FIRST-TIER TRIBUNAL PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**MAN/30UH/LBC/2023/0014**
Property	:	**Second Floor Flat, 22, Thornton Road, Morecambe LA4 5PE**
Applicant	:	**Mr and Mrs A Jiagbogu (represented by Mr Eastham of Counsel)**
Respondent	:	**Lisa Marie Law**
Type of Application	:	**Application to establish Breach of Covenant: Section 168(4) Commonhold and Leasehold Reform Act 2022**
Tribunal Members	:	**J R Rimmer** **J Elliott**
Order	:	**For the reasons set out herein the Tribunal determines that there have been no breaches of the covenants created by Clauses of the lease.**
Date of Decision	;	**14 May 2024**

DECISION

BACKGROUND

1 The Applicant is the freehold owner of the property at 22, Thornton Road, Morecambe, Lancashire, within which there is a second floor flat which is the property to which this application relates. It is the only flat on the second, uppermost floor of the building. 22, Thornton Road is situated in a terrace of similar properties just back from the Promenade, into which Thornton Road leads, at the Eastern end of the town. The Tribunal understands the other floors of the property also contain residential flats.

2 The Applicants and the Respondent have been and continue to be, respectively, the freeholders and the leaseholder of the flat as the assignees of their respective interests under a lease dated 5th February 1976 for a period of 999 years from 1st November 1975 at a premium and a peppercorn rent.

3 The issue that arises between the parties relates to the removal of a dividing wall and other works (principally, but not limited to, removal of cross beams) between the front living room and kitchen, creating one large living area. It is alleged that this work was carried out in breach of covenant and now allows the roof to press outwards onto the boundary walls and to permit continual water penetration to the living area.

4 It is necessary for proceedings to be brought before this Tribunal by reason of

Section 168 Commonhold and Leasehold reform Act 2002 which provides:

A landlord under a long lease of a dwelling may not serve a notice under

Section 146(1) Law of property Act 1925… 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 finally been determined upon an application under subsection (4) that the breach has occurred

(b)…

(c)…

(3)…

(4) A landlord…may make an application to the appropriate tribunal for a determination that a breach of covenant or condition of the lease has occurred.

5 It does appear that in this current Application the Applicants hold the view that the Tribunal has the power to enforce compliance with the covenants in respect of which a breach is found. This is not the case. The Tribunals only function in these proceedings is to determine whether or not a breach of covenant has occurred.

The Allegations

6 The Applicants identify in their submissions to the Tribunal the following breaches of covenant within the lease that are alleged to have occurred:

(1) Clause 3(x) – not to make any alteration in the second floor flat without the approval in writing of the landlords to the plans and specifications thereof and to make all such alterations in accordance with such plans the tenant(s) shall at his/her/their own expense and in all respects obtain all licences approval of plans and other things necessary for the carrying out of such alterations and comply with the said bye-laws regulations and other matters prescribed by any competent authority either generally or in respect of the specific works involved in such alterations.

(2) Clause 3(xi) – Not to do or permit or suffer to be done in or upon the said second floor flat anything which may or become a nuisance or annoyance or cause damage or inconvenience to the landlord or the occupiers of the remainder of the said property or neighbouring owners and occupiers or whereby any insurance for the time being effected on the remainder of the said property shall be rendered void or voidable or the rate of premium may be increased.

Inspection

7 On the morning of 26th March 2024 the Tribunal inspected the building at 22, Thornton Road and in particular the second floor flat, including the area where the works (there being no dispute that they had been carried out at some time between 2006 and 2010 and that those works had originally taken place in breach of covenant (x)) had taken place.

Evidence and Submissions

8 The Applicants provided in their application form to the Tribunal the details of the covenants in respect of which breaches were alleged, together with a concise description of the works that had been undertaken in the flat. Thereafter they provided details of the problems that had been caused by the works:

(1) The insurance policies for the flats had been rendered void and subsequent insurance had been refused in the light of a structural engineer's report.

(2) The integrity of the front chimney stack had been compromised by its use as a combined flue for the extraction of combustion products from both properties.

(3) Chronic water ingress occurs from the roof and chimney stack along the line of the removed wall and has done so since 2013.

(4) The chimney stack has rotated/twisted/leaned to allow in water and has become hazardous by its instability.

9 The Applicants later supplied a statement of case which provided some expansion upon those basic points and views upon how the issue might be remedied, and upon whom that responsibility fell: those latter matters not being for the Tribunal's consideration.

10 In support of those contentions the Applicants provides two documents that are referred to as reports. Firstly, a report provided in earlier tribunal proceedings MAN/30EH/LBC/2014/0018 from Peter Hodgson (Hodgson) and secondly a more recent document from Burgess Roughton Ltd from 2023 (Burgess)

11 The first report suggests that the removal of the horizontal ceiling might, in the longer term, result in a fully loaded roof (by snow) pressing down upon the outside walls and forcing them outwards, there being only limited purlins providing an opposite force and may therefore deflect sideways.

12 The second is more in the form of an estimate for certain works, presumably those referred to in the first report, to provide the support apparently required.

13 The Respondent's position is set out in her statement of case and adopts the position that although the breach of the covenant in clause 3(x) of the lease has been the subject of an admission by the Respondent, the position has been regularised by the tribunal proceedings in 2014 and a subsequent consent order made in the County court in proceedings referenced B00LA150. So far as the subsequent issue of water ingress and possible roof/chimney stack damage are concerned they arise by virtue of a breach of the landlords repairing covenants in the lease.

