752

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AP/LBC/2016/0053**
Property	:	**12B Woodside Road, London, N22 5HU**
Applicant	:	**Mantlegreen Limited**
Representative	:	**Berlard Graham LLP**
Respondents	:	**(1) Mattias Liaibi** **(2) Mortgage Agency Services Number Five Limited (Mortgagee in possession)**
Representative	:	**(1) A Quick Financial Group for the first respondent** **(2) Optima Legal for the second respondent**
Type of application	:	**An application under section 168 (4) of the Commonhold and Leasehold Reform Act 2002**
Tribunal members	:	**(1) Judge Amran Vance** **(2) Mr M Taylor, FRICS**
Date and venue of hearing	:	**4 January 2017 at 10 Alfred Place, LondonWC1E 7LR**
Date of Decision	:	**4 January 2017**

DECISION

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Decision

1. The tribunal determines that there has been a breach of the covenant at clause 3(10) of a lease dated 13 March 2003, for the letting of the first and second floor maisonette at 12 Woodside Road, London N22 5HU by virtue of the conversion, without any apparent consent having being given, of a single dwelling into two one-bedroomed flats. However, the evidence before the tribunal does not establish that the respondents to this application were responsible for that breach of covenant.

2. Numbers in bold and in square brackets below refer to pages in the hearing bundle provided by the applicant

The Application

3. This is an application under section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination that there has been a breach of covenant in respect of the relevant lease of the first and second floor maisonette ("the Flat") at 12 Woodside Road, London N22 5HU ("the Building").

4. The freehold owner of the Building is David Glass whose title was registered at HM Land Registry under Title Number MX68241 on 28 July 1992**[71]**.

5. The applicant is the leasehold owner of the Building pursuant to a lease dated 18 December 1978 entered into between (1) Poolaction Limited and (2) Brian Joseph Smith. Its leasehold interest was registered at HM Land Registry under Title Number NGL343500 on 12 October 2007 **[75]**.

6. The first respondent is the underlessee of the Flat which forms part of the applicant's demise. His leasehold interest was registered at H. M. Land Registry on 5 November 2007 under title number AGL 115710 **[79]**. He has the benefit of the remaining term of a lease dated 13 March 2003 entered into by (1) Benjamin Hughes and Caroline Hughes and (2) Hart Investments Limited for a term of 99 years (less 3 days) from 24 June 1978.

7. The second respondent is the first respondent's mortgagor who has entered into possession of the Flat. It appears from the first respondent's witness statement dated 7 October 2016 that the second respondent entered into possession of the Flat in 2015 after he fell into mortgage arrears. However, office copy entries dated 23 August 2016 still show the first respondent as being the registered proprietor of the underlease **[78]**.

8. The applicant alleges that the following covenant under the Lease has been breached

Clause 3(10)

"Not to cut maim or injure any of the ceilings floors walls or partitions of the Demised Premises nor to make any alterations in the Demised Premises without the prior consent in writing of the Lessor"

9. This application was received by the tribunal on 12 July 2016. Notification of receipt of the application was sent by the tribunal to the First Respondent by letter dated 13 July 2016 using the address provided in the application notice, namely, 12B Woodside Road, London, N22 5HU.

10. On 8 August 2016 the first respondent's representatives, A Quick Financial Group, requested that the tribunal write to the first respondent at Flat 4, 48 Upper Berkely Street, London W1H 5QP. The tribunal's subsequent directions dated 18 August 2016 were sent to him at that address. The directions provided for the applicant to prepare a bundle of documents relevant to the application and to send this to the respondents and to the tribunal by 9 September 2016. The respondents were directed either together, or separately, to send a bundle of documents to the applicant and to the tribunal by 23 September 2016 which should include a full statement in response to the applicant's case, any signed witness statements of fact and any legal submissions together with copies of any documents on which they wished to rely. This deadline was subsequently varied by the tribunal to 26 September 2016 following a request for an extension of time made by the second respondent. The directions of 8 August 2016 also specified that the application to be determined on the papers in the week commencing 10 October 2016 unless an oral hearing was requested. No request for an oral hearing was made.

11. In a letter to this tribunal dated 26 September 2016 the second respondent's solicitors, Optima Legal, state that it had no instructions to contest this application.

12. In an email to the tribunal dated 27 September 2016 A Quick Financial Group confirmed that it and the first respondent had received a bundle of documents prepared by the applicants. In a subsequent email sent to the tribunal and the applicants dated 29 September 2016 A Quick Financial Group confirmed that it was assisting the first respondent in this matter and that he wished to instruct counsel. On the same day a copy of the directions made on 8 August 2016 was sent by the tribunal by email to both the first respondent and A Quick Financial Group following the first respondent's assertion that he had not previously received those directions.

