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RESIDENTIAL PROPERTY TRIBUNAL (WALES)

Reference: RPT/0022/10/20

In the Matters of 20–22 Carlisle Street, Splott, Cardiff, CF24 2DS

In the matter of an Application under the Housing Act 2004 – Improvement Notice

APPLICANT	Tapestart Ltd
RESPONDENT	Cardiff City Council
TRIBUNAL	Judge – Trefor Lloyd Surveyor Member – Andrew Lewis Lay member- Dr Angie Ash
HEARING	Via CVP Remote Hearing on the 27th April 2021
REPRESENTATION:	Mr Benjamin Hammond for the Applicant Mr Richard Grigg for the Respondent

DECISION

ORDER

1. The Improvement Notice dated the 29th September 2020 in relation to 20-22 Carlisle Street, Splott, Cardiff, CF24 2DS is dismissed and the Applicant's appeal is allowed.

2. If so advised the parties are to file and serve narrative statements limited to the issue of costs in accordance with Schedule 13 of the Housing Act 2004 at Section 12 (2)(d) thereof by 12.00 noon on the 22nd July 2021.

The Application

3. The Applicant appealed to the Tribunal pursuant to paragraph 10(1) of Part 3 of Schedule 1 of the Housing Act 2004 "The Act" against an Improvement Notice issued by the Respondent under Section 11 and 12 of the 2004 Act dated 29th September 2020 relating to 20-22 Carlisle Street, Splott, Cardiff, CF24 2DS ("20-22 Carlisle Street").

4. Directions were initially issued on the 19th November 2020. Paragraph 1 of those directions required the parties to communicate with each other with a view to settling their dispute or narrowing the issues and paragraph 3 of the same directions required the

Respondent to by 12.00 noon on the 2nd December 2020 send the Applicant copies of calculations used to calculate the hazards which formed the basis of the Improvement Notice being served.

5. By way of an e-mail dated the 2nd December 2020 sent to the Tribunal and copied to the Respondent Mr Hammond for the Applicant confirmed that he had been informed that Mr Richard Grigg would represent the Respondent but the Applicant had not received any formal notification of acting. In addition, the Applicant maintained that:

   i) The Respondent Council had failed to engage in proposals for mediation in compliance with paragraph 1 of the directions;
   ii) the Respondent had failed to file and serve the copy calculations as required by paragraph 3 of the aforesaid directions by 12.00 noon on the 2nd December 2020.

6. As a consequence, the Applicant invited the Tribunal to exercise its case management power by virtue of Regulation 26 (i)(e) of the Residential Property Tribunal Procedures and Fees (Wales) Regulations 2016 and allow the appeal by way of a sanction due to the Respondent's non-compliance with the Tribunal directions.

7. As a result a Case Management Conference ("CMC") was convened on the 16th February 2021. The conclusion of the CMC was that the Applicant's application for the appeal to be allowed pursuant to a sanction was dismissed, the 19th November 2020 directions were stayed and the matter was listed to deal with the preliminary issue of whether or not the Improvement Notice had been served upon the correct party.

8. At the time of issuing the directions it was proposed that the matter would be determined on paper without an oral hearing given that the parties were given a further opportunity to provide written submissions on the isolated issue of service of the Notice.

9. As the 19th November 2020 directions order had been stayed the Respondent did not initially file and serve the grounds of its objection to the appeal. However, by way of a single page document received by the Tribunal on the 10th February 2021 (unsigned and absent any Statement of Truth) the Respondent set out its grounds of opposition to the appeal (see further below).

10. The directions of the 16th February 2021 required the parties to complete a Statement of Agreed Facts in relation to whether or not there were common parts that were not included following the demise of the leases relating to 20-22 Carlisle Street together with a plan or plans clearly marked indicating both demised and any areas outside any demise.

11. Further, in relation to any dispute between the parties in relation to the Statement of Agreed Facts, each party was directed to set out its reasons for the stance taken together with any supporting evidence/authority in the format of a Scott Schedule to accompany and be filed and served at the same time as the Statement of Agreed Facts and plan(s).

