



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

Case Reference : **BIR/17UD/LBC/2022/0016**

Property : **Flat 15b Hill View Road, Brimington,
Chesterfield, S43 1JW**

**Applicant
Represented by** : **Glenis Pamela Lee
BRM Law Limited**

Respondent : **Jonathan Paul Thorneycroft**

**Type of
Application** : **Application under section 168(4) of the
Commonhold and Leasehold Reform Act
2002 for a determination that a breach of
covenant or condition in the lease of the
property has occurred.**

Tribunal Members : **Judge C. P. Tonge, LLB, BA.
Mrs K Bentley.**

Date of Decision : **20 January 2023**

DECISION

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Application and background

1. The Applicant freeholder brings this case before the Tribunal by an application dated 14 September 2022 and received by the Tribunal on 16 September 2022. The application requests (paragraph 5 of the application form) that the Tribunal determine whether or not Mr Jonathan Paul Thorneycroft, the Respondent tenant, is in breach of two covenants in the long lease. The first being not to make alterations to the building without written consent (clause 12 of the lease) and the second being not to sublet flat 15b, Hill View Road, Brimington, Chesterfield, S43 1JW "the property" (clause 14(a) of the lease).
2. Directions were issued on 30 September 2022. In those Directions it is noted that the Applicant has indicated that this case can be dealt with without the need for the evidence to be considered at a hearing, so that the case can be decided upon consideration of the written evidence in the papers after an inspection has been held. The Directions indicate agreement with this course of action, but provide for an oral hearing to be arranged, if requested. There has not been a request for an oral hearing.
3. Further, the Directions indicate that the Tribunal will consider the alleged breaches of covenant as specified in the application form and repeats them in the Directions. There was an application to extend time limits as provided in these Directions and this was granted. There has not been any application to extend the number of alleged breaches of the lease. The Directions warn the Parties that they must comply with the Directions and that should the Applicant fail to do so the Tribunal may strike out part or all of the Applicant's case.
4. In partial compliance with these Directions the Applicant has served a statement of case and a bundle of evidence that is not paginated. This will make reference to individual pages within the bundle more difficult than it would otherwise have been. The Applicant's statement of case has sought to extend the ambit of the case to include three additional breaches of covenant that were not specified in the application and are outside the scope of the Directions. This purported extension of the case from two breaches to five breaches has taken place without the permission of the Tribunal.
5. In compliance with these Directions the Respondent has served a statement of case and a bundle of evidence that is not paginated. This will make reference to individual pages within the bundle more difficult than it would otherwise have been.
6. The written evidence referred to in paragraphs 3 and 4, above will be dealt with, where relevant, in the determination of the issues in the case.

7. Arrangements were made for the Tribunal to inspect the property at 10.30am on Friday 22 January 2023.

The property

8. The inspection commenced at 10.35 am on Friday 22 January 2023. Persons present were Georgina Wood, a lettings assets manager, representing the Applicant and the Respondent in person.
9. The property is a flat in a building that is semi-detached, being built on the corner of Hill View Road and its adjoining street. The part of the building that relates to this case contains three flats. Flats 15 and 15a occupy the ground floor and 15b the first floor. Access to flat 15b is via a small entrance porch leading to stairs from a small yard at the rear of the building.
10. To the front of the building there is a parking area that has space for three vehicles to be parked in it, although if the centre is used to park a vehicle some manoeuvring would be necessary to get past it. The Respondent does not have permission to use this parking area. To gain entry to flat 15b it necessary to walk down the side of the building to a small rear yard that contains the entrance porch to 15b. The rear yard has meter cupboards that are mounted into the exterior walls of the building, two being set into the exterior porch wall of flat 15b. These two meter cupboards are for the electricity supply to the building and the Tribunal notes that on the inside of these meter cupboard doors they are marked with the words “ E B meter enclosure”. This indicates that these meter enclosures were installed in or before 1990 when the Electricity Board was replaced by the National Grid.
11. The Tribunal made a careful inspection of the extension to the side and rear of this building. The extension is mostly provided to increase the ground floor area of flat 15a but does also provide the entrance porch for flat 15b. The Tribunal noted that the original exterior brick work of the building is slightly darker than the bricks of the extension and that the builders who built the extension used the same bricks, wooden facias and rain water gutters throughout. The facias are in need of repainting. It is clear that the whole of the extension was all built at the same time, including the porch to flat 15b. It is not a recent extension of the building.
12. The Tribunal did inspect other matters that relate only to the three additional breaches that the Applicant has sought to add to the case. However, the Tribunal excludes this evidence from this Decision because this Tribunal has determined that it is fair and just to limit this case to the two breaches that are alleged in the application form and dealt with in the Directions that guide the parties as to how the case should proceed.

