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RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0040/11/16

In the matter of Section 168(4) of the Commonhold and Leasehold Reform Act 2002

And in the matter of Flat 5, 33 South Parade, Pensarn, Abergele LL22 7RG

Tribunal: Dr Christopher McNall (Lawyer – Chairperson)
Mr David K Jones FRICS (Surveyor - Member)

Applicant: CJW Holdings Limited
(Represented by Mr Shaun Williams, a Director)

Respondent: Miss Julie Jenkins
(Represented by her brother, Mr S F Jenkins)

Hearing: Heard in public at Colwyn Bay Town Hall
on 10 March 2017.

DETERMINATION / DECISION

For the reasons which are set out below, the Tribunal determines that the following breaches of covenant contained in the Lease dated 18 March 1975 have occurred:

1. A breach of Clause 3, namely a failure to comply with Schedule 2 Paragraph 2, in leaving perambulators and other articles obstructing parts of the building and other common areas, together with a breach of Clause 2(14) in leaving furniture and heavy or bulky goods in the common passages and staircases.

2. A breach of Clause 3, namely a failure to comply with Schedule 2 Paragraph 3, in that the floors of the flat's hallway, lounge and downstairs bedroom are not suitably carpeted.

3. A breach of Clause 2(6) in failing to maintain and keep in repair an external water discharge pipe serving the flat alone and therefore the Respondent's responsibility.

Dated this 31st day of March 2017

CHAIRMAN

REASONS FOR THE DETERMINATION / DECISION

Introduction

1. These are our full reasons in relation to this application, made on 31 October 2016 under section 168(4) of the Commonhold and Leasehold Reform Act 2002 (**'the 2002 Act'**). That subsection provides:

   "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 covenant or condition in the lease has occurred".

2. The Tribunal inspected the property both internally and externally on the morning of the hearing. The Respondent does not live at the property, nor even in the same building. She sub-lets the property on an assured shorthold tenancy. We thank the Respondent and the present occupant for giving us access. We inspected in the presence of the Respondent, her brother (who represented her at the hearing) and the present (sub) tenant. This inspection took place in the absence of the Appellant's representative. No submissions were made to us during the course of our inspection.

3. The property is a duplex residential flat on the top floor and in the attic space of a substantial three-storey semi-detached 'villa'-style house near the seafront in Pensarn, a suburb of Abergele on the North Wales coast. The house appears to have been built in about 1900 as a single dwelling-house, at a time when Pensarn was a resort area popular with wealthy Liverpool and Manchester merchants. The house is no longer a single dwelling, having been sub-divided internally to provide 6 flats. The present Applicant also owns the neighbouring house, number 31, and there are connecting fire doors between the communal areas of number 33 and number 31.

4. The house is accessed through an external front door, which gives internally onto a hallway which is approximately 8 by 6 feet. This hallway also contains fire extinguishing equipment and a fire call point. The internal front door of Flat 1 gives onto this hallway. The hallway leads to the staircase to the upper floors. The hallway used to give onto a back door, leading to a yard behind the house, but that has now been blocked off.

5. Flat 5 is at the head of a short flight of stairs leading from the top-floor landing. The internal front door of Flat 6 gives onto that landing. Flat 5 contains an internal staircase. Inside the flat, on the ground floor (so to speak), it has a hallway, bedroom, lounge, kitchen, and bathroom. On the upper floor, in the roof space, it has bedroom accommodation under pitched roofs.

6. The Applicant limited company is the registered proprietor of the freehold title, registered with Land Registry under Title Number WA931826.

7. The leasehold interest is registered under Title Number WA683680, and was acquired by the Respondent on 18 September 2003.

8. The lease with which we are concerned was made on 18 March 1975 to hold from 11 March 1975 for a term of 999 years, at a ground rent of £10 per year. The lease was of the property described in the First Schedule, being all that residential flat being and known as Number 5 of 33 South Parade Pensarn Abergele in the County of Clwyd.