12. In addition, the parties were required to file and serve Witness Statements dealing with their respective cases by the 9th March 2021.

13. Following the filing and serving of those documents the Applicant raised an issue in relation to the content of the Respondent's Witness Statement specifically relating to the reasons behind the service of the Improvement Notice and requested the opportunity to cross-examine Mr Huw Gronow the Respondent's officer that was the author of the improvement notice. For this to be achieved the matter, in the Applicant's submission, should proceed by way of an oral hearing.

14. The Chairman acceded to that request and the matter proceeded by way of a virtual oral hearing on the 27th April 2021. Despite the Tribunal requesting that Mr Huw Gronow attend to give evidence on the day of the hearing we were informed at the commencement of the hearing that Mr Grigg for the Respondent had been trying to contact Mr Gronow all morning but to no avail.

Background.

15. 20-22 Carlisle Street comprises of 6 leasehold flats, one of which is owner occupied with the other 5 let to tenants. No site visit by the Surveyor Member was undertaken as we are dealing with the preliminary issue of whether or not the Improvement Notice had been served upon the correct party. As such we have not heard any evidence in relation to the requirements of the Improvement Notice itself as the same is not relevant to this preliminary determination.

The Applicant's Grounds for Appeal in relation to the Preliminary Issue to be determined

16. The Applicant's grounds for appeal put simply are that the Applicant was not the person having control and owner of the common parts of 20-22 Carlisle Street for the purposes of the Housing Act 2004. As a consequence, the Respondent has incorrectly served the Notice on the Applicant and/or that one or more persons as owners of the premises ought to take the actions specified in the Notice.

17. Conversely the Respondent's stance put simply is that the correct entity was served.

The Applicant's Written Submissions

18. The Applicant has provided a detailed document headed "Applicant's further submissions" dated 8th March 2021 signed by Mr Benjamin Hammond, Solicitor for the Applicant. That document details inter alia the mandatory requirements that a local authority must follow when serving an Improvement Notice with reference to paragraphs 4(1) and 4(2), Schedule 1 Part 1 of the Housing Act 2004 as follows:

    Service of improvement notices: common parts

    4(1)This paragraph applies where any specified premises in the case of an improvement notice are—

    (a)common parts of a building containing one or more flats; or

    (b)any part of such a building which does not consist of residential premises.

(2)The local housing authority must serve the notice on a person who—

(a)is an owner of the specified premises concerned, and

(b)in the authority's opinion ought to take the action specified in the notice.

(3)For the purposes of this paragraph a person is an owner of any common parts of a building if he is an owner of the building or part of the building concerned, or (in the case of external common parts) of the particular premises in which the common parts are comprised.

19. The Applicant further submits that there is no test that a recipient must be a person in control of parts of the building where the hazards exist in relation to the Improvement Notice. The test according to the Respondent is that the recipient is an owner of the building in which the common parts are located and secondly in the Respondent's opinion the recipient is the person who ought to take the action specified in the notice.

20. The Applicant further criticizes the Respondent's alleged failure to explain why the Applicant was the relevant party to carry out the works. In that regard we were referred to paragraph 16(3), Schedule 1 of the Housing Act 2004 relating to our powers to order that a person other than the Applicant ought to carry out the repairs which is set out as follows:

(3) In the exercise of its powers under sub-paragraph (2), the tribunal must take into account, as between the appellant and any such owner—

(a)their relative interests in the premises concerned (considering both the nature of the interests and the rights and obligations arising under or by virtue of them);

(b)their relative responsibility for the state of the premises which gives rise to the need for the taking of the action concerned; and

(c)the relative degree of benefit to be derived from the taking of the action concerned.

21. In relation to those matters the Applicant submits that:

a. It owns the freehold reversion to the building but all parts are subject to the reversionary leases.

b. There is no covenant requiring the Applicant having to maintain and repair the building other than in default.

c. As a consequence, the leaseholders must in the Applicant's eyes as a matter of construction have primary responsibility for the maintenance and repair of the building.

d. The most valuable interest in the premises given the Applicant receives only £25.00 ground rent is in the long reversionary leases themselves.