13. On 30 September 2016 the tribunal received a further email from A Quick Financial Group requesting an extension of time for the first respondent to comply with the directions made on 8 August 2016. That request was not granted and by letter dated 4 October 2016 the tribunal notified A Quick Financial Group that the application would be determined on the papers in the week commencing 10 October 2016.

14. By email dated 10 October 2016 A Quick Financial Group sent the tribunal a witness statement made by the first respondent. A hardcopy of that statement was received by the tribunal on 11 October 2016.

15. The tribunal considered the application on 13 October 2016. It was not satisfied on the evidence before it that it had sufficient information on which to make its determination. It noted that it did not appear to be in dispute that at some point after the lease dated 13 March 2003 was granted the Flat has been converted into two separate flats. It also noted that the applicant had not adduced any evidence as to when this conversion took place or who carried out the conversion and that the first respondent's case was that the Flat was in its current configuration when he purchased it.

16. The tribunal therefore issued further directions dated 14 October 2016 which were sent to the parties by post on 18 October 2016. These directions required the applicant by 31 October 2016 to send to the respondents and the tribunal any witness statements of fact and any further statement of case on which it intends to rely. The tribunal indicated that the witness evidence should address how the headlessor became aware of the alterations to the Flat and should address the issue raised by the following issues, namely:

    (i) whether or not there is any evidence as to when the alterations were carried out;

    (ii) whether or not there is any evidence that the alterations were carried out prior to both the first respondent and the applicant acquiring their respective leasehold interests;

    (iii) whether or not consent for the alterations was sought by a predecessor in title of the first respondent from a previous headlessor of the Building and if the same was granted. It will obviously need to make enquiries of its predecessors in title in order to address these points.

17. The directions of 14 October 2016 provided that the respondents could send to the applicant and the tribunal a further statement of case in reply by 14 November 2016. They also referred to the first respondent's representatives previously stating in an email dated 29 June 2016 **[96]**

that it intended to obtain a copy of the original valuation report obtained when the first respondent purchased the Flat and that if this report or any survey report is available this should be also be provided to the applicant and the tribunal by 14 November 2016 together with any other documents on which the first respondent intended to rely. The directions stated that the tribunal would determine this application on the papers in the week commencing 21 November 2016.

18. These directions were sent to the first respondent via his representatives, A Quick Financial Group, at the address stated on the emails it had sent to the tribunal, 88 Wood Street, 10th – 11th Floor, London, EC2V 7RS. However, these were subsequently returned to the tribunal inside an envelope marked "RTS". However, there is no indication that this was returned by the postal service. The Royal Mail usual label indicating the reason for the return of an item is absent. It appears, therefore, that this may have been returned to the tribunal by hand.

19. On 21 October 2016 A Quick Financial Group sent an email to the tribunal referring to a telephone conversation that day and stating that their client had not received the tribunal's further directions. It requested that these be emailed as a matter of urgency so that their client could deal with the same. These were emailed by the tribunal to A Quick Financial Group and to the other parties' representatives the same day.

20. On 1 November 2016 the tribunal received an email from the applicant's representatives enclosing a witness statement made by Raanan Berlad and a copy of the headlease and lease plan. Both respondents' representatives were copied into that email.

21. In a letter dated 9 November 2016 the applicant's solicitors wrote to the tribunal stating that it had sent the witness statement of Mr Berlad and the accompanying documents to the respondent's representatives but that for some reason the letter sent to the first respondent's representatives had been returned in the post that day marked, by hand, "RTS".

22. By letter dated 14 November 2016, the second respondent's representatives confirmed to the tribunal that it had no instructions from its clients to oppose the application.

23. On 16 November 2016 the tribunal wrote to A Quick Financial Group stating that there had been non-compliance with the tribunal's directions and that the missing documents should be lodged with the tribunal and the applicant immediately. No response was received and no documents were sent to the tribunal on behalf of the first respondent in response to its directions of 14 October 2016.

24. The tribunal considered the application on the papers on 30 November 2016 but considered that an oral hearing was required so that the applicant could present a clear explanation as to the grant of the various leasehold interests for the Building and the alleged breaches of covenant. Its directions dated 30 November 2016 were issued to the parties on 5 December 2016. They provided for the applicant to send to the respondents and the tribunal any further witness statements of fact on which it intended to rely and for the respondents provide a further statement of case in reply, if so advised, together with any witness statements of fact on which they intend to rely.

25. The tribunal subsequently received a second witness statement from Raanan Berlad, the solicitor acting on behalf of the applicant, and a second report from Mr Gordon Kirby, FRICS dated 22 December 2016. No further documents were received from either respondent. The tribunal's letter dated 5 December 2016 sent to A Quick Financial group enclosing the tribunal's directions was returned to the tribunal in an envelope marked "RTS". The tribunal also sent a copy of the directions to the first respondent directly at Flat 4, 48 Upper Berkeley Street, London W1H 5QP. That letter was not returned undelivered.