9. Clause 2 of the Lease sets out a series of 21 individual lessee's covenants.

10. The Second Schedule contains a series of 'Management Restrictions and Regulations'. By Clause 3 of the Lease, the Lessee covenanted with the Lessor and with the owners and lessees of the other flats comprised in the building that the lessee and the persons deriving title under him:

> '*will at all times hereafter observe and perform all and singular the Management Restrictions and Regulations set forth in the Second Schedule hereto so far as the same apply to the demised premises to the intent that the benefit of this covenant and the said Management Restrictions and Regulations may be annexed to each and every part of the Building*'.

The Law

11. The Applicant bears the burden of proof in relation to each of the allegations in relation to which the Applicant seeks a determination. That means that the Applicant is under a duty to establish the facts, and in particular to establish that any alleged breach of covenant in the lease has occurred.

12. The standard of proof placed upon the Applicant is the ordinary civil standard: namely, the balance of probabilities. In Re B (Children) (Care Proceedings: Standard of Proof) [2008] UKHL 35 the Supreme Court made it clear that there is no greater or 'enhanced' burden even if the allegation is one where serious misconduct is alleged. If the Applicant fails to satisfy us to the appropriate standard that the breach has occurred, then the breach is not proved and the allegation in that regard must, as a matter of law, be dismissed.

13. We note the somewhat antagonistic relationship between the parties which has deteriorated over the past few years. But that has no bearing upon our decision-making. We are tasked and are empowered by Parliament only to determine the narrow statutory question which we are asked. In the context of this application, that also means that we are not tasked or empowered to undertake any wider inquiry as to the relationship between the parties. It would be wrong in law to do so. Nor are we tasked to inquire into an Applicant's motive in applying to the Tribunal. There was a suggestion in the correspondence that this application was motivated by the prospect of this whole house being zoned for re-development. We were not addressed on that issue, and have not had any regard to it.

14. The language of the 2002 Act is clear that we must determine whether a breach 'has occurred'. Whilst we did not hear argument on the point, the statute does not appear to require that a breach be continuing at the date of the hearing. On that analysis, a declaration must still be made if the breach is proved (to the appropriate standard) to have taken place, even if that breach has in fact ceased or has been put right by the time of the hearing. Having conducted our own research, this is made clear by the decision (which binds us) of the Lands Chamber of the Upper Tribunal in Forest House Estates Ltd v Al-Harthi [2013] UKUT 0479 (LC) (Peter McCrea FRICS). That decision in turn applies and follows the decision of the then-President of the Leasehold Valuation Tribunal (George Bartlett QC) in GHM (Trustees) Limited v Glass [LRX/153/2007] in which he said:

> *"in my judgment the Leasehold Valuation Tribunal was in error in refusing to make a determination that a breach had occurred on the ground that the breach had been remedied by the acquisition of the landlords of knowledge of the tenants' identity. The jurisdiction to determine whether a breach of covenant has occurred is one for the [Tribunal]. The question whether the breach has been remedied, so that the landlord has been*

occasioned no loss, is a question for the Court in an action for breach of covenant."

15. The 2002 Act gives no guidance as to whether a breach, in order to attract a statutory determination, should be more than trivial (or *'de minimis'*). We were not addressed on the point, nor was any relevant law drawn to our attention. We have approached the question on the footing that the breach should be shown (to the appropriate standard) to have been more than trivial.

16. Similarly, and although we were not addressed on the point, the language of the 2002 Act does not seem to permit any inquiry by the Tribunal, if a breach is found at some point to have occurred, whether a declaration should still be made if the breach (for example) has been waived or otherwise acquiesced in by the landlord so as to bar the landlord from seeking to rely on it. On this point (i) given the narrow and focussed way in which the 2002 Act is expressed and (ii) having failed to identify through our own researches any reported decision on the point, we conclude that we cannot properly take account of any such circumstances or factors. However, having so described *our* jurisdiction, we express no view as to whether such issues could be considered in any *other* jurisdiction (for example, the County Court in connection with any application for relief from forfeiture).

