



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

Case Reference : **MAN/00EX/LBC/2022/0375**

Property : **11, Beech Close, Clayton Le Dale, Blackburn
BB1 9JF**

Applicant : **Gracefavour Limited**

Respondent : **Mr Paul Anthony Flynn**

**Type of
Application** : **Commonhold & Leasehold Reform Act
2002 Section 168(4)**

**Tribunal
Members** : **Tribunal Judge C. Wood
Tribunal Member H. Thomas**

Date of Decision : **7 July 2023**

DECISION

ORDER

1. The Tribunal declines to make determination that a breach of the covenant in clause 2 (xiii) of the lease dated 13 September 1965 made between GCT Construction Limited (1) and L V Tresise and G A Hardy (2), (“the Lease”), has occurred.

BACKGROUND

2. By an application dated 14 October 2022, (“the Application”), the Applicant sought a determination from the Tribunal pursuant to section 168(4) of the Commonhold & Leasehold Reform Act 2002, (“CLARA”), that a breach of the covenant in clause 2(xiii) of the Lease had occurred.
3. Directions dated 25 January 2023 were issued by the Tribunal pursuant to which both parties made written submissions to the Tribunal.
4. A video hearing was scheduled to take place on 11 May 2023 at which the Applicant was represented by Mr. B Hammond, and the Respondent attended in person.

LAW

5. Section 168 of CLARA provides as follows:
 - (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...in respect of a breach by a tenant of 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 a breach has occurred.
 - (3)
 - (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 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 a determination by a court, or
 - (c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
6. The meaning of a “long lease” for these purposes is as set out in sections 76 and 77 of CLARA.
7. The Tribunal is an “appropriate tribunal” for these purposes.

HEARING

8. Applicant

- 8.1 The Applicant’s case is that the Respondent carried out works to the Property between 2013-2015 in breach of clause 2(xiii) of the Lease which provides as follows:

“Not to erect or suffer to be erected any building or structure on any part of the land without the prior consent in writing of the Lessors or their Solicitors”;
- 8.2 the Respondent bought the Property on 25 October 2012 and it appears that it is common ground between the parties that works have been carried out by the Respondent;
- 8.3 the Applicant’s position is that there is no record of consent by the Lessor;
- 8.4 in an email dated 27 September 2022, the Respondent’s wife states that all of the plans relating to the works were sent to the-then Lessor, Mrs Wacks, although it is noted that no reference was made to this by the Respondent in his initial statement in these proceedings, and, there is no reference to any response received from Mrs Wacks;
- 8.5 the Applicant considers that the planning application in which a statement was made to the effect that no-one had an interest in the Property other than the Respondent was indicative of a desire on the Respondent’s part not to alert the freeholder to the works, and also constitutes a fraud and therefore a criminal offence;

- 8.6 the Applicant claims that the Respondent has contradicted himself in his evidence where he states that he shredded the consent document sometime in 2016/17 as he had no reasonable expectation of being required to produce it in the future but, in his later statement, acknowledges the importance of retaining such documentation for future reference. As such, the Applicant considers that the Respondent's evidence should be viewed as unreliable;
- 8.7 the Applicant also raised an issue regarding the burden of proof with regard to the obtaining of consent.

9. **Respondent**

- 9.1 The Respondent does not contest that works have been carried out. He explained that he and his wife bought the Property to accommodate the needs of their disabled child. The works comprised a bathroom facility which had been funded by the local authority;
- 9.2 the Application is part of larger story of action by the Applicant since their acquisition of the freehold to the Property eg the Applicant contacted the Respondent's building society, who then contacted him, to suggest that they were in breach of their insurance covenant and regarding alleged ground rent arrears. The Respondent believes there was no substance in either of these claims;
- 9.3 the Applicant believes that the purchase price for the Respondent to buy their freehold (£1995) is significantly more than for a neighbouring comparable property (£950);
- 9.4 the Respondent acknowledges that it is only with the benefit of hindsight that he has recognised the significance of the consent document;
- 9.5 the Respondent now understands that the planning application relates to the installation of the ramp to the front of the Property but he was not aware that a planning application was being made at the time. All of the paperwork was done by the local authority and the Respondent only became aware of the contents of the application form in the course of these proceedings. The Respondent relied on the local authority to be sure that everything to do with the works was done correctly;
- 9.6 it is very alarming to be accused of fraud by the Applicant;

