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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/OOHH/LBC /2017/0042
Property:	15 Elmsleigh Park Paignton TQ4 5AT
Applicant:	Ralph William Bell
Representative:	Mr Robert Sheridan of Counsel
Respondent:	Robert Downs
Representative:	Mr Tim Felton of Counsel
Type of Application:	Section 168 Commonhold and Leasehold Reform Act 2002 (Breach of Covenant)
Tribunal Members:	Mr W H Gater FRICS ACIArb (Chairman) Judge A Cresswell
Date and venue of Hearing:	27 February 2018 at Newton Abbot.
Date of Decision:	29 March 2018

Summary Decision

The Tribunal has determined that the Applicant has demonstrated that there has been a breach of covenant. The breaches found are in respect of Clause 2 of the lease and Clause 1 of the Third Schedule, the covenants relating to the tenant's duty not to cause a nuisance damage annoyance or inconvenience to the landlord, any occupier of the building or the neighbourhood, as the Tribunal details more particularly later.

DECISION

The Application

1. On 4 August 2017, the Applicant, the occupier of Flat 15a and owner of the freehold interest in 15 Elmsleigh Park Paignton TQ4 5AT, made an application to the Tribunal claiming breach by the Respondent being the lessee of Flat 15 of various covenants in his Lease. Some of the issues raised in the application were withdrawn during the hearing as noted in 21 and 49 below.Accordingly, those issues form no part of this Decision. The Applicant Landlord seeks a determination under subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") that the Respondent tenant is in breach of various covenants contained in the lease. In particular, the Applicant asserts that the Respondent has demolished certain boundary walls in the front garden of the property to create a hard standing for a car.

Directions

2. Directions were issued on 6 September 2017. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration.
3. This determination is made in the light of the documentation submitted in response to those directions and the evidence and oral representations received at the hearing. The Tribunal heard submissions from the representatives and evidence from the Applicant and Respondent. At the conclusion of the hearing, the parties and their representatives confirmed to the Tribunal that they had been able to say all that they wished to say.

Inspection and Description of Property

4. The Tribunal inspected the property on 27 February 2018 at 10:15. Present at that time included Mr Bell, the Applicant, his solicitor's representative Mr

Crapper and Mr Sheridan of Counsel; Mr Down, the Respondent, and Mr Felton of Counsel. The property in question comprises a ground floor flat in an Edwardian two-storey semi-detached building, now divided into four flats, each held on a long lease. The building is constructed out of brick and stone walls under a pitched tiled roof. There is access into the front forecourt with limited parking and a rear yard, accessed over a service road giving additional parking.

5. The Tribunal observed that part of the front boundary wall had been removed and left in an unfinished state. It appeared that a further wall at the side of the front forecourt had been removed and that brick paviours had been laid on part of that forecourt.

Procedural and Preliminary Issues

6. Immediately before the hearing, Mr Felton submitted a folder to the Tribunal, said by him to contain a skeleton argument and authorities. This was not referred to during the hearing and, therefore, no account was taken of it by the Tribunal. The folder was returned to Mr Felton at the conclusion of the hearing.

The Law

7. The relevant law in relation to breach of covenant is set out in section 168 Commonhold and Leasehold Reform Act 2002.

8. A covenant is usually regarded as being a promise that something shall or shall not be done or that a certain state of facts exists. Section 168(1) and (2) Commonhold and Leasehold Reform Act 2002 provide that a landlord may not serve a notice under Section 146 Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition in the lease unless it has been finally determined, on an application to the Tribunal under Section 168(4) of the 2002 Act that the breach has occurred.

9. A determination under Section 168(4) does not require the Tribunal to consider any issue relating to the forfeiture other than the question of whether

a breach has occurred. The Tribunal's jurisdiction is limited to that question and cannot encompass claims outside that question, nor can it encompass a counterclaim by the Respondent; an application under Section 168(4) can be made only by a landlord.

10. The issue of whether there is a breach of a covenant in a lease does not require personal fault unless the lease says so: Kensington & Chelsea v Simmonds (1997) 29 HLR 507. The extent of the tenant's personal blame, however, is a relevant consideration in determining whether or not it is reasonable to make an order for possession: Portsmouth City Council v Bryant (2000) 32 H.L.R. 906 CA, but that would be a matter for the Court.

