Y Tribiwnlys Eiddo Preswyl

Residential Property Tribunal Service (Wales)

Leasehold Valuation Tribunal

Reference LVT/0007/05/19

In the Matter of Premises at Flat 1, 67 Penylan Road, Cardiff, CF23 5HZ ("The premises")

And in the matter of an applications S.168(4) of the Commonhold and Leasehold Reform Act 2002

Applicant:	**RESIDENTIAL FREEHOLDS LIMITED**	
Respondent:	**KALI SASAN BARAWI**	
Tribunal:	**Chairman**	**Jim Shepherd**
	Surveyor	**Andrew Weeks MRICS**
	Lay	**Juliet Playfair**

DECISION

There has been a breach of clause 14.2 of the lease.

1. In this case the Tribunal was hearing an application made pursuant to s.168 (4) of the Commonhold and Leasehold Reform Act 2002 for a determination that a breach of lease has taken place. This is normally the pre-cursor to forfeiture proceedings. The Tribunal's role is limited to confirming if a breach has happened.

2. The Respondent purchased the leasehold of the premises for £106,000 on 3rd May 2016. The original lease was for a term of 99 years from 29th September 2002. It is common ground that at the date that the Respondent purchased the property the wall between the lounge and the kitchen had been removed. The Respondent only realised that this was a potential issue when she instructed Haines Conveyancing to inspect the premises as she was seeking to sell. The prospective purchaser's sought disclosure of the landlord's consent for the removal of the wall pursuant to clause 14.2 of the lease in a letter dated 3rd January 2019. In fact clause 14.2 is not a consent clause but a prohibition clause which prohibits inter alia any structural

alteration to the Demised premises. It was common ground that the removal of the wall was a structural alteration. The letter dated 3rd January 2018 alerted the Applicant to the fact that works had been carried out contrary to the prohibition in the lease.

3. Upon inspecting the premises the Applicant found that the Respondent had installed laminate flooring. A second limb of their application therefore relates to an alleged breach of clause 18.4 of the lease which prohibits any floor covering other than carpet unless the floor covering has the same soundproofing characteristics of carpet with a good quality underlay. In addition the tenant is permitted to lay linoleum or similar such floor covering in the kitchen and bathroom of the Demised Premises.

4. A Mortgage Valuation Report did not identify any discrepancy in the lease plan. The lease plan showed the wall in situ between the kitchen and the lounge (Page 26 of the bundle). Furthermore in her seller's information the Respondent's predecessor in title did not declare any alterations since the lease was granted. The Respondent also produced adverts for letting the premises in 2008/2009 which showed the wall in situ however it is clear that the wall had been removed before the Respondent purchased the property. The Respondent has plainly been badly served by her conveyancing solicitors and she has made a formal complaint to them. The Applicant has sought a sum for the grant of retrospective consent. In fact as indicated above this is not a matter of consent.

5. The Tribunal inspected the premises on the morning of the hearing. The wall between the lounge and the kitchen had been removed and laminate flooring had been put down in the kitchen, bathroom and hallway. The Respondent put the laminate flooring down.

6. At the hearing the Applicant was represented by Paul Simon of Counsel. The Respondent was represented by Alys Williams of Counsel. The Tribunal is grateful for the assistance of both advocates.

7. In her skeleton argument Ms Williams relied on provisions in the Landlord and Tenant (Covenants) Act 1995,s.23 and the decision in *Edlington Properties Ltd v JH Fenner & Co Ltd* [2005] EWHC 2158 at [25] where Mr Justice Bean said that the combined effect of section 3 and 23 (1) of the Act is to make the benefit and burden of covenants pass with the estate for the future, but to leave past rights and obligations with the assignor. This at least was the case for so called "new tenancies" - those granted after the coming into force of the Act (as in the present case).

8. Ms Williams submitted that any breach that may be found to have occurred took place before the assignment to her client of the rights and liabilities of the lease. Accordingly she submitted that her client cannot fall foul of s.168(4). Pausing here this submission can only relate to the breach in relation to the wall. The Respondent admitted that she laid down laminate albeit she did state that this was a like for like replacement in the kitchen and hallway, and

that she had merely added an adhesive layer to the surface of the pre-existing flooring in the bathroom.