22. The Respondent's grounds for the opposition of the Appeal are as follows:

1. The Applicant owns the freehold of 20-22 Carlisle Street, Cardiff

2. The building contains 6 flats which are all subject to a long lease.

3. The Applicant retains ownership of the roofs, gutters and other common areas that are not included in the lease demise.

4. Under section 11 and 12 of the Housing Act 2004 ('the Act') a local housing authority can serve an improvement notice on the person having control of that property. Such notice is served where the authority believes there is a risk to the health and safety of the occupants or visitors.

5. The Respondent served an improvement notice on the Applicant dated the 29th of September 2020. The notice was regarding the roof, guttering, pipes and other communal areas.

6. The Respondent believes that the Applicant is the person having control, and the owner of the areas where the works were identified.

7. The definition of 'person under control' under section 263 of the Act is the person who receives the rack-rent of the premises, or who would receive it if the premises were let at a rack rent. As the works are to areas that are still under the ownership of the Applicant they would satisfy the definition.

8. The definition of 'owner' under section 262(7)(a) of the Act is a person entitled to dispose of the fee simple. The Applicant accepts that they satisfy that definition.

9. The Applicant has a covenant under Clause 3(6) of each lease to maintain, repair redecorate and renew the matters referred to in Clauses 2(17) and 2(19) if the lessees fail to keep the building in repair.

10. Clause 2(17) of the leases includes repair works to the roof, gutters and rainwater pipes. The lessees have failed to keep these in repairs. The Applicant should undertake the necessary works and charge each lessee one sixth of the costs.

11. In circumstances where there is a risk to the health and safety of the occupiers it is appropriate that the Applicant undertake the necessary works.

23. In relation to those grounds the Applicant by way of the further submission as are aforesaid agreed grounds (1) and (2) as a matter of fact.

24. In relation to ground (3) this was not agreed. The Applicant's case is that the flats are demised by reference to their flat number and location in the building. There is no exclusion of structural or external parts.

25. In this regard the Applicant relies upon the High Court decision of **Ralph Klein Ltd -v- Metropolitan County Holdings Ltd [2018] EWHC64 (CH)** hereinafter referred to as **"Klein"** where Edwin Johnson QC sitting as a Deputy Judge in the Chancery Division in summary found that:-

    (i) The true construction of the terms of a lease has to be undertaken to determine the case. In **Klein** the Court determined that the true construction of a lease (referred to as the Mobax lease) relating to a series of buildings in Finchley Road, London was that the whole of the buildings including the roofs and airspace had been demised to the leaseholders.

    (ii) The claimant in **Klein** argued that only the internal parts of the building had been demised. As the Mobax lease in **Klein** was silent in terms of description of the demised property the Judge had examined the specific clauses of that lease to arrive at his conclusion.

26. The Applicant's assertion is that the **Klein** decision is on all fours with the case before us. The facts and questions to be determined, the Applicant says, are identical; the decision to be reached (given the concession that the internal areas are demised) is whether the roof, gutters and down pipes are demised, is to be undertaken by following the true construction of a lease.

27. The said leases the subject of this application being in accordance with the Applicant's assertion are in the same form, and therefore cannot be distinguished from the decision in **Klein**.