11. In Vine Housing Cooperative Ltd v Smith (2015) UKUT 0501 (LC), HH Judge Gerald said this: The question before the F-tT ..... was the straightforward question of whether or not there had been a breach of covenant. What happens subsequent to that determination is partly in the gift of the landlord, namely, whether or not a section 146 notice should be issued and then whether or not possession proceedings should be issued before the county court. It is also partly in the gift of the county court namely whether or not, if and when the application for possession comes before the judge, possession should be granted or the forfeiture relieved. These events are of no concern to, and indeed are pure conjunction and speculation by, the F-tT. Indeed, the motivations behind the making of applications, provided properly made in the sense that they raise the question of whether or not there had been a breach of covenant of a lease, are of no concern to the F-tT. The whole purpose of an application under section 168, however, is leave those matters to the landlord and then the county court, sure in the knowledge that the F-tT has determined that there has been breach.

The Lease

12. The lease before the Tribunal is a lease dated 17 July 1998, which was made between Edwin George Oliver Reubens as landlord and Christopher Ralph Phillipson and Eunice Florence Leonora Edwardes as tenant.

13. In Clause 2 of the lease the tenant covenants to observe the regulations set forth in the Third Schedule.

The Third Schedule Regulation 1. *No act or thing which shall or may become a nuisance, damage, annoyance or inconvenience to the landlord or any occupier of the building or the neighbourhood shall be done or suffered to be done in the flat or any part thereof not (sic and read as "nor") shall the flat be used for any unlawful or immoral purpose nor shall thereby (sic) brought into the flat any dangerous or offensive goods.*

14. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court in **Arnold v Britton and others** [2015] UKSC 36 Lord Neuberger:

> 15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case Clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

Hearing and Evidence

15. In the application dated 4 August 2017, at Section 5, para 2, the Applicant asserts that the Respondent lessee has:

"...demolished two boundary walls and a brick pillar which form the boundary of the garden of the Respondent's premises in order to present a hard standing for a car."

16. The Applicant states that on 22 October 2014, he returned from the town centre to the property and found that the Respondent was in the course of dismantling a water feature in the front garden of flat 15. A discussion ensued in which the Respondent confirmed that he intended to create a hard standing in place of the lawn. The Applicant states that he informed the Respondent that he had no vehicular right of access over the driveway leading to the front wall of flat 15a. The Tribunal established at the hearing that the driveway concerned was the area edged yellow on the upper part of the lease plan.

17. On returning to his flat, the Applicant wrote a letter ("the letter") to the Respondent that day shown as RB6 in the bundle. The Applicant's and Respondent's views of the effect of that letter will be examined in the consideration of the matter below.

18. It is not disputed that the Respondent went on to remove the low wall ("the low wall") between the lawn to flat 15 and the drive, the brick pillar forming the junction of the two walls and part of the wall standing on the front boundary ("the front wall"). Furthermore, there is no dispute between the parties that such consent as was granted to the Respondent in the letter, permitted him to remove the low wall.

19. It is also agreed between the parties that the front wall now partially demolished does not form part of the Respondent's demise.

20. The definition of "the Flat" and the inclusion of the walls and pillar at the centre of the application, was discussed in submissions. The Tribunal was provided with an original lease plan for flat 15a, but it was not possible to see an original for flat 15. It notes that the parties agree that the area marked red on the lease plan provided for 15 delineating the flat, includes the garden, but excludes the two boundary walls and pillar referred to; they are, in short, agreed to be outside of the flat.

21. Section 5 of the application goes on to refer to sub clause 8 of Clause 3 of the lease and Clause 9 of the 3rd Schedule. Subsequently, at the Tribunal, the Applicant, through Mr Sheridan did not rely on these points and submissions

centred on Clause 1 of the 3rd Schedule. The Tribunal notes that Mr Felton, for the Respondent, had not been notified of this until the hearing.

