

Y TRIBIWNLYS EIDDO PRESWL
RESIDENTIAL PROPERTY TRIBUNAL
LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0029/09/19

In the matter of 1 Tan Y Graig Cottages, Pentreath, Anglesey, LL75 8UL

And in the matter of an Application under Section 168(4) of the Commonhold and Leasehold Reform Act 2002

Applicant: Mr. Thomas John Cusack
(Represented by Mr. M Barrow, Counsel)

Respondent: (1) Mr. Kenneth Hanks and (2) Mrs. Joan Hanks
(Represented by Mr. N Jackson, Counsel)

Tribunal: Mr. Andrew Grant (Legal chairperson)
Mr. David Jones (Surveyor member)
Mr. Eifion Jones (Lay member)

Decision

The Tribunal determine that there has not been a breach of the lease. The Application is dismissed.

Reasons

1. This is an application brought by Mr John Cusack pursuant to Section 168(4) of the Commonhold and Leasehold Reform Act 2002 by which he seeks a determination that there has been a breach of the term of a lease.
2. The application was received at the Tribunal on the 18th September 2019. Directions were issued on the 23rd September 2019.
3. The matter was listed for an inspection and hearing on the 21st January 2019 at the Bulkeley Hotel in Beaumaris, Anglesey.

Inspection

4. The Tribunal inspected the Property at 09-30 on the 21st January 2020. The Applicant was present together with his barrister, Mr Barrow. The first Respondent was also present together with his barrister, Mr. Jackson.

The Background

5. The Applicant is the freehold owner of the property known as and situate at number 1 Tan Y Graig Cottages, Pentreath, Anglesey, LL75 8UL (“the Property”).
6. The Respondents hold the leasehold interest in the property pursuant to the terms of a lease made between Thomas John Cusack and Katherine Knowles which is dated the 14th April 2014 and is for a term of 999 years commencing on the 24th October 2013.
7. Pursuant to clause 3-5 of the lease there is a covenant which relates to alterations. The wording of the clause is as follows – “The Lessee must not erect or make any extension or alteration to the exterior of the Property (including any garden or frontage area) unless he first:
3-5-1 obtains and complies with the necessary consents of the competent authorities and pays their charges for them and
3-5-2 obtains the Landlords written consent.
8. On or about the 12th December 2018, the Respondents began the construction of a conservatory at the property. As at the date that the construction commenced, the Respondents had not obtained the Applicant’s written consent as required by Clause 3-5 of the lease.
9. Accordingly, the Applicant asserts that there has been a breach of the lease.

The hearing

Preliminary matter

10. At the start of the hearing Mr Jackson made an application to adduce in to evidence three further witness statements that had been received at the Tribunal the day prior to the hearing.
11. Mr Barrow, on behalf of the Applicant, objected to the late introduction of this evidence indicating that witness evidence should have been served as long ago as the 4th November 2019.
12. Having considered the application, the Tribunal formed the view that the contents of the statements did not really go to any of the issues in the case. Furthermore,

no good reason was provided for such a late application. In those circumstances, permission to rely upon the statements was refused.

Opening submissions

13. In opening, Mr Barrow submitted that the Applicant had never given verbal consent for the proposed works to the conservatory as had been alleged and submitted that in those circumstances there was no Estoppel as alleged by the Respondents. He said that his client's evidence would show that at the initial meeting between the parties, no information about the proposed conservatory had been provided.
14. He went on to say that the application for consent was subsequently refused in writing on the 17th April 2019.
15. Mr Jackson opened by saying that although his skeleton argument was "efficient" he was not abandoning any of the points taken in his client's formal response to the application.
16. He went through the chronology of events and said that the refusal of consent by the Applicant was essentially based on matters which were not relevant to the request for permission but related to other issues which had been simmering between the parties at the same time.

Mr Cusack

17. Mr Jackson cross examined the Applicant as to the reason for failing to consent to the Application. Mr Cusack stated that the Respondents were in "total breach of the lease" and had "showed no respect for the lease".
18. He was asked whether the Respondent had broken any other terms of the lease and Mr Cusack replied that the Respondents had "just carried on" when they had been told to stop work.
19. It was suggested by Mr Jackson that work on the conservatory did not start until after planning permission had been granted which was on the 15th November 2018. Mr Cusack rejected that suggestion stating that work had been going on "at all stages".
20. It was put to the Applicant that he had given the Respondent cause to understand that no further consent was required for either the changes to the windows or the outside wall. The Applicant denied this was the case.
21. The Applicant was again asked why he had refused consent. He again stated that there had been a total breach of the lease and the Respondent had not provided any details or information in support of the application.