17. Lastly, the lease is a contract and, where we are required to interpret it, we do so on the conventional basis that we should read the lease to ascertain the meaning which it would convey to a reasonable person having all the background knowledge which would have been available to the parties in the situation they were at the time of the contract: see Lord Hoffmann in Investors' Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896; *Lewison on the Interpretation of Contracts* §1.01

Our findings

18. Following the inspection, a hearing was held in Colwyn Bay Town Hall. We are grateful to the participants for the courteous manner in which the hearing was conducted, and their well-focussed submissions concerning the evidence before us. There were witness statements from Mr Shaun Williams and from Miss Jenkins, as well as a bundle of documents. Consistently with the Tribunal's Rules, and the flexibility of procedure which they permit, we adopted a relatively informal approach - identifying the 8 alleged breaches of covenant, adopting those as a form of agenda, and then hearing from each party in turn

concerning the alleged breaches one by one. We treated everything which we were told by Mr Shaun Williams in the manner of evidence. Whilst we did not hear directly from Miss Jenkins, representations were made on her behalf by Mr Jenkins and we asked questions of both representatives. We are satisfied that Miss Jenkins' case responding to the allegations (in relation to which she bore no burden) was fully and properly put.

Allegation 1: Use of flat to supply drugs

19. It was said that the flat was being used to supply drugs. It was not alleged that the Respondent herself or the present occupant were supplying drugs, but rather that this was being done by someone associated with the present occupant and perhaps also living at the flat. It was said that this, if true, was contrary to Clause 2(15) of the Lease (prohibition of use for illegal or immoral purpose).

20. In our view, the Applicant has failed to prove this allegation to the requisite standard.

21. The highest at which Mr Williams could put the Applicant's case was that he had been told (but he did not say by whom, or when, or told how) that the occupant's partner was selling drugs. He had gathered CCTV footage from the cameras in the hallway, by the front door, but Mr Williams accepted that the recorded footage (which we did not see) does not show anyone selling drugs, but shows people (he did not say whom) coming to the foot of the stairs and examining 'a small clear packet of something' (note the singular). Mr Williams accepted that the Applicant's case in this regard was 'probably one of inference'. He had reported his suspicions and supplied that CCTV footage to North Wales Police about 12 months ago. But he had not heard back from the police and was not aware of any criminal investigation. As far as he was aware, there had been no raids of the building or the flat.

22. In itself, the absence of a conviction is not determinative since it is possible for there to a breach of an express covenant against illegal use even though there has been no criminal prosecution for the acts complained of: see *Woodfall on Landlord and Tenant §11-197*.

23. However, and whilst the circumstances described to us do in our view trigger some legitimate suspicion, and point towards some kind of untoward behaviour, we cannot be satisfied, even on the balance of probabilities, that there is sufficient evidence to show that the flat is being used to supply drugs. Therefore the allegation does not succeed.

Allegation 2: Blocking communal areas

24. The allegation was that items have been left blocking exit routes and blocking access to fire extinguishers and a fire call point.

25. Schedule 2 Paragraph 2 says:

> *"...[N]o owner shall on any account whatsoever leave or permit to be left any ... perambulator .... or any article whatsoever upon or obstructing any part of the Building or the pathways or entrances leading thereto used in common with other occupiers."*

26. Clause 2(14) of the Lease also provides that no *'furniture or heavy or bulky goods .... are to be left in the common passages or staircases'*.

27. It needs hardly be said that these covenants exist for a good and obvious reason. Keeping the doorways, staircases, and communal areas unobstructed is for the benefit of everyone (including, one might say, in particular, the occupants of the upper-storeys) if there is a fire alarm or some other reason why the occupants of the building need to get out in a hurry. It is plainly dangerous to block fire extinguishers, fire exits, and fire call points, for any reason.

28. **We are satisfied that non-trivial breaches of these covenants have occurred.** The occupant has three young children. Two of them are now of school age. There are photographs showing two prams in the entrance hallway, as well as a car seat. We do not know when they were taken, but we accept that the prams belonged to the occupant and/or to persons visiting her. The prams and the car seat are blocking the front door, the internal front door to Flat 1, the fire extinguishers and the fire call point.

