FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	..	CAM/ooMC/LBC/2023/0006
Property	..	Flat 4, 11 Carnarvon Road, Reading, Berks
Applicant	..	Sykes Capital Ltd
Representative	..	Mr Andrew Strong, Director
Respondent	..	Mr Damian Odoemene
Representative	..	No attendance
Date of Application	..	20 June 2023
Type of application	..	Application for an order that a breach of covenant or condition has occurred pursuant to s.168(4) of CLARA 2002
The Tribunal	..	Tribunal Judge S Evans
Date/ place of hearing	..	14 March 2024, By cloud video platform
Date of decision	..	15 March 2024

DECISION

DECISION

1. The Tribunal determines that the Respondent has breached the covenants in the Lease as follows:

(1) The Respondent has breached clause 4.1 of the Lease between 7 March 2023 and 6 December 2023 by not repairing the broken bathroom fanlight window.

(2) The Respondent has been in breach of clause 4-3 of the Lease between 7 March 2023 and 6 December 2023 by not keeping the front entrance door in good condition (it not being a FD30 standard fire rated door), and by not renewing it with a door to that standard.

(3) The Respondent has breached clause 4-3 of the Lease between 21 February 2023 and 14 March 2024 by not permitting access to the Applicant to the Property to install a wireless heat detector.

2. The Applicant having been successful, the Tribunal orders the Respondent to pay the Applicant's application fee of 2100 and hearing fee of 2200 within 14 days of the date of this decision, pursuant to rule 13(2) of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013.

Introduction

1. By its application the Applicant seeks a determination of breach of covenant or condition pursuant to s.168(4) of the Commonhold and Leasehold Reform Act 2002 ("CLARA 2002").

Relevant Law

2. The relevant statute law is in Appendix 1.

Background

3. On 30 October 1992 a Lease was granted for a term of 125 years from 25 December 1998 ("the Lease") of Flat 4, 11 Carnarvon Rd, Reading RGI 5SB ("the Property").

4. The Lease contains the following express terms on the part of the Tenant:

"3-3 To permit the lessor and his duly authorised surveyors or agents with or without workmen at all reasonable times by appointment (but at any time in case of emergency) to enter into and upon the Demised Premises or any part thereof for the purpose of viewing and examining the state of repair thereof

3-4 In accordance with the Tenants covenants in that behalf hereinafter

contained to repair decorate and make good all defects in the repair decoration and condition of the Demised Premises of which notice in writing shall be given by the Lessor to the Tenant within two calendar months next after the giving of such notice

3.11 Not at any time to do or permit or suffer to be done any act matter or thing on or in respect of the Demised Premises which contravenes the provisions of the Town and Country Planning Acts 1947 to 1972 or any enactment amending or replacing the same and to keep the Lessor indemnified against all claims demands and liabilities in respect thereof

3.12 To comply in all respects at the Tenants own cost with the provisions of any statute statutory instrument rule order or regulation and of any order direction or requirement made or given by any authority or the appropriate Minister or Court so far as the same affect the Demised Premises (whether the same are to be complied with by the Lessor the Tenant or the occupier) and forthwith to give notice in writing to the Lessor of the giving of such order direction or requirement as aforesaid and to keep the Lessor indemnified against all claims demands and liabilities in respect to thereof

4. The Tenant hereby covenants with the Lessor and as a separate covenant with and for the benefit of the flat owners that throughout the term the Tenant will:

4.1 Repair maintain renew uphold and keep the Demised Premises and all parts thereof including so far as the same form part of or are within the Demised Premises all windows glass and doors (including the entrance door to the Demised Premises) locks fastenings and hinges sanitary water gas and c electrical apparatus and walls and ceilings drains pipe wires and cables and all fixtures and additions in good and substantial repair and condition save as to damage in respect of which the Lessor is entitled to claim under any policy of insurance maintained in accordance with the covenant in that behalf hereinafter contained except insofar as such policy may have been vitiated by the act or default of the Tenant or any person claiming through the Tenant or his or their servants agents licensees or visitors

4-3 Permit the Lessor and each Tenant of a flat in the Building with or without workmen at all other persons authorised by any of them all reasonable times by appointment (but at any time in case of emergency) during the said term to enter into or upon the Demised Premises or any part thereof for the purpose of repairing or altering any part of the Building or executing repairs or alterations to any adjoining or contiguous premises or for the purpose of making repairing maintaining supporting

rebuilding cleansing lighting or keeping in good order and condition the Common Parts and all roof foundations damp courses tanks sewers pipes drains cables water courses gutters wires party or other structure or other conveniences belonging to or serving or use for the Building or any part thereof and also for the purpose of laying down maintaining repairing and testing drainage gas and water pipes and electric wires and cables and for similar purposes the Lessor or the Tenant so entering or authorising entry (as the case may be) making good all damage occasioned to the Demised Premises

