of any such plans and any changes due to the Agent or solicitors for the Trustees of the Chatsworth Settlement in connection therewith"

5. On 10th July 2014 directions were issued which included a direction that the application was to be determined on the papers without a hearing in accordance with Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 unless as party objected in writing to that

course of action. The Applicant objected and as a result further directions were issued on 23rd July 2014 that there would be an oral hearing of the case. However, by a letter dated 25th August 2014 the Respondents consented to a paper determination and explained that they would be replacing the uPVC window frames and patio doors with aluminium window frames and patio doors. By a letter dated 2nd September 2014 the Respondents notified the Tribunal office that on 13th August 2014 there had been a meeting between Windowcraft Limited, Mr. Henry the Chairman of the Committee of Management for and on behalf of the Applicant, and Mr. Way the Company Secretary of the Applicant and that the proposed design and installation suggestions had been verbally accepted. By a letter dated 3rd September 2014, Mr. Henry notified the Tribunal office that the Applicant had reluctantly agreed to a paper determination rather than an oral hearing.

6. The application is therefore being determined in that way without an oral hearing.

Inspection

7. On 22nd September 2014 the Tribunal in the presence of Mr. Henry and the Respondents inspected the exterior of Ravens Court.

8. The Tribunal could see that the window frames and patio doors in Flat 2 were, as the parties agreed, constructed of uPVC.

9. However, while we could see that at Ravens Court the majority of the window frames and patio doors were constructed of aluminium or other modern material, we could see that there were at least four different types and styles of window frames and patio doors. Some appeared to be the original sliding aluminium frames and doors while others were of more modern design. Some windows were sliding, some were top hung and others were fixed casements.

10. To the casual observer, the window frames and patio doors, including those in Flat 2, all appeared to be reasonably similar in appearance and it was only because we had attended with the particular objective of inspecting them that we became aware of the differences.

Reasons

11. We can understand the Applicant wishing to maintain the appearance of Ravens Court and not wanting to have a wide variety of dissimilar fenestration and we can understand the Respondents wishing to improve the insulation of Flat 2 by the use of uPVC. It is possible that there may have been some misunderstanding between Mr. Henry and Mr. Wood. Mr. Henry confirms in his extended reasons at paragraph 13 that he and the Applicant had no objection to the installation of double glazing, which had never been an issue, it was just the use of uPVC to which objection was taken. These days when people speak of double glazing they generally mean double glazing using uPVC and perhaps that was Mr. Wood's understanding whereas Mr. Henry was referring to double glazing in aluminium frames.

12. Presumably, when Ravens Court was built there was, as Mr. Henry stated, uniform fenestration. In the extended reasons for the Application at paragraph 4 it is stated that "Therefore all flat owners have a mutual responsibility to abide by the covenants set out in their leases as well as to respect the Building and its integrity. That responsibility includes what should be seen as uniform fenestration." However, over the years, the situation has changed and leaving aside the uPVC window frames and patio doors in Flat 2, the remainder of Ravens Court as seen at the inspection could not be described as having uniform fenestration.

13. The photographs produced by the Applicant in the hearing bundle at Tab 10 show some of the differences. The first photograph which is said to show "the original aluminium windows and the patio doors onto the balcony" shows a mixture of sliding and top hung windows in different styles. The remaining photographs are said to demonstrate "the installed UPVC windows and patio doors". The next two photographs show, in addition to the uPVC window frames, two different types of window frame: one sliding and the other apparently top hung, in different styles and finishes giving a non-uniform appearance. The next photograph shows the uPVC frames and the sliding frames. The next photograph shows the uPVC frames and two types of frame which are top hung and different to the sliding frames. The final photograph shows the uPVC patio doors of Flat 2 which are white and below them on the ground floor the, presumably original, patio doors which appear to be more grey in colour. However, on the floor above Flat 2 the patio doors do not appear to be identical to the ground floor patio doors and to be more similar in colour to those in Flat 2 than to those on the ground floor. The design of uPVC frames has changed over the years and they are now less bulky in appearance. Mr. Way in his email dated 12th February 2014 referred to a flat with "white surrounds and aluminium inserts". We were not sure to which flat that referred but that would seem to be yet another variation. Mr. Henry at paragraph 16 of his statement refers to a conversation with Mr. Wood about the windows when Mr. Wood said that "they all look white to me" and Mr. Henry replied "I am not sure, yes they do a bit. Come up to my flat and we can have a closer look". Mr. Henry opened the dining room window for more detailed inspection of the double glazing and aluminium frame and bar and remarked "the outside is slim line aluminium but it is white on the inside." This indicates that at least from ground level the aluminium frames have a white appearance.