Preliminary issue

13. Later on 20 January 2023 the Tribunal considered this case and determined that it is necessary to consider, as a preliminary issue, whether the case should proceed with two alleged breaches of covenants of the lease or to extend the case to include five such breaches.
14. The Tribunal notes that the application form is very clear in that it alleges only two breaches of covenants. The Directions in the case are also very clear and they deal with only those two alleged breaches of covenants. There has been no application to extend the case to include three additional allegations that three other covenants have been breached. If such an application had been made there would have been additional Directions that would have permitted the Respondent to make submissions on the point and then there would have been a judicial decision as to whether the case could be so extended.
15. This is a case in which, if the Tribunal determines that there has been a breach of covenant by the Respondent, then there can be an application to the relevant Court for forfeiture of the lease. In circumstances that the determinations made by the Tribunal can have such severe consequences the Tribunal determines that it would be unfair and unjust to extend the case to include three additional alleged breaches of covenants. The Tribunal will deal with the case as involving the two alleged breaches of covenant as detailed in the application form and Directions and will exclude all evidence as it relates to other alleged breaches.

Relevant provisions of the lease

16. The Respondent holds the remainder of a lease on flat 15b, with a term of 90 years, commencing on 24 June 1985. The Respondent acquired the remainder of the lease on 6 January 2020, having paid a fee of £50,000. It should also be noted that the Applicant freeholder was not the freeholder when this lease was originally granted in 1985, having become the freeholder of the building in February 1994. The plan for the demised property shows the first floor flat outlined in red and the ground floor entrance porch outlined in blue.
17. The lease contains covenants that are binding upon the Respondent during the term of the lease.
18. The first such clause relevant to this case is clause 2 (12). That clause prevents any extension to flat 15b without written consent from the Applicant. No such permission has been granted.

19. The second such clause relevant to this case is clause 2 (14)(a). That clause prevents the sub let of any part of flat 15b to any other person, but it does not prevent the sub let of the whole of flat 15b. Clause 2 (13) does restrict occupation of flat 15b to one family and residential use only.
20. The effect of clause 2 (13) and 2 (14)(a) taken together is that the Respondent may sub let flat 15b for the residence only of one family. They would prevent a sub let of a bedroom to another person.

The Law

The Commonhold and Leasehold Reform Act 2002

Section 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-dispute 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 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.

Determination of the issues in the case

21. In this case the Applicant must satisfy the Tribunal on the balance of probability that the Respondent is in breach of either clause 2 (12) and or clause 2 (14)(a).
22. Dealing first with clause 2 (12). The Applicant states that there has been a recent extension to the building providing a porch for flat 15b. The Tribunal's inspection has established that the extension to flat 15a and the provision of the entrance porch to flat 15b are part of one extension that is not recent. The wooden facias are of some age and are need of repainting. The electricity meter enclosures establish that the single extension is likely to have been built in or before 1990.
23. The Applicant also points out that during enquiries before contract, when the Respondent was considering purchase of the remainder of the lease, enquiry form LPE1 was completed by her. At paragraph 6.4 and 6.4.1 of LPE1 the Applicant stated that the prior leaseholder had breached the terms of the lease by building an unlawful extension. The Respondent went on to purchase the remainder of the lease, having been so warned.
24. The Respondent submits that he caused his conveyancer to have the building inspected and that he was then informed that the extension predated the grant of the lease.
25. The Tribunal considers the plan as to what was demised in this lease and it is clear that the ground floor entrance porch in that plan is the same as the entrance porch as it now exists. The Tribunal notes that the Applicant has recently rewired electricity to other flats, but that does not alter the fact that it is highly likely that there has not been any extension of this part of the building during the term of this lease.
26. The Tribunal determines that there has not been a breach of clause 2 (12) of the lease.
27. Considering now clause 2 (14)(a). The Tribunal notes that it is common ground that the Respondent has sub let the whole of flat 15b to a third party with an assured shorthold tenancy, for the use of the flat as a residence for one family only. The Respondent submits that this is permitted by clause 2 (13) and clause 2 (14)(a).
28. The Tribunal has already dealt with interpretation of the lease above (this Decision, paragraphs 19 and 20). The Tribunal agrees with the Respondent that a sub let as described in paragraph 27 is permitted by the terms of the lease. The Tribunal determines that there has not been a breach of clause 2 (14)(a) of the lease.

29. This case has been conducted during the Covid pandemic but the procedures of the Tribunal have been in no way effected by this fact.

Decision

30. The Tribunal Decides that it is not satisfied that the lease has been breached as described in paragraph 5 of the Tribunal application form.

31. Appeal against this Decision is to the Upper Tribunal. If any party should wish to appeal, they have 28 days from the date that this Decision is sent to them to deliver to this First-tier Tribunal an application for permission to appeal, stating the grounds for that appeal, providing particulars of those grounds, stating the paragraphs of the Decision that are appealed against and the result that the party making the application for permission to appeal seeks as a result.

Judge Tonge

Date this Decision sent to the parties 30 January 2023