14 The Respondent also provides a report of Joe Parkins of R G Parkins and Partners Limited, (Parkins) a firm of structural engineers, following an inspection of the flat and building which draws the conclusion "…the observations made during the visit would suggest that the works undertaken have not had any detrimental effect upon the structural integrity of either this flat or the building as a whole".

15 Bundles of documents were provided to the Tribunal by both parties which contained considerable detail about the disputes between the parties and proceedings other than those referred to above. Apart from details in the preceding paragraphs none of that other correspondence assisted the Tribunal's deliberations, other than 2 letters/emails relating to the insurance of the building by the Applicants.

16 One communication, dated 18th Jue 2023, advises that Barclays Home Insurance (Barclays) is exiting the house insurance market, but that the current policy is unaffected. Presumably as a result of that information and how the Applicants acted upon it, a subsequent communication is received from Gallaghers, insurance brokers, (Gallaghers) indicating they cannot place further insurance in view of the reported defects with the roof.

17 Later, on 26th March 2023, following the inspection of the house and flat, the Tribunal reconvened at Lancaster Magistrates' Court to hear further from the parties. The Applicants were assisted by Mr Matthew Eastman and the Respondent by her partner.

18 Mr Eastman directed the Tribunal to the crucial issues before it. There had been previous proceedings relating to the breach of Clause 3(x) and those proceedings had been resolved by the consent order in the County Court whereby retrospective consent to the alterations was given and a subsequent Regularisation certificate was provided by Lancaster City Council. Notwithstanding the retrospective consent, there was still a failure to comply with that part of the covenant relating to the obtaining of consent.

19 There then remained the issue of Clause 3(xi). The work in question had now caused nuisance or annoyance, or caused damage or inconvenience to the Applicants, the other occupiers of the building, or the neighbouring occupiers by reason of the water ingress and the potential damage from the chimney stack.

20 Furthermore, that work had caused the insurance policy to be void or voidable and further insurance would be impossible to obtain, or if it was, at a higher premium.

21 The Tribunal was able to take considerable time exploring those various points with the parties and those who assisted them and isolate for discussion the three issues identified by Mr Eastman:

(1) The failure or otherwise to comply with all requirements in respect of plans, consents, specifications, compliances or approvals in respect of the works

(2) The extent to which the damage which had occurred, or may occur, caused nuisance, annoyance, damage, or inconvenience to the Applicants, other occupiers, or neighbours.

(3) Had the works caused the current insurance to be void or voidable, or caused any future premium to rise?

22 In particular, the Tribunal was directed by Mr Eastman to adopt a disjunctive approach to the natural meaning in clause 3(x) and the need to comply with both the need for the consent of the landlord and to obtain the necessary consents, licences and approvals for the works in question.

23 He was also of the view that the works in question had constituted a nuisance or annoyance, or caused damage and inconvenience to other occupiers and neighbours, as evidenced by the reports adduced and existence of subsequent water ingress.

24 The attention of the Tribunal was also drawn in some detail to issues of which the Applicants were aware in relation to likely difficulties in obtaining insurance of the building by reason of the works done. The conclusion to which the tribunal was being drawn is that the actions of the Respondent, in breach of Clause 3(xi) is what has brought about that position being adopted by potential insurers.

25 The Respondent contends that there is no breach of the second element of covenant 3(x) by reason of the subsequent consent and regularisation certificate and that there is no clear evidence sufficient of water ingress being attributable to the works carried out, as opposed to some other extraneous cause, or simple lack of repair. The insurance documentation, so far as she is concerned does not prove the Applicants' case.

Conclusions

26 Covenant 3(x)

The Tribunal is of the view that a breach of this covenant is not established. The Tribunal notes that within the County Court proceedings B00LA150 the Applicants provide their consent to the works. This happens on 4th December 2015, a considerable time after those works have been completed and when it is only possible for retrospective consent from the local authority is possible and which is obtained in the form of a regularisation certificate. The Tribunal is satisfied that it is not then open to the Applicants to allege a breach of covenant in respect of works to which they have now given their consent and the local authority have granted approval, there being evidence in the consent order of the existence of relevant plans and designs.

27 Covenant 3(xi)

The Tribunal also takes the view that the Applicants do not satisfy it that on the balance of probabilities there has been a breach of this covenant.

This conclusion is reached for a number of reasons:

There are two reports that go back some time, those being from Hodgson and Parkins. They differ in their conclusions. The later report from Burgess is not a report at all but an indication of work required, based upon instructions received. They do not satisfy the Tribunal that water ingress and any issues caused to other neighbours and occupiers are attributable to activities of the Respondents.

28 Further, so far as insurance is concerned, the correspondence from Barclays merely indicates that they are exiting the market. The correspondence from Gallaghers indicates that no new policy cannot be found by them. That is not the same as evidence suggesting an existing policy has been rendered "void or voidable or the rate of premium may be increased". Even if such evidence were to exist the Tribunal believes that the observations above in relation to the consent in 2015 apply also in this insurance issue. If the Applicants accept that their consent was unreasonably withheld, subsequent consent must be reasonable, therefore taking into account what the reasonably foreseeable consequences (so far not necessarily established) might be.

J R Rimmer (Chairman)