29. There are emails complaining about the 'leaving' of prams in the hallway on 24 November 2014. Miss Jenkins responded that she had asked the tenant several times and explained the need to remove prams. Mr Williams wrote another email on 25 January 2015 complaining that a pram had been left in the hallway outside the front door of Flat 3. There are further emails (for example) on 17 April 2015, 25 April 2015, 27 April 2015, 28 April 2015, 30 April 2015, 22 May 2015, 26 May 2015, 28 May 2015, 29 May 2015. These obviously reflect an ongoing state of affairs.

30. The photographs show the situation complained of. There is also a photograph of a 'foldaway' chair and a pram at the foot of the flight of stairs to Flat 5, impeding full access to Flat 6, and also to the connecting fire door. This is dangerous. It is notable that the persons principally impeded from getting down the stairs and through the fire door in the event of a fire are the present occupant and her children.

31. We do not accept Miss Jenkins' submissions that the photographs must have been taken when the prams were only in the hallway temporarily, for a matter of minutes, whilst the tenant took her children upstairs to settle them, and who would have shortly been coming back down to take the prams up the stairs.

32. We accept Mr Williams' evidence that he had taken photographs at various times of the day and that the photographs did not show 'shuttling'.

33. We do not believe that the occupant would always carry each pram and/or the car seat up several flights of stairs to the flat, and back down again on each and every occasion she wanted to go in or out with the children. We do acknowledge that the occupant did so on at least one occasion, since Mr Williams wrote on 24 June 2015 to complain (amongst other matters) that the occupant was bashing the pram into the walls going up the stairs. But overall the suggestion that the photographs show transient incidents is inherently improbable since it is explicable only if Mr Williams simply happened on the prams in the short interval - perhaps no more than minutes - when the prams were unattended in the hallway. It is also inconsistent with the succession of emails to which we have referred.

34. Our conclusion that prams were being left unattended is fortified in that we were shown a note, in somewhat belligerent terms, dated 15 March 2016, which had been left by the occupant on the prams, following an occasion upon which Mr Williams had moved them. The very existence of that note only makes sense if prams were being routinely left unattended by the occupant in the hallway. We accept that carrying large prams up and down several flights of stairs is cumbersome and time-consuming. But we also have to take account of the fact that the Respondent let this flat, and the occupant took it, each knowing that the occupant had small children, and that the flat was a top-floor flat, with a long lease which contained covenants prohibiting storage and obstruction of common areas.

35. We were also shown a photograph of a two-drawer chest of drawers alleged to have been left on the stairs for about 5 days. We accept Mr Williams' evidence on that point. We were shown a photograph of a ladder in the hallway, which had been there for months. The explanation that it was there in connection with decorating may well have been true. But even if true, the ladder should not have been stored in the communal areas. It should have been stored in the flat, or elsewhere.

36. We conclude that the occupant has been treating the communal areas as part of her lease. We accept Mr Williams' evidence that the occupant had told him that the landing at the foot of the short flight of stairs leading to Flat 5 was hers, up to the mid-line of the landing, and that she could store anything she wanted there. That is consistent with the photographs but it is not our reading of the lease.

37. Unfortunately, Miss Jenkins seems to have paid little regard to the Applicant's extremely numerous emails on the subject of prams. Given the weight of the evidence pointing to there being an ongoing and persistent situation, it was perhaps not entirely well-advised for Miss Jenkins to choose to reject the allegations about pram storage as '*photographs or hearsay*' (as in her letter of 7 June 2015), leading her to demand copies of CCTV footage, rather than (for example) discussing it with her tenant, whose sub-tenancy she had the power to regulate.

38. As early as 3 December 2015 Miss Jenkins was given fair warning that the storage of prams (amongst other items) amounted to a breach of the lease. Thereafter, similar warnings were regularly and repeatedly given. Unfortunately, those warnings do not seem to have attracted any substantive response from Miss Jenkins. Giving Miss Jenkins the benefit of the doubt, we acknowledge that her apparent silence may have been because she was ill and had moved to London for a while. But Mr Williams was emailing repeatedly because he was not receiving any response, and because the situation with the occupant was not improving. Mr Williams' approach was not unreasonable. The Applicant company, through its officers, one of whom was Mr Williams, was answerable for the safety of the building, and the safety of its occupants. If the occupant's activities, as here, infringed the terms of Miss Jenkins' lease, then Miss Jenkins was and is answerable to the Applicant for those actions.