28. The Applicant specifically directs us to paragraphs 44-45 which state:

> "44. While I take the point that the Mobax Premises are described, in clause 1 of the Mobax Lease, by reference to specific sets of premises, it seems to me that this description is not apt to confine the Mobax Premises to internal parts of the Buildings only. I say this for the following reasons.
>
> i) If the intention had been that the demise should be internal only, I would have expected to see this spelt out in the description of the Mobax Premises. There is however no wording which specifically excludes structural or external parts of the Buildings. In my view, the references to specific shop premises, specific flat premises and specific garages in the description of the Mobax Premises do not perform this function. Indeed, if the intention had been to confine the demise to internal parts of the Buildings only, the obvious question is what those internal parts were intended to comprise. Did those internal parts exclude all the parts referred to by Mr. Freed in sub-paragraphs 8.3-8.7 of his second witness statement, or only some of them and, if so, which parts? Clause 1 of the Mobax Lease does not answer these questions. The obvious explanation for this is that

such questions do not arise, because the Mobax Premises include the entirety of the Buildings.

ii) The demise was expressed to include what I take to be the open parts of the Premises, referred to as *"the gardens and grounds appurtenant thereto"* . It seems to me that it would have been very odd to demise the open parts of the Premises, without qualification, and then to confine the letting of the Buildings to internal parts only. The much more natural reading of the words of the demise is that they include the open parts of the Premises and the entirety of the Buildings.

iii) The demise was expressed to include *"all additions and improvements hereafter made to the demised premises"* . On the Claimant's argument, and so far as the Buildings were concerned, such additions and improvements could only have been made to the internal parts of the Buildings. An addition could not have been made to a Building. This strikes me as a very odd result, given the unqualified nature of the reference to additions and improvements.

iv) The demise was expressed to include *"all fences walls gates fixtures drains and other works now or hereafter thereon"* . While I take the point that these words did not include any references to the roofs of the Buildings, this wording seems to me inconsistent with the demise of the Buildings being an internal demise only.

v) The description of the Mobax Premises includes the words *"as the same are delineated on the plan Number L.507 annexed to these presents and thereon edged blue"* . The blue edging on the plan attached to the Mobax Lease is shown as enclosing all of the land and buildings which I am referring to as the Premises. I accept that the plan would not necessarily have been intended to show which parts of the Buildings were demised by the Mobax Lease, if the demise of the Buildings was limited to internal parts only. As against that, it strikes me as odd that *"the demised premises"* , as defined in clause 1 of the Mobax Lease, should be identified by reference to the blue edging on the plan, without further express qualification, if the intention was that the internal parts only of the Buildings were being demised.

45. In my judgment the wording of the description of the Mobax Premises in clause 1 of the Mobax Lease is much more apt to describe the entirety of the Premises, including the entirety of the Buildings, than it is to describe the internal parts of the Buildings and the open parts of the Premises only."

29. The Applicant further avers that the true construction of Clause 2 (5) of the lease (page 45 of the bundle), the words *"to keep the demised premises including the drains and sanitary and water apparatus, main walls and boundary walls and fences and all fixtures and fittings and additions thereto in tenantable repair and condition throughout the term"* can only be construed as a full repairing clause which clearly includes the main walls.

30. Furthermore, Clause 2(17) (pages 49-50 of the bundle states) "*to contribute and pay a 1/6 share of the cost and expenses of maintaining, repairing redecorating and renewing the foundations, roof, gutters and rainwater pipes of the building in which the flat is situated and the gas and waterpipes, drains, electric cables and wires in under and upon the building and enjoyed or used by the lessee in common with the owners and other lessees of the other parts of the building"* when read together with Clause 2(5) mean that they relate to the whole building.

31. We were also invited to consider that similar provisions occurred within the Mobax lease (paragraph 49 and 51 of the Klein judgement)

32. Furthermore *"The Decoration Clause"* at Clause 2(7) (pages 45-46 of the bundle) requires the painting externally in every third year places more weight upon the fact that all of the premises has been demised.

33. The Applicant further asserts that it would be remarkable that the leases made no mention of a landlord's repairing covenant of the roof, gutters and downpipes if that was the intention. In this regard the Applicant further refers to paragraph 53 in the **Klein** Judgment where the Judge commented that if the leases in that case only refer to internal areas there would be a upon the Applicant's case a "*remarkable"* gap in the lease, resulting in neither landlord nor tenant being responsible for the repairs.