- 9.7 communication with the previous Lessor, Mrs Wacks, was very informal eg the ground rent receipts were handwritten on scraps of paper;
- 9.8 the Respondent also refers to the email dated 27 September 2022 from his wife to the Applicant's representative in which she recalls that the plans were sent to Mrs Wacks to the same address at which the ground rent was sent, which she believed to be Mrs Wacks' son's office address in Manchester;
- 9.9 the Respondent explained that he had a "to do" list in connection with the works and believes this included consent from Mrs Wacks. He recalls having paperwork almost 1 foot high and has a mental image of the consent document but acknowledges that he is being asked to recall matters which happened 10 years ago and cannot be definitive.
10. In response to questions from the Applicant, the Respondent answered as follows:
 - 10.1 he could not confirm to which of Mrs Wacks' two sons (Tony or David) office the plans were sent;
 - 10.2 he could not confirm whether the mental image he has of the consent is a memory from 10 years ago or something which originates from this being uppermost in his mind in recent months;
 - 10.3 he thought that possibly it was a typewritten document but he refused to be pressed to confirm because of the time that has elapsed;
 - 10.4 he was satisfied that they had everything in place by February/March 2013 before the works began in June 2013;
 - 10.5 he cannot recall any fee being sought for consent but has some recollection of the freehold being offered for sale for possibly £250;
 - 10.6 he confirmed that the lease terms were explained to him at the time of their purchase of the Property in 2012 but had only limited knowledge/involvement in the property transaction and was unaware of any questions being asked of their vendors relating to compliance with the Lease. The Respondent view is that would have been regarded as of limited relevance to them as they were buying the Property for a very specific reason with no intention of selling in the foreseeable future;

- 10.7 he reiterated that he knew nothing about the planning application at the time and could not therefore have authorised the local authority to sign the form on his behalf;
- 10.8 he explained that his change of position with regard to the keeping of records reflects his recognition, as a result of these proceedings, of the importance of retaining such documents and the gravity of the situation which can arise if you have not done so.
11. In response to questions from the Tribunal, the parties responded as follows:
 - 11.1 the Respondent repeated that he first became aware of the Applicant's acquisition of the freehold as a result of the contact from his building society regarding an alleged breach of the insurance covenant and arrears of ground rent, neither of which he believes were sustained. He believes that, it was at this time, he became aware of the difference in the purchase price for the freehold of the Property as compared with that for a neighbouring property. He raised this repeatedly with the Applicant but received no answer;
 - 11.2 the Applicant confirmed that he was aware of issues/correspondence relating to compliance with the insurance covenant;
 - 11.3 the Applicant stated that there was nothing in the file relating to the Property indicating that consent was granted for the works. He refuted the Respondent's suggestion that the information on the file was missing 6 years' of information;
 - 11.4 the Applicant recognised that the Respondent had voiced a fear of losing his home as a consequence of these proceedings. He acknowledged that whilst a determination of a breach of covenant was a necessary precursor for forfeiture proceedings, forfeiture is not an inevitability and would be very much a last resort for the Applicant where a property is owner-occupied as here. The Applicant confirmed that it is not waiving its right of forfeiture;
 - 11.5 the Applicant confirmed that it was customary to negotiate the purchase price for the freehold of a property on an individual basis, such that a comparison with the price at which neighbouring properties had been sold was largely irrelevant. Whilst the ground rents are similar between

the Property and the neighbouring properties, it is noted that the Property is a larger plot. In addition, it might be the case that a negotiation would include an element of compensation/damages for an established breach of covenant although Mr. Hammond had no instructions on this point in respect of the Property;

11.6 the Applicant acknowledged that there was no obligation to sell the freehold unless and until an application from a leaseholder was received;

11.7 the Applicant confirmed that there had been an email exchange with Mrs Wacks' son, David Wacks, who stated that, when younger, it was his mother's practice to send handwritten notes for matters like consent, charging a fee of between £5 and £25 but, by the time of the works when she was in her 90s, it was more usual for her to countersign a type-written letter;

11.8 the Applicant confirmed that they had chosen not to submit this email exchange in evidence and had not thought it necessary/useful for Mr Wacks to submit a witness statement as they were unsure he would have been able to adduce relevant evidence.

12. In conclusion, the parties stated as follows:

Applicant

12.1 the works at the Property, carried out in 2013, required prior written consent from the Lessor under the terms of the Lease and, if such consent was not obtained, the Respondent is in breach of covenant;

12.2 the Respondent maintains that consent was obtained but, at the same time, acknowledges that his evidence of such consent is to be regarded as unreliable.

Respondent

12.3 the Respondent is satisfied that consent was obtained prior to the commencement of the works;

12.4 the unreliability of his evidence relates to his unwillingness to provide a detailed description of the consent document received 10 years ago.