Allegation 3: Floors not suitably carpeted

39. Schedule 2 Paragraph 3 reads:

> *"No Owner shall reside or permit any other person to reside in a flat unless the floors thereof are suitably carpeted (where it is usual to do so) except while the same shall be removed for cleansing repairing or decorating the flat or for some temporary purpose."*

40. It is accepted by the Applicant that this covenant does not apply to the kitchen or bathroom, which, for reasons of hygiene, are not usually carpeted.

41. The purpose of such covenants is to provide a degree of sound insulation between flats above and below each other. Therefore, reading the covenant purposively, it cannot have been intended to affect the upper storey of this flat, which is laid with laminate wood floors, since any noise generated by walking on those floors would only affect the downstairs of this particular flat.

42. **Subject to those qualifications, we are satisfied on the evidence that there is a continuing breach of this covenant.** There is a wooden laminate style boarded floor laid in the hallway, bedroom and lounge. As far as we can tell, it was laid over plywood placed over the original floorboards, consistently with what would be required by building regulations. We note the complaint on 4 January 2016 about noise from children running around in the flat.

43. Having seen the receipt from Coastal Carpets, we find that wooden laminate floors were bought in late 2003 (that is, shortly after Miss Jenkins bought the flat) and presumably laid shortly afterwards, and therefore have now been down for well over a decade.

44. We note that the Applicant did not advance any case before us that the floor was laid without the landlord's permission, and did not advance any case before us that the laying of the floor was an alteration contrary to Clause 2(12).

45. We have already noted our view as to our inability to consider any arguments as to waiver and acquiescence. This inability means that we cannot consider any arguments as to whether the ground rent has been paid; or, if not paid, effectively tendered.

Allegation 4: Leak

46. Clause 2(6) says that the lessee shall

> "*well and substantially repair ... maintain ... and keep the ... exterior of the demised premises (except insofar as such work falls upon the Lessor under the terms of Clause 4 of this Lease)...*"

47. There was much documentation concerning a single leak from the bathroom into the downstairs flat in November 2014 which was quickly repaired. But there was no express allegation that we should determine that particular leak to be a breach of covenant. The Notice said that the Respondent *'has allowed leaks from the flat repeatedly'* but the only leak referred to was a leak from an external water pipe leading out from the kitchen to the main down-pipe at the side of the house.

48. Clause 4(iii) of the Lease provides that the Respondent is liable for any pipes which serve the flat alone, as this one does. Hence this pipe is within the scope of Clause 2(6) and is the Respondent's responsibility to keep in good repair.

49. That pipe is alleged to be dripping onto the windows and sills of downstairs flats, as well as onto the pavement. A complaint in these terms was made on 9 June 2015.

50. Whilst we did not observe the pipe dripping during our inspection, we were shown a photograph of a water mark or stain on the outside of the building, consistent with the email of 9 June 2015 and a leak from the elbow of this pipe.

51. Accordingly, we find this allegation, in relation to the external water pipe, proved.

Allegation 5 - littering

52. This allegation relates to littering. Although we heard submissions on it, the allegation was withdrawn during the course of the hearing by Mr Williams.

Allegation 6 - loitering

53. This allegation is that the tenant and her visitors 'loiter in the hallway late at night', contrary to Schedule 2 Paragraph 10 ('No child or other person (being a person under the Owner's control) shall loiter in any entrance hall passage landing or staircase of the building'.

54. To 'loiter' is to hang about. Since loitering is prohibited, the word is obviously intended to catch more than merely ‘hanging about’, but hanging about in such a way as to occasion nuisance or inconvenience to others.