4-5 Observe and perform the regulations in Schedule 4 hereto provided that the right is reserved to the Lessor to supplement modify or waive such regulations or any of them in their absolute discretion

6. Subject to and conditional upon payment being made by the Tenant of the interim charge and the service charge at the times and in the manner hereinbefore provided the Lessor hereby covenants with the Tenant that he will perform the following obligations save that none of the Lessors obligations as set out in this clause 6 shall come into effect unless and until the LeSsor named in the Particulars hereof transfers it[s] freehold interest in the Building namely:

(a) To maintain and keep in good and substantial repair and condition:

(i) the main structure of the Building including the principal internal timbers and the exterior walls and the foundations and the roof thereof with its main water tanks main drains gutters and rain water pipes (other than those included in this demise or in the demise of any other flat in the Building

(ii) all such gas and water mains and pipes drains wastewater and sewage ducts and electric cables and wires as may by virtue of the terms of this Lease be enjoyed or used by the Tenant in common with the owner or tenants of the other flats in the Building

(iii) the common parts

(iv) the entry phone system (if any)

(v) the boundary walls and fences of the Building

(vi) all other parts of the Building not included in the foregoing subparagraphs (i) to (iv) and not included in this demise or the demise of any other flat or part of the Building

(c) To insure and keep insured the Building... against loss or damage by fire... in some Insurance office of repute in the full value thereof... "

(h) Without prejudice to the foregoing to do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessor may be considered necessary or advisable for the proper maintenance safety amenity and administration of the Building

(j) To act fairly and reasonably in carrying out his obligations under clause 6 hereof and at all times to manage and maintain the Building economically and efficiently

13. Except where the context otherwise so admits every reference in this Lease to an Act of Parliament shall include every statutory amendment or re-enactment thereof and every regulation and order made thereunder or under any Act replaced thereby.

Schedule 1

The Demised Premises

The flat and garage specified in paragraph 3 of the Particulars as the same is shown for the purpose of identification only edged red on plan 1 and 2 annexed hereto including

(a) the internal plastered coverings and plaster work of the walls bounding the flat and the doors and door frames and window frames fitted in such walls (other than the external surfaces of such doors and door frames and window frames) and the glass fitted in such window frames...

Schedule 3

The Excepted Rights

1...

2. Full right and liberty for the Lessor and his duly authorised surveyor or agents with or without workmen and others upon giving 3 days' previous notice in writing at all reasonable times (or in the case of emergency at any time without notice) to enter the Demised Premises for the purpose of carrying out any of the obligations

contained in clause 6 of this Lease or for any of the purposes set out in clause 4-3 of this Lease.

4.Full right and liberty for the Lessor in his absolute discretion to do as he may think fit with any part of the Building.... and to make any alterations and carry out any demolition rebuilding or other works which they may think fit or desire to do whether such buildings alterations or works shall or shall not affect or diminish the light or air which may now or at any time during the term hereby granted be enjoyed by the Tenant and provided that any such works of construction demolition or alteration are carried out with due regard to modern standards and method of Building and workmanship the Tenant shall permit such works to continue without interference or objection...

Schedule 4
Regulations

4.Not to do or permit to be done any act or thing which may render void or voidable any policy of insurance maintained in respect of the Building or may cause an increased premium to be payable in respect thereof nor O to keep or permit to be kept any petrol or other inflammable substances in row about the Demised Premises and to repay to the Lessor all sums paid by way of increased premium and all expenses incurred in or about the renewal of any such policy or policies rendered necessary by a breach of this regulation all such payments to be recoverable as rent in arrear"

5. Since 18 August 2004 the Respondent has been the registered titleholder of the Leasehold interest in the Property, under title no. BK307362, having paid 2102,000 for the same on 4 August 2004.

6. On 31 March 2021 the Applicant acquired the Leasehold interest in Flat 4, 11 Carnarvon Rd, Reading, before purchasing the freehold title of the Building in which both Flat 1 and the Property are situated, from the Crown Estate, on 20 September 2021. This freehold interest was registered at the Land Registry under title no. BK518074 on 11 November 2021.