9. Section 168 states the following:

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 or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and
(b) in relation to a dwelling in Wales, a leasehold valuation tribunal
extract from 1995 Act

10. Ms Williams also submitted that the breaches of covenant relied upon by the Applicant were not continuing breaches and therefore the Respondent could not be responsible for any continuing breach.

11. Mr Simon submitted that section 23 did not assist the Respondent. This was not a case about liability. It was an application for a determination that the lease had been breached. The Applicant was not seeking a remedy as such. Even if successful in the present application they would have to seek the remedy of forfeiture in the County Court. In any event in relation to the flooring the Respondent had installed this.

12. Ms Williams argued that on its face s.168 (1) applied to the present tenant of the premises. It states *a breach by a tenant.* Further s.23 of LT(C) Act 1995

made clear that an assignee should not be bound by previous breaches for which he or she was not responsible.

13. Mr Simon took a contrary view of s.168. He said that the provision was generic. All that was required was a breach by *a tenant*, it did not have to be *the tenant* (meaning the current tenant). He relied on subsection 4 in support of this submission. All the Tribunal has to do is to determine if there has been a breach. It is not for the Tribunal to determine who is liable for the breach. In relation to the flooring the Respondent was responsible for this breach.

14. In relation to the flooring there was some discussion about the hallway/lobby in the premises and whether it could be regarded as part of the kitchen and/or bathroom. This is important because the provision relied on by the Applicant (clause 18.4) effectively gave permission to the tenant to lay linoleum or similar such floor covering in the kitchen and bathroom.

Analysis

The breach of covenant relating to the removal of the wall

15. There is no doubt that this was a breach of covenant by the former leaseholder which was not disclosed to the Respondent. The question then is whether the Respondent is bound by that breach in relation to a determination under S.168(4). The Tribunal considers that she is so bound. S.168 is a generic provision which is not limited to breaches committed by current tenants. This seems clear from the fact that there is no limitation in the application of the provision to current tenants. All that is required is for there to have been a breach. Ms Williams sought to argue that s.168(2) (b) is supportive of the provision being aimed only at the current tenant but that subsection merely recognises that an admission whether by the current or previous tenant will be sufficient to make out a determination.

16. The Tribunal was initially attracted to the argument put forward by Ms Williams in relation to s.23of LT(C) Act 1995. It does seem at first blush that this provision could apply to limit the Tribunal's powers in relation to a determination against an innocent tenant. The argument being that under LT(C) Act 1995,S.23 the previous tenant retains that liability. There are three reasons why the Tribunal does not accept this argument:

17. First, as already indicated, the Tribunal has interpreted s.168 to apply generically. Any application of s.23 in the manner argued for by Ms Williams would hinder the purpose of the provision.

18. Second, the Tribunal considers that Mr Simon is right in his argument that a determination by the Tribunal is not a liability as such. It is merely a pre-cursor to the imposition of a liability through forfeiture proceedings. In other words section 23 (1) which deals *inter alia* with liability under a covenant does not apply.

19. Third, the Tribunal considers that were it to interpret s.23 as applying to determinations under s.168 this could hamper the landlord's proprietary rights in relation to breaches of covenant. Where there is an assignment of a lease which is encumbered by a breach of covenant of which the landlord was not aware he would have no redress. This is not considered to be a fair or correct outcome.

The breach of covenant in relation to the flooring

20. The Tribunal considers that the hallway/lobby is not part of the kitchen and therefore the exception allowing linoleum *or* similar such flooring in clause 18.4 of the lease does not apply to this area. However the Applicant produced no evidence to support the proposition that the laminate flooring would not have the same soundproofing characteristics as carpet and underlay. Moreover it is clear that the purpose of clause 18.4 is to ensure that the floors are soundproofed as best as possible in order to avoid nuisance to other residents if the tenant does not have carpet with underlay. In the present case the premises are on the ground floor with nobody below accordingly there would be less concern about noise transfer. This is a relevant consideration when interpreting the lease provision.

21. In relation to the kitchen and bathroom the Tribunal does not consider that there has been a breach either. No evidence was provided by the Applicant to support the proposition that laminate flooring is not similar to linoleum. It is open to the Tribunal to find that it is similar and it does make this finding.

22. Whilst this had no bearing on its decision the Tribunal considered that the removal of the wall and the laying down of the laminate flooring actually improved the premises. Further the Tribunal has some sympathy for the Respondent who has essentially been foisted with a problem which is not of her own making.

Dated this 8th day of November 2019

J Shepherd
Chairman