REASONS

13. The Tribunal noted that the Lease comprised "a long lease of a dwelling" for these purposes.

14. The Tribunal notes that there is no dispute between the parties that building works were carried out at the Property.
15. The Tribunal determines that the works to the rear of the Property constituted the erection of a building and/or structure on a part of the Property which required prior written consent from the Lessor within clause 2(xiii) of the Lease.
16. The Tribunal notes that the Applicant did not include the works relating to the installation of a ramp to the front of the Property within its Application and the Tribunal made no determination as to the nature of those works accordingly.
17. The Tribunal determines that, on the balance of probabilities, consent for the works was given by the Lessor, Mrs Wacks.
18. In making this determination, the Tribunal took into account the following matters:
 - 18.1 the Tribunal was persuaded by the Respondent's evidence that he was aware prior to the commencement of the works of a need to obtain approvals/consents;
 - 18.2 the Tribunal considers that the Respondent's reference to his "to do" list, (paragraph 9.9) is persuasive of an organised approach to the project; the Respondent also referred to being aware that works should not be started until all consents had been obtained;
 - 18.3 the Tribunal accepts the evidence of the Respondent's wife in the email dated 27 September 2022 that she had sent the plans to Mrs Wacks "...at the address provided for collection of the rent, which from memory was her sons office in Manchester". The Tribunal is satisfied that the purpose of sending these plans was to seek consent from the Lessor for the works. The Tribunal notes in this respect that the Applicant had stated that, at or about this time, work relating to the freeholds owned by Mrs Wacks was undertaken by one of her sons, a solicitor in Manchester;
 - 18.4 the Tribunal considers the Respondent to be a credible witness. The Tribunal accepted that his statement in oral evidence that he was "unreliable" referred specifically to his unwillingness to provide a detailed description of the consent document rather than to his recollection of events generally surrounding the seeking/obtaining of

consent. The Tribunal further notes that, when pressed by the Applicant, the Respondent's recollection was of a typewritten document; this was subsequently supported by the Applicant's summary of the email exchange with Mr David Wacks that, at this time, it was Mrs Wacks' practice to countersign typewritten documents;

18.5 the Tribunal is unclear as to the purpose of the Applicant's allegations of fraud against the Respondent other than as an attempt to discredit the Respondent in the view of the Tribunal, as whether or not the planning application form was incorrectly completed is irrelevant to the issue for determination by the Tribunal. The Tribunal accepts the Respondent's explanation that he was unaware of the contents of the form until it was produced in these proceedings;

18.6 the Tribunal considers it extremely surprising that the Applicant chose not to submit in evidence the email exchange with Mr David Wacks. The Applicant had told the Tribunal that Mrs Wacks had two sons, one a solicitor and another an accountant. It is unclear whether Mr David Wacks is the solicitor or the accountant, but it is clear that he is a professional and he had, at least, some knowledge of his mother's affairs;

18.7 the Tribunal is further surprised by the Applicant's decision not to obtain a witness statement from Mr David Wacks, on the basis that they were unsure that he would have been able to adduce relevant evidence. From the information provided to the Tribunal by the Applicant from this email exchange, it appears that there was relevant information relating to Mrs Wacks' practice of countersigning typewritten documents and the level of the fee for consent;

18.8 in the circumstances, the Tribunal considers that it is permissible for it to draw an adverse conclusion as to the reason behind the Applicant's decision not to submit this evidence to the Tribunal which, on the limited information available to it, appears likely to have been relevant to the Tribunal's determination of the Application;

18.9 with regard to the consent fee, the Tribunal notes that it was likely to have been sufficiently small – the maximum fee was said to be £25 - for it to be credible that the Respondent might have forgotten paying it/how

much it was, particularly when viewed in the context of the cost/extent of the overall works;

- 18.10 the Tribunal is not persuaded that the Respondent's recognition of the importance of the consent document only during the course of these proceedings supports the Applicant's claim that consent was not granted/obtained. The Tribunal agrees with the Applicant that "common sense" would dictate that such consents should be retained but the Tribunal considers that everyday experience of the conveyancing process would suggest that laypeople often fail to do so. Further, it is unreasonable to suggest that "a reasonable owner of a leasehold property" would have any actual knowledge of the questions asked in the Law Society Leasehold Information Form (TA7);
- 18.11 it is also reasonable for the Tribunal to take into account the particular circumstances of the Respondent. The Tribunal considers that the reason for, and purpose of, the Respondent's acquisition of the Property and the nature of the works make it credible that the Respondent did not envisage selling the Property at any time in the foreseeable future, minimising the significance for him of a need to produce documents in the future;
- 18.12 the Tribunal also found convincing the Respondent's evidence regarding the quantity of paperwork generated by the works which may have made the recognition of which documents were important/required to be retained more difficult.
19. For the reasons set out above, the Tribunal considers that it is reasonable to determine that, on the balance of probabilities, prior written consent for the works was obtained by the Respondent.
20. The Tribunal therefore makes no determination of a breach of the covenant in clause 2(xiii) of the Lease.