34. We are also taken to the guidance of interpretation of written contracts laid down in **Arnold -v- Brittain [2015] UKSC36.**

35. The Applicant also contends that it is settled law that a repairing covenant cannot be implied where none exists (**Adami -v- Lincoln Grange Management Ltd (1998) 30 HLR 982.**)

36. Further, the Applicant avers that the Respondent's case that, despite an absence of covenants, the Applicant is primarily responsible as freeholder for repairing, is flawed. They say if that was the case provision would be included within the lease for access to carry out the repair.

37. The leases grant quiet enjoyment. Therefore, the Applicant maintains that the works required by the Improvement Notice could not be undertaken, as the landlord could not lawfully enter the premises absent a breach of the quiet enjoyment provisions and therefore could not be upheld.

Discussion

38. In terms of the grounds of appeal we form a view that they stand or fall dependent upon our consideration of the substantive matter in the case which is whether or not the demise includes the areas the subject matter of the Improvement Notice. Accordingly, we firstly deal with the issue of the demise.

39. In this regard the parties were invited to complete a Scott Schedule both of agreed points of lease interpretation and a separate schedule of points of lease interpretation in dispute. In this latter regard there is no merit in us as a Tribunal rehearsing the points that have been agreed, therefore we turn to the schedule of points of lease interpretation in dispute.

40. Unsurprisingly, the parties stances are similar to those within the Grounds of Appeal, Respondent's Reasons for Objecting and the Applicant's Further Submissions.

41. Dealing with the matters in dispute in turn. In summary the Applicant's position is that the leases are drafted as maisonette leases with the whole building divided between the leaseholders and contain external and internal elements as well as common parts. As a consequence, there are no common parts and no landlord's covenants to maintain part of the demise save as the default provision (as referred to above).

42. The Respondent's position is that it avers that the landlord retains ownership of the roofs, gutters and other common parts that are not included in the lease demise. There is a default landlord's covenant for maintenance if the tenants fail to carry out the repair and redecoration. The Respondent, despite the request and directions to provide reasons for stances taken when there is disagreement, appears to either choose not to do so or alternatively not be able to do so.

43. In relation to Clause 2.5 of the lease, the Applicant maintains that this requirement for the tenants to repair (page 44 of the bundle) points towards evidence that everything is included in the demise. In response, the Respondent again provides the same answer, i.e. the landlord retains ownership of the roofs, gutters and other common parts that are not included in the lease demise and there is a default repair covenant in the event of the tenant's failure to repair.

44. In terms of Clause 3(1) (page 50 of the bundle) in reply to the Applicant's assertion that due to the landlord having to provide the tenant with quiet enjoyment, the landlord could not enter the premises without proper cause the Respondent simply "disagrees" again without providing any reasoning.

45. In relation to Clause 3(3) of the lease (page 51 of the bundle) the landlord's covenant to observe regulations in relation to parts of the building retained by the lessor or which may come into the possession of the lessor by determination of the expiration of the leases, the Applicant avers that it does not mean that the landlord has retained parts of the building but simply relates to a situation where a landlord would retain a flat for its own use or for letting or has exercised a right of entry/forfeiture. To this the Respondent again provides the same answer as to ownership of roofs, gutters etc.

46. In relation to the requirements to maintain and renew as per Clause 2(17) "if the tenant fails to do so" the Applicant's case is that this is only a default provision and the leases are clear that the leaseholders have primary responsibility. In addition, the Applicant makes the point that the leaseholders have the right to enforce clauses 2(17) and 2(19) directly against fellow leaseholders if the same are in default. In relation to this aspect

the Respondent's case is that the landlord is responsible for repair to roofs, gutters and other common areas that are not included in the lease where tenants have failed to do so.

47. As regards the provision at paragraph 5 of the First Schedule of the leases which enable the tenant to enter other parts of a building to carry out repairs where part of the building provides shelter / protection to the flat, the Applicant avers that if the landlord was responsible for repairs this provision would not be necessary. The reply from the Respondent is simply that "it disagrees".