22. Mr Sheridan for the Applicant referred the Tribunal to the Third Schedule of the lease, Clause 1, detailed above.

23. He stated that the Respondent had no consent to remove the front wall and pillar. Such consent as was given was preparatory to concluding agreement to alter the garden area. No consent had been given at the date of the letter to remove the front wall. The act of wall removal was undertaken from within the garden and as such, from within the flat.

24. Mr Sheridan in further submissions, conceded that whilst consent may have been given in effect to remove the low wall, the Applicant wished to protect his rights. There had been no discussion on altering or removing the front wall or kerb. When the part of the pillar came down whilst the Respondent was operating a digger in the garden, the Respondent apologised. He then went on, however, to demolish and remove the whole of the pillar and part of the front wall. A year after the letter, the wall and pillar had not been reinstated despite promises by the Respondent to do so.

25. As regards consent, Mr Sheridan concluded that consent and discussion as described by the Respondent (and detailed later) had not taken place.

26. Mr Felton for the Respondent pointed out that Sch.3 Clause 1 above refers to "*done or suffered to be done in the flat*". It was agreed that the walls were outside the flat and, therefore, whilst there may have been a possible trespass or nuisance, this was not a breach of the lease.

27. He submitted that the letter constituted consent to remove the low wall and the Respondent's position was supported by the matters referred to in Mr Downs' witness statement.

28. With regard to the front wall and pillar, the letter did not envisage permission to remove, although the pillar was removed by accident. On questioning by the Tribunal Mr Felton was unable to provide evidence of the accident.

29. The Respondent, Mr Downs stated that he remembered conversations with the Applicant. One took place in the Applicant's kitchen, he said, when a number of issues such as surface water run off was discussed.

30. He said that the pillar came down when it was clipped by the mechanical digger being used in the garden. He went to see Mr Bell, who was upset, and he apologised. When asked why, after apologising, he did not rebuild the pillar he stated that it was verbally agreed he would do so. He said that he believed the Applicant was supportive of the removal of the front wall and he mentioned to the Applicant a plan to drop the kerb.

31. Mr Downs used the digger to relevel the garden in preparation for a parking area. The digger had been hired for several days.

32. Mr Downs stated that in carrying out works, he acted in the belief that he had consent from Mr Bell. Once the dispute became clear he refrained from further works.

33. The Tribunal asked Mr Downs why he had knocked down further walling beside the pillar. He said that this followed a discussion with Mr Bell after looking at the plans.

34. The Applicant Mr Bell stated that 90% of what Mr Downs had said was nonsense.

35. There had been no prior request to carry out works to create a hard standing on the garden. He found out when returning to the property and noting removal of a water feature in the front garden.

36. Mr Bell said that he wrote the letter to underline the fact that the Respondent had no legal rights to drive over the drive to access the front garden area, and to point out the pitfalls.

37. **In summing up Mr Felton** submitted that the letter of 22 October 2014 was clear permission to remove the low wall. The pillar was removed as a result of an accident. It was conceded that there was no consent to remove the pillar. Regulation one of the 3rd schedule, he submitted, is restricted to damage within the flat.

38. The timing of works was evidence of agreed action. Why would the Respondent go on to remove the pillar and part of the front wall if he had not been given consent to do so?

39. Mr Downs had recollection of a different conversation to Mr Bell, amounting to consent and Mr Felton invited the Tribunal to prefer Mr Downs' version.

40. Mr Felton submitted that the application lacked specificity and the interpretation of Schedule 3 Clause 1 by the Applicant was wrong.

41. In submissions Mr Felton referred to an issue of estoppel relating to the question of forfeiture and the settlement options offered by the Applicant in a letter of 16 June 2017. The Tribunal pointed out that the former issue was outside its jurisdiction which is strictly limited to the question of whether there was a breach. In relation to the latter issue, these were clearly attempts to reach an amicable solution after the damage was done and again an issue for a Court. Mr Felton accepted the points and withdrew these submissions.

42. **In summing up Mr Sheridan** referred again to Schedule 3 Clause 1, pointing out that the clause was not limited to the flat and referred to "the neighbourhood". This he believed was a key point in demonstrating that the removal of walls, albeit outside the flat, was a breach of the lease. As a point of law, the removal of the pillar was damage which constituted a breach of the lease.