The Hearing

26. The tribunal hearing of this application took place on 4 January 2016.The applicant was represented by Mr Wills of counsel and by Mrs Khan, trainee solicitor. There was no attendance by either respondent. At the hearing Mr Wills handed up a set of photographs taken on 16 December 2016 following a site inspection at which Mrs Khan was present. He also provided the tribunal with a copy of the lease dated 18 July 2001 relating to that part of the upper maisonette that falls outside the demise of the subject flat and which is subject to a separate lease dated 18 July 2001. The tribunal considered that the material was of assistance to the tribunal and that it was in the interests of justice to allow the applicant to rely on this additional evidence despite its late provision.

Inspection

27. No party requested an inspection and the Tribunal did not consider one to be necessary to determine the application.

The Law

28. The relevant parts of s.168 of the Act provide as follows:-

> *(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-dispute arbitration agreement, has finally determined that the breach has occurred.

(3) .....

(4) A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred.

The Applicant's Case

29. The Applicant submits that it is clear from the Lease plan **[69-70]** that at the time the lease was entered into the demise of the subject Flat was of a single dwelling with a single entrance. It contends that in breach of clause 3(10) the Flat has been divided into two one-bedroom flats. This, it says, was an alteration for which permission was required under clause 3(10) but which had not been requested nor granted.

30. The applicant relies upon Mr Kirby's reports dated 14 June 2016 and 22 December 2016. Its case is that it is clear from those reports that walls and/or partitions have been added and removed in order to make these two flats and that these alterations are a breach of the covenant at clause 3(10) of the Lease.

31. In his witness statement of 31 October 2016 Mr Berlad states that his client's instructions are that if the alterations had taken place prior to the first respondent's purchase of the property that his mortgagors would have required confirmation that consent had been given by the superior lessor and evidence of planning and building regulations

consent having been obtained. He states that the freehold owner's representatives have confirmed that no building regulations consent was in place. He also contends that when these alterations took place is irrelevant for the purposes of section 168(4) as the tribunal only needs to be satisfied that a breach of covenant has occurred.

32. Exhibited to Mr Berlad's witness statement was an email dated 26 October 2016 from the representatives of the freeholder of the Building, David Glass, in which they confirm that their client has never consented to the creation of the new flat in the Building.

The First Respondent's Case

33. The first respondent's evidence is that he lived in the property from 10 July 2007 until 28 August 2014. He then fell into mortgage arrears and the second respondent obtained possession of the Flat in 2015.

34. His position, quite simply, is that the alterations in question were made prior to his purchase of the Flat and that he had not carried out any alterations at all. His case is that the applicant has provided no evidence to substantiate that he carried out unauthorised alterations to the Flat and that no breach of covenant by him is established.

Decision and Reasons

35. We are satisfied that there has been a breach of the covenant at clause 3(10) of the Lease in that the flat has been converted from a single dwelling into two one-bedroomed flats with consequent alterations and without any apparent consent having being given by the applicant.

36. We have compared the lease plan to the subject Flat alongside the sketch plans attached to Mr Kirby's report and the photographs provided on the day of the hearing. We accept this evidence as reliable. From our comparison of those documents we are satisfied that the following alterations to the Flat have been made, as asserted by Mr Wills, since the grant of the subject Lease:

First Floor level

(a) A new entranceway has been created to the right of the Flat;

(b) A partition wall has been removed to create a new living-room/kitchen area;

(c) An entrance door to the bedroom area has been moved closer to the bay window;

Second Floor level

(a) A new kitchenette has been created;

(b) A new shower and toilet room has been created;

(c) A door has been altered from opening outwards to opening inwards in order to accommodate the kitchenette; and

(d) A partition wall has been added dividing the bedroom area from the living room area.

37. In our view these alterations must have taken place after the grant of the subject Lease as the current configuration is not referred to in the demise of the Flat, nor does it reflect the plan to the Lease. There is no evidence before us to indicate that consent to the alterations was granted by the freeholder or by the applicant or any predecessor in title. As such we consider the specified alterations are in breach of clause 3(10) of the Lease in that they involved the cutting or maiming or injury to walls and/or partitions of the Flat and because they amounted to alterations to the Flat for which prior consent in writing of the Lessor was required but not obtained.

38. It is possible, as the first respondent asserts that the alterations were carried out before he acquired the subject lease. There is no substantive evidence before the tribunal sufficient to establish *when* the alterations took place. However, the tribunal's obligation, in an application under section 168(4) is to determine whether a breach of a covenant in the lease has occurred, not who was responsible for the breach. We are satisfied that a breach of covenant has occurred although we record that we are not satisfied that there is evidence that either respondent to this application was responsible for the identified breaches of covenant.

Name: AmranVance **Date:** 4 January 2017