7. Accordingly, the Applicant is the landlord under the Lease and the Respondent its lessee.

8. On 10 October 2022 the Applicant commissioned a Fire Risk Assessment in relation to the Building in which the Property is situated. The Tribunal does not have the benefit of a copy of the report, but has been informed by the evidence of the Applicant that the report recommended that each flat

in the Building have a flat door installed, rated to FD30 standard. The report further recommended that the Building should have a L2 fire detection system installed.

9. On 21 February 2023 the Applicant wrote to the Respondent seeking access to the Property on 20 March 2023 and 21 March 2023 to install a wireless heat detector in the Property. There was no response to this request.

10. On 7 March 2023 the Applicant wrote to the Respondent regarding the flat door to the Property. The letter cited clauses 3.12 and 4.1 of the Lease (set out above) and requested replacement of the flat door by the Respondent within 28 days (or evidence that it was appropriately fire rated). The letter further drew attention to a broken window in the Property, which required replacement, the Applicant alleged. There was no response to this letter.

11. On 23 March 2023 the Applicant wrote again to the Respondent seeking access on 18 April 2023 to fit the heat detector in the Property.

12. Having failed to get any response from the Respondent, the Applicant wrote to the Respondent's mortgagee, Bank of Scotland, on 5 May 2023 enclosing its correspondence with the Respondent.

13. On the same day the Applicant sent a chaser letter to the Applicant, again without response.

14. On 23 May 2023 the Applicant wrote for a third time to the Respondent seeking access to fit the heat detector, this time on 6 June 2023.

15. For the first time, the Applicant received a response, but it was not directly from the Respondent, rather his sub-Tenant. It was an email dated 26 May 2023 in these terms only:

"My name is Mark Rutter and am the tenant of this flat. My landlord has asked me to inform you that you will not be getting access to the flat. If the communal areas are being fire protected then there is no reason to access the flat. If you need to speak to me then feel free to call on [tel number]"

16. On 20 June 2023, having received nothing from the Respondent himself, the c Applicant filed this Application at the Tribunal, citing breaches of clauses 3.11, 4.1 and 4-3 of the Lease. The Application included photographs of the front entrance door and the broken fanlight window.

17. On 1 July 2023 the Applicant took out a Buildings insurance policy with Zurich, to cover the period until 30 June 2024. The Respondent's interest is noted on the policy.

18. On 30 November 2023 the Tribunal gave directions towards a hearing.

19. On 11 December 2023 insurance brokers Macbeth wrote to the Applicant about certain clauses in the insurance policy.

20. On 12 December 2023 Mr Andrew Strong, director of the Applicant, made his witness statement in these proceedings. This witness statement alleges not only breaches of clauses 3.11, 4.1 and 4-3, but also clause 4-5/Schedule 4 paragraph 4 to the Lease.

21. The Respondent's bundle of evidence was due to be provided to the Tribunal and the Applicant on 29 January 2024, but he has not participated in these proceedings, nor has the Applicant heard from him.

The hearing

22. The hearing was listed as a video hearing on 14 March 2024. Mr Strong appeared for the Applicant. The Respondent did not attend.

23. The Tribunal is satisfied that Respondent was notified of the hearing date and time, because the Tribunal had posted a letter informing the Respondent of the time and date of the hearing. The Applicant indicated it had not heard anything from the Respondent, but it had received the notice of hearing date and time. Mr Strong also confirmed that the hearing bundle have been posted to the Property by tracked delivery and he had evidence to indicate it had been received on 6 January 2024, from the Royal Mail website.

24. The Tribunal noted that no mortgagee or occupier has applied to join the proceedings. The hearing therefore proceeded.

Discussion and Determination

Window

25. Mr Strong set out his case for breach of Lease, starting with the Respondent's failure to have repaired the Property's window.

26. Mr Strong confirmed that the Applicant relied solely on clause 4.1 of the Lease, as set out above. He took the Tribunal to photographs in the bundle dated 6 December 2023 which his colleague Charlie Sykes, another director of the Applicant, had taken. He confirmed that these showed a bathroom fanlight window in the Property which was broken. He

confirmed that the period of the breach for which a finding was sought was 7 March 2023 to 6 December

2023, given that he had no evidence of breach after or before that date, and he O was unaware whether or not it had been repaired since the photographs were taken.

27. Mr Strong took the Tribunal to the definition of Demised Premises in the Lease within the definitions section and also at Schedule 1, and relied on the fact that the latter provides that the Demised Premises includes "the glass fitted in...window frames". His simple submission was that the broken window was not in repair, it was part of the Demised Premises, and so clause 4.1 had been breached.