43. He drew attention to the discussion at the hearing on consent to remove walls. He pointed out that the Respondent's reliance on claiming such consent had come late. There had been no mention of such consent in correspondence or pleadings. He referred to Mr Downs' witness statement as not mentioning such consent.

44. He also stated that there was no evidence that an application had been made to the Highways authority in pursuance of consent for the kerb to be dropped.

45. In summary, there was no consent as described and Mr Bell wishes to have the walls and pillar replaced.

Consideration and Determination of Breach of Covenant

46. The Tribunal has followed the guidance of the Supreme Court in **Arnold v Britton and others** when considering the words of the lease in this case.

47. The Tribunal was assisted by the presentation of various documents at the hearing but notes both that there were divergences in the evidence provided by both parties and that the Tribunal can only make its decision on the basis of the evidence available to it.

48. The flat. It is agreed between the parties that the low wall, pillar and front wall were outside of the flat as described in the lease.

49. Damage. The Applicant confirmed at the hearing that reliance is placed on Clause 1 of Schedule 3 of the lease and that submissions re Clauses 8 and 9 of that Schedule were withdrawn.

50. The Tribunal has considered the parties' submissions regarding the effect of Clause 1 of Schedule 3. This clause is repeated at 14 above.

51. The Tribunal finds that the garden is a part of the flat under the terms of the lease. Sch.3 Clause 1 states that "*No act or thing which shall or may become a*

nuisance, damage, annoyance or inconvenience to the landlord or any occupier of the building or the neighbourhood shall be done or suffered to be done in the flat or any part thereof" (emphasis by Tribunal).

52. On balance the Tribunal prefers the interpretation of the Applicant and concludes that the removal of the walls and pillar did constitute "nuisance damage annoyance or inconvenience" and that whilst those consequences were outside the flat they were captured by the terms of the clause.

53. The Tribunal so interpreted the clause as clearly including such consequences occurring outside the flat arising from acts done within the flat. Just as say noise or thrown items could cause such consequences, so could the accidental and deliberate actions of the Respondent in clipping the pillar and then removing the pillar and a part of the wall. The Tribunal was strengthened in this view by the fact that the clause makes no limitation as to the geography of the consequences and includes reference also to other occupants of the building and the neighbourhood, both of which descriptions envisage victims outside the flat.

54. Consent. There is a clear divergence of recollection and opinion as to whether consent to carry out the wall removal works was granted.

55. The letter of 22 October 2017 was to an extent inconclusive as to full intent and makes no reference to wall removal. Both parties accept, however, that the removal of the low wall has received consent. The Tribunal concentrates, therefore, upon the pillar and front wall.

56. The Tribunal notes the opportunities, in correspondence and pleadings, for the Respondent to clearly demonstrate consent, but no such opportunity was taken in any of the pleadings or the witness statement he made. Indeed, astonishingly, the first reference to this vital limb supportive of the Respondent's actions came when he gave oral evidence. In such circumstances, whilst recognising that the incidents in question happened some time ago so as to affect memories, the Tribunal has been driven to the conclusion that the Applicant's evidence on the question of consent is to be preferred. Whilst the Tribunal recognises the strong feelings on both sides and

the firmly held views on recollection, on balance it prefers the submissions by Mr Sheridan and the evidence from Mr Bell on the key disputed issues. The Tribunal concludes, therefore, that there was no effective consent, implied or otherwise for the damage to and removal of the pillar and part of the front wall.

57. Whilst it might have been accepted that there may have been retrospective consent for the removal of the low wall, and that the initial damage to the pillar following the accident may have resulted in an apology, it was, the Tribunal finds, more likely than not that no consent was granted for the removal of the pillar and part of the front wall following the accident.

58. Schedule 3 Clause 1 is sufficiently broad to capture the actions of the Respondent. There has been a breach of Clause 2 of the lease and Clause 1 of the Third Schedule.

59. In conclusion the Tribunal finds that there has been a breach of the lease.

W H Gater FRICS ACIArb Date 29 March 2018

APPEAL

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.