48. In relation to the tenant's repairing obligations Clause 2(5) (page 44 of the bundle) the Applicant avers that the gutters would fall under the definition of fixtures to the main walls as evidence of responsibility for maintenance of gutters. The Respondent simply repeats its earlier answer of the landlord retaining ownership of roofs and gutters etc.

49. In relation to the requirement that the landlord must allow the tenant quiet enjoyment Clause 3(1), the Applicant asserts that the landlord could not enter the premises without proper cause. The Respondent simply "disagrees".

50. As regards Clause 3(3) being the landlord's covenant to observe regulations in relation to part of the building retained by the lessor which has come into the possession of the lessor, the Applicant's case is that this does not mean that the lessor has retained parts of the building, it would be triggered in the event of a landlord either retaining or securing future possession of one of the flats. The Respondent's response is again reliance upon ground 3 as aforesaid.

Conclusion

51. Having considered the matter carefully in terms of both the written material supplied and also the oral submissions of the parties, all of which were extremely helpful in assisting the Tribunal, and having considered carefully the precise wording of the leases, we find as a fact for the reasons set out below that the entirety of the structure of numbers 20-22 Carlisle Street are the subject matter of having been demised to the respective leaseholders of the flats.

52. Clause 6(1) of the leases defines the extent of the demise of each flat. Therefore, in relation to the Flats 3,4, & 5 located on the first floor, they are divided from the ground floor flats by their floors, but there is no restriction on the extent of their demise above their ceilings, in contrast to the ground floor flats.

53. Accordingly, we further find as a fact as a consequence that there are no common parts.

54. In coming to the above conclusion, we prefer the Applicant's evidence in relation to this aspect of the application. The Applicant's precisely worded submissions set out succinctly the Applicant's stance. Conversely the Respondent has chosen not to or is unable to provide any conclusive rebuttal evidence/argument to undermine the Applicant's position.

55. We further agree that this case is on all fours with the decision in Klein despite there being a difference in the insurance provision (in **Klein** the tenants were required to insure whereas in this case it is the landlord's responsibility) . This difference isin our view, not significant enough to distinguish the matter we are determining from the decision in **Klein.**

56. Accordingly, as we are bound by the Court of Appeal decision in **Klein** and applying the guidance as set out therein, in our view the only conclusion that can be arrived at is that the entire property is the subject matter of having been demised to the respective leaseholders.

57. It would be highly unusual for a lease to be silent as to a reservation and be construed so that for example the roof was simply not part of the demise. Had it been the intention for the demise to simply relate to the internal areas, reservation to that effect would surely have been imposed.

58. In the circumstances, as we have found as a fact by way of interpretation of the relevant lease terms that there are no common parts under the control of the Applicant landlord, it must follow that the Improvement Notice has been served upon the incorrect party and is therefore invalid.

59. Having come to this conclusion about the substantive subject matter of this application we do not consider it necessary to further explore the other grounds of appeal that were put forward in relation to the service of the notices and procedure for undertaking the same, and also the effect of failure to serve on all parties.

Costs.

60. At the end of the hearing Mr Hammond raised the issue of an application for costs pursuant to Section 12 (2)(d) of Schedule 13 to the 2004 Act. That provision enables the Tribunal to award costs of up to £500 in the event of it forming a view that any party had acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

61. In this regard Mr Hammond confirmed the Applicant was relying upon unreasonableness in relation to the way the Respondent had gone about matters appertaining to the Improvement Notice.

62. Having come to our substantive conclusion in relation to the Improvement Notice in the relation to the issue of costs, if so advised, the parties may file and serve narrative statements limited to the issue of costs in accordance with Schedule 13 of the Housing Act 2004 at Section 12 (2)(d) thereof by 12.00 noon on the 22nd July 2021.

63. The parties at the time of filing and serving any submissions as to costs are also to confirm whether they wish to have a further virtual hearing to deal with the matter of costs or in

the alternative that they are content for this Tribunal to consider the issue of costs upon the papers.

DATED this 8th day of July 2021

CHAIRMAN