28. The Tribunal agrees. It is trite law that, generally speaking, breach of covenant to repair requires a physical deterioration to that which is required to be kept in repair: Quick v TaffEly BC [1986] QB 809. In Quick, it was held that the covenant is not concerned with lack of amenity or efficiency: see Dillon LJ at 818D, Lawton LJ at 823B and Neill LJ at 823D-G.

29. Here the window, the Tribunal finds, was in a state of physical deterioration (cracked glazing) between 7 March 2023 and 6 December 2023.

30. Notwithstanding clause 3-4, clause 4.1 of the Lease is not dependent on notice being given of the condition of the window and a reasonable period of time having elapsed before the Leaseholder can be in breach, as is sometimes the (obverse) case when the tenant claims a breach against the landlord. But in any event, the Applicant wrote to the Respondent about the breach on 7 March 2023, and the letter even included an image of the window in question, which may be seen to be in the same state as in the later December 2023 photographs.

31. Accordingly, the Tribunal finds that the Respondent has breached clause 4.1 of the Lease between 7 March 2023 and 6 December 2023.

Fire Door

32. Mr Strong next contended that the Respondent was in breach of Lease for not installing a fire door compliant to FD 30 standard. He confirmed the clauses on which he relied in the Lease were clauses 3.11, 4.1, and 4-5/Schedule 4, paragraph 4.

33. Mr Strong confirmed the period for which a determination of breach was sought was between 7 March 2023 and 6 December 2023, at the earliest.

34. Mr Strong relied on the word "renew" in clause 4.1. He said that the fire risk assessment which the Applicant had obtained recommended that fire doors

should be installed in all flats, because the Building needs to be fire safety compliant. The Tribunal was not provided with a copy of the fire risk assessment, but was invited to accept Mr Strong's evidence at face value in paragraph 8 of his witness statement, in which he sets out the recommendations of 4Site Consulting, the consultants who wrote the report.

35. Mr Strong also contended that a fire door which was not fire safety compliant was also not in "good condition" for the purposes of clause 4.1.

36. Mr Strong conceded that clause 3.11 didn't help his case and he formally withdrew reliance on that clause.

37. As to Schedule 4 paragraph 4, Mr Strong explained that this had not been included in the application notice because the case had developed since then. He made an oral application to amend the application form to include reliance on Schedule 4 paragraph 4, indicating that he was relying on the same facts as were contained in the bundle, and not any additional evidence.

38. He took the Tribunal to the summary of cover of buildings insurance within the bundle, referred to in the chronology above. He confirmed that the insured was the Applicant, and that the insurance was for the whole of the building, and the period of the insurance was 1 July 2023 to 30 June 2024.

39. When the Tribunal pointed out that this insurance was taken out at the time when the Applicant knew that the flat entrance door to the property was not fire compliant, Mr Strong indicated he no longer pursued reliance on breach of Schedule 4 paragraph 4. The Tribunal was therefore not required to decide any oral application to amend the application form.

40. The only determination the Tribunal need therefore make is whether the Respondent has been in breach of clause 4.1. In the Tribunal's determination, he has. The Tribunal agrees that the door is part of the Demised Premises. The Tribunal is persuaded that it needs to be renewed, because it is not a FD30 rated fire door. That is evident from the summary of the FRA, as reported by Mr Strong, and we have no reason not to take his evidence at face value; Mr Strong presented as a thoughtful, careful witness. The Tribunal also takes into account the photograph of the flat

door in the bundle, which presents as a standard 4 panelled door containing what appears to be a regular mortice lock only.

41 . Even if the Tribunal is wrong to find the Respondent is not in breach of covenant to "renew" the Property front door, the Tribunal determines that the door is not in "good... condition" for the purposes of clause 4.1. The addition of the words "and condition" in clause 4.1 potentially extends the covenant beyond mere bringing of the state of the Premises from deterioration to nondeterioration, but widens the scope of what the lessee must do. For example, in Welsh v Greenwich (2000) 33 HLR 40, CA, the use of the words required the landlord as covenantor to remedy damp, even though it was not caused by a physical deterioration to the parts it was required to repair.

42. The Tribunal can see no reason why in this case this covenant to keep in good condition should be construed in a narrow sense, being equated only with repair. The words "in good condition" must be given some effect. The Tribunal determines in this case those words are apt to include the requirement to replace a non-compliant front entrance door with a compliant one. In other circumstances it may be different, but the flat door in this case, which will not protect the common parts from rapid spread of fire because it is not FD30 standard (see letter dated 7 March 2023), may truly be said not to be in good condition.