55. The occupant of Flat 1 would be the obvious person affected, but that flat has been unoccupied since February 2015. We were told about children - both the occupant's children and other children visiting them - playing in the entrance hall and in the communal areas: but in our view that is not loitering within the meaning of Schedule 2 Paragraph 10.

56. We are not satisfied on the evidence that the allegation of 'loitering' is made out. Accordingly, it must be dismissed.

Allegation 7 - drying towels

57. This allegation relates to drying towels on the bannister outside the flat's front door. We were shown a photograph to demonstrate that this had indeed happened, on at least one occasion. Miss Jenkins' retort was that, when this had been drawn to her attention, she had told her tenant to stop it, and there had been no repetition.

58. The allegation was withdrawn during the course of the hearing by Mr Williams.

Allegation 8 - noise

59. This allegation is that the occupant and her visitors have been making noise when entering and exiting the building allowing fire doors to slam and on 21-22 October 2016 between 10pm and 2am there were 24 entries/exits.

60. Clause 2(16) of the Lease says that:

> *"... no act or thing which shall or may be or become a nuisance damage annoyance or inconvenience to the Lessor or his tenants or the occupiers of any adjoining or neighbouring flat or*

the neighbourhood shall be done upon the demised premises or any part thereof."

61. We were shown a schedule of movements in-and-out of the building, from 22.29 on 21 October 2016 to 07.54 on 23 October 2016. There were 24 movements (we do not know whether these were in or out) from 22.29 to 06.07. There is then a lull until 09.15, with 4 movements between 09.15 and 09.41. Thereafter, there is nothing until 22.22, when there are 12 movements between 22.22 and 01.57.

62. It seems to us that these are a lot of visits. Moreover, if they do not involve the occupant, then the coming-and-going must also be a disturbance to her and her small children.

63. But, despite the heading of that Schedule, there is no evidence that all those movements (or indeed any of them) did in fact relate to the occupant of Flat 5 or any visitors to Flat 5. There are other occupants of the building: in Flats 2 and 4. It is also possible that people were gaining access to number 31 through the front door of this house and the connecting fire doors.

64. Moreover, the Schedule is a snapshot of about 36 hours. Hence, it did not show a pattern over (for example) several weeks. It is not clear whether there is such a pattern. Although Mr Williams described 'a constant stream' of people with 'literally dozens of visits in the night', he also accepted that some weeks were 'very quiet'.

65. Albeit with some reluctance, we find that the allegation is not proved to the requisite degree. It was not shown whether the visitors were connected with Flat 5, or with the other 2 flats in the building which were then occupied, or even this building, given the possibility of gaining access to and from next-door. Moreover, the evidence was, in effect, a snapshot showing only just over one whole day. Hence, it did not show a pattern.

66. Although we have not accepted the Applicant's case in this regard, we wish to make clear that we do not accept Miss Jenkins' submission that these movements, if related to the occupant of Flat 5, were in all likelihood innocuous visits from members of her extended family. There was no evidence of any kind from the occupant to explain that this was the case. In the absence of such evidence, the movements are inherently suspicious - in timing (in the middle of the night); frequency; and duration. If members of the occupant's extended family

were visiting her, we do not understand why there would need to be repeated visits (sic), each of short duration, between 2am and 6am.

A postscript

67. The hearing was a public hearing and this Decision is a public document, and will be made available, in the usual way, on the Tribunal's website. All applicants are advised on the Application Form that any information which they provide to the Tribunal may be recorded in a decision document. The same applies to Respondents.

68. Allegation 1 was a serious one. We have noted the careful way in which Allegation 1 was put and pursued. A suggestion was made during the hearing concerning intended proceedings for defamation arising from Allegation 1.

69. Given that suggestion, it may be helpful if we record that we have treated everything placed before us, both in writing and orally, as subject to the privilege which ordinarily attaches to statements made in the course of proceedings before this Tribunal, which exercises functions equivalent to those of a court. Moreover, the parties will have noted that this Decision does not name the present occupant of the flat or her alleged partner or friend.

70. If any further proceedings of any description are brought, by either of the parties, they will doubtless wish to place a complete copy of this Decision before the Court.

Dated this 31st day of March 2017

Chairman