14. It is understood that the leases of all the flats at Ravens Court have similar clauses and that clause 3(12) of the lease requires the lessee not to alter nor in any manner interfere with the construction of the Flat or cut alter or injure any of the walls partitions or floors thereof or the drains wires or pipes therein. We are satisfied that the phrase "construction of the Flat" could include the window frames and patio doors and therefore there has been a breach of that covenant. However, one wonders whether the draughtsman of the lease had in mind window frames and patio doors when drafting this clause or whether he was, understandably, more concerned that the walls, floors and other items mentioned not be interfered with or damaged because they are of physical importance to the stability of the rest of the building. It

appears that despite the apparent absolute prohibition in clause 3(12) the draughtsman had in mind that there could be alterations because a procedure for dealing with them was provided in clause 3(19). It is clear from the documents supplied by the Applicant that alterations to other flats have been made and apparently no objection was taken to the variety of frames and patio doors installed until the uPVC frames and patio doors were installed in Flat 2.

15. Clause 3(19)(b) of the lease requires compliance with the Planning Acts and all licences consents permissions and conditions (if any) granted or imposed thereunder so far as they relate to or affect the Flat or any part thereof or any works done therein or the use thereof. Clause 3(19)(c) requires the lessee to obtain from the appropriate Authorities all such licences consents and permissions as may be required under the Planning Acts and local bye-laws for the carrying out in the Flat of any works and to obtain the previous consent in writing of the Lessor and the Trustees of the Chatsworth Settlement. In a letter dated 3rd July 2014 from Eastbourne Borough Council the opinion is given that the works constitute a breach of planning legislation and on the basis of that letter and the fact that consent had not been obtained from the Applicant or the Trustees of the Chatsworth Settlement, there has been a breach of Clauses 3(19)(b) and (c). However, it is noted that the general guidance given in the email dated 7th March 2014 from Eastbourne Borough Council does also make the point that each case would be judged on its individual merits. Also that as a general rule, modern materials are considered appropriate for non-historic buildings (post 1948), subject to design. In the extended reasons for the application at paragraphs 17 to 23 reference is made to The Town and Country Planning Act 1990 and in particular the definition of "development" in Section 55(1) and (1A). Reference is also made to Section 55(2) "The following operations...shall not be taken for the purposes of this Act to involve development:- (a) the carrying out of maintenance, improvement or alteration of any building of works which...(ii) do not materially affect the external appearance of the building." It is then stated at paragraph 21 b) that "The external appearance of the building is materially affected by the UPVC windows". That is an expression of an opinion presumably by Mr. Henry, although the extended reasons have not been signed, and nothing more. The Tribunal having inspected Ravens Court considers that it is by no means certain that the installation of the uPVC window frames and patio doors would be considered to have 'materially' affected the external appearance of the building.

16. In the letter dated 18th March 2014 from the Company Secretary of the Applicant to the Respondents it was stated that "It is a long established policy at Ravens Court that in order to preserve the appearance and unity of the building only aluminium frames may be fitted..... Please advise the Company Secretary in writing to the Registered Office within 14 days that you will now replace the U-PVC frames with aluminium frames in accordance with the policy at Ravens Court." One of the options suggested by Eastbourne Borough Council in the letter dated 3rd July 2014 to the Respondents is the removal of the offending structure and replacement of slimline aluminium framed (grey exterior) window and patio doors in keeping with the existing building. In the email dated 25th July 2014 from the Council it is stated that "However, if it was brought to our attention that the frames differed considerably in style and

material from that already in existence at the block of flats we would again investigate the matter as a potential enforcement issue. It would therefore be in their interests to ensure the frames match those already at the premises.” Having regard to the fact that there are at least four different styles of window frame and patio door at Ravens Court this appears to provide a certain amount of scope to provide a match. In the letter before action dated 12th May 2014, it was stated that the Applicant was seeking from the Respondents confirmation that they would replace the uPVC frames of the windows with aluminium ones. As it is understood that the Respondents have made arrangements for the uPVC window frames and patio doors to be replaced with aluminium window frames and patio doors, although the details have still to be agreed between the parties, the Tribunal hopes that that will bring an amicable end to this matter.

Appeals

17. 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.

18. 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.

19. 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.

20. 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.

Judge R. Norman (Chairman)