43. On balance of probability the Tribunal determines that the Respondent has been in breach of clause 4-3 of the Lease between 7 March 2023 and 6 December 2023 by not keeping the front entrance door in good condition (it not being a FD30 standard fire rated door), and by not renewing it with a door to that standard.

Failure to give access to instal a heat detector

44. Mr Strong indicated at the hearing that the Applicant relies solely on clause 4-3, and that the period of the breach is 21 February 2023 (the date of the first letter) to date of the hearing (because the only contact since has been a refusal of access for all purposes).

45. The Tribunal first enquired what evidence there was of "appointment[s]" having been made. Mr Strong took the Tribunal to the letter of 21 February 2023 and a proof of posting in the bundle of the same date. He then took the Tribunal to the letter of 23 March 2023, again confirming that it had been sent by post and that there was a proof of posting on the preceding page of the bundle (page 62, bottom right Post Office slip). He confirmed the Applicant had written to the Bank of Scotland, the Respondent mortgage, but he did not know whether or not that bank had contacted the Leaseholder as a result. Finally, Mr Strong took the Tribunal

to the letter of 23 May 2023 and the corresponding proof of postage on the preceding page in the bundle.

46. In addition the Tribunal takes into account the fact that the Applicant had confirmed to the Tribunal at the beginning of the hearing that it had sent the hearing bundle by tracked delivery to the Respondent on 6 January 2024.

47. The Tribunal is therefore satisfied that at all material times the Respondent has known of the Applicant's intention to seek access to instal a heat detector in the Property.

48. The Tribunal next enquired of the Applicant what right it had to install a heat detector in the Property. Mr Strong confirmed that what was to be installed was a wireless smoke detector, which would take about 30 minutes to install, and be fixed within the Property by two screws. This device would then communicate to a central fire alarm box in the common parts by an independent Wi-Fi system, not reliant on any Leaseholders' Internet (if any). Mr Strong argued that this was required for the landlord to comply with its fire risk assessment, which had opined that it was unclear whether there was complete compartmentation between flats and the common parts. As such, a fire alarm system was required to make all occupiers aware in the event of a fire, thus enabling simultaneous evacuation.

49. Mr Strong took the Tribunal to clause 6 of the Lease which contains the landlord's covenants to maintain and keep in good and substantial repair and condition the main structure of the building, and the common parts. The detector was required to ensure the common parts (and the whole building) are kept in good condition. He also relied upon clause 6(h): the installation of this system was a matter which in the discretion of the landlord might be considered necessary or advisable for the proper safety of the building.

50. Mr Strong then argued that, under clause 4-3, the Applicant's lawful purpose was to alter part of the building, being the flat; and/or its purpose was to keep in good order and condition the common parts (which are defined in the definitions clause of the Lease as including not only the halls landings and passageways but also the main structure of the building, all of which was retained to the lessor). Finally, he relied on the words "for similar purposes" as indicating that in a modern world the addition of a wireless smoke or heat detector would be similar to the lessor laying down electric wires and cables.

51. The Tribunal agrees that Clause 4-3 is wide enough to cover the installation of a wireless heat detector in the Property, designed to be part of an L2 fire

alarm detection system, which has the purpose of protecting the common parts of the building against the risk of fire, amongst other areas. It would not amount to a trespass upon the Demised Premises or be breach of covenant to give quiet enjoyment, the Tribunal determines, given the express permission granted by the Respondent to the Applicant by virtue of clause 4-3.

52. The only remaining issue to determine is whether or not the Respondent has failed to permit the Applicant to enter the property to undertake the works proposed. The Tribunal is so satisfied. The Applicant has written to the Respondent on several occasions, without even the courtesy of a direct reply.
Moreover, the only response given to the Applicant, being the email of 26 May 2023, whilst not from the Respondent himself, purports to be made on his behalf, and is an unequivocal refusal of access to the Property.

53. The Tribunal therefore determines that on balance of probability the Respondent has breached clause 4-3 of the Lease between 21 February 2023 and 14 March 2024 by not permitting access to the Applicant to the Property to install a wireless heat detector.

Costs

54. The Applicant having been successful, we order the Respondent to pay the Applicant's application fee of 2100 and hearing fee of 2200 within 14 days.

Name: Tribunal Judge S Evans Date: 15 March 2024.

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the Tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends mitten reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the Property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the Tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix 1

Commonhold and Leasehold Reform Act 2002

168 No forfeiture notice before determination of breach

(1) 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.

(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 postdispute 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.