22. The Applicant was asked if either he or the agent had sought further details from the Respondents. The Applicant responded that they requested information right up to the 6th January 2019. No plans had been received until after planning permission had been granted.
23. It was put to him that he did not list as a reason for refusal either that the footprint of the proposed build was unreasonable or that the building had increased in size. The Applicant responded by saying that he refused on both grounds as the base did not follow the original measurements and there was an increase in size from the original. He also stated that the conservatory was totally out of keeping with the building and had taken away the charm of the cottage.
24. It was suggested that at the time of the Applicant's decision to refuse consent, the Applicant was of the view that he could refuse consent for whatever reason he wished even if that reason was capricious. It was suggested that the Applicant wanted to forfeit the Respondents' lease. The Applicant responded by saying that Forfeiture was a possibility but the Respondents had disregarded both the lease and him.
25. When asked why he was seeking a declaration, the Applicant replied that he wanted to "send a message to Mr Hanks".
26. It was put to him that he wanted to "keep Mr Hanks in line". The Applicant said he was just relying on a provision which was in the Lease.
27. The Applicant was then asked about the day of the initial meeting. He confirmed that sale of the property completed on the 27th July 2018 but the Respondents did not move in that day. However, he said that building work had started at that stage. He said that the first meeting took place on the 1st August 2018.
28. The Applicant was asked where he was on the 27th July 2018. He said that it was his wife's birthday. He said that they had gone out for drinks but said that he could not remember where they had gone.
29. The Applicant was adamant that he had not met with the Respondents on the 27th July 2018 as had been suggested. He said that the meeting took place at his home on the 1st August 2018. He had just finished cutting the grass. He said that his wife would have been at home and that he had discussed the issue of consent with his wife as she was a director of Anglesey Country Cottages.
30. The Applicant was asked if he had seen the document at page 71 of the bundle which was a plan of the conservatory with dimensions and measurements. He said he had only seen it when he received the Respondents bundle. He said that had he seen it he would have asked further questions such as how the proposed conservatory attached to the building.

31. It was put to the Applicant that in any event he would have received notice of the planning application. The Applicant said he had not received any notice. He said he had spoken with the planning officer and it seemed that notices were sent to cottages number 2 and 3 only. He said that he was informed that a notice had been affixed to the telegraph pole at the site. He said that he passes the telegraph pole at the site every day but did not see any notice.
32. It was put to him that he knew of the planning application and could have checked the plans. The Applicant stated that he could not recall being aware of the planning application.
33. It was put to the Applicant that he was aware of what Mr Hanks wanted and that the only written response on the issue was the e mail from Ewan Lynn (who is the Applicants Land Agent) dated the 23rd November 2018. The Applicant replied that the Respondent had failed to supply sufficiently detailed plans and that the structure was not "like for like" as he had initially been led to believe that it would be.

Mr Hanks

34. The next witness called was Mr Hanks. He confirmed that although the purchase of the property completed in July 2018, he and his wife did not move into the property until a point towards the end of November 2018. He said that he visited the property every 7 to 10 days prior to moving in.
35. He confirmed that he took possession of the keys to the property on a Sunday. On the same day he and his wife went to the Applicant's house to introduce themselves. They knocked on the door but got no response. As they were walking back down the lane, they met the Applicant half way along the lane.
36. Mr. Hanks confirmed that the meeting took place at around 13-30 to 14.00 as he had travelled from Chester. He said that the Applicant's wife was not present.
37. He confirmed that he was aware of the lease and that he had specifically read clause 3-5. He confirmed that he was a retired surveyor.
38. In response to questioning, he confirmed that work on the conservatory did not take place prior to obtaining planning permission.
39. He said that internal works started on the 27th July 2018. He said that he did not mention the conservatory in his first e mail as he did not have any plans. He got the plans on the 6th August 2018. He said work started on the conservatory on the 12th December 2018.

40. Mr Hanks was asked if he was aware that written consent was required for the work. He confirmed that he was aware of that fact.
41. He was asked that if he was aware of clause 3-5 and knew he required consent, why did he start works without obtaining consent? He said that he had sent e mails with details requesting consent but did not think he was going to get anywhere with the Applicant.
42. It was put to him that there were no proper drawings until the 21st September 2018. The Respondent confirmed that was correct.
43. It was suggested by Mr Barrow that even as at the 3rd January 2019 he did not have the plans. The Respondent said that he did not have hard copy plans but did have them on his computer but was unable to locate them.
44. It was suggested that he deliberately proceeded in breach of the terms of the Lease. He replied that he knew from discussions with other occupiers that consent would not likely be forthcoming.
45. It was put to the Respondent that his e mail dated the 30th July 2018 made no mention of a conservatory. The Respondent agreed. He said that no mention was made at that point as he had no plans to show them. He said that approval had been given by the Applicant at the initial meeting subject to receiving planning permission and satisfactory plans. They had relied upon the Applicant's word. The Applicant had asked for a drawing "that they would be happy with".
46. It was put to the Respondent that the plans that appeared on pages 38 and 39 of the bundle were unsatisfactory as there were no floor plans, no dimensions and no scale.
47. The Respondent was asked why he had pressed on with work in light of the e mail from Ewan Lynn dated the 23rd November 2018. The Respondent stated that work had not started on the 23rd November 2018. However, and in any event the Respondent stated that he considered that he had provided all necessary information and that written consent was outside of his control.
48. It was put to him that he had not attempted to contact the Applicant with the required details. The Respondent said that everything went through Ewan.
49. Mr Barrow asked when did the Respondent think the Applicant had received sufficient information to make a decision? The Respondent replied that the Applicant had sufficient information by the 6th September 2018.
50. It was put to the Respondent that there was no delay in refusing consent. The Respondent said that he disagreed. He said the Applicant had taken close to five months to respond.

Mrs Hanks

51. Mrs Hanks gave confirmatory evidence in respect of her husband's statement.
52. She confirmed that she could recall the first meeting between the parties. However, after that first meeting, she had no further dealings with the Applicant.
53. She stated that at the first meeting she had said to the Applicant that the Estate was nicely kept.

Discussion

54. It is common ground that the Respondents did not obtain the written consent of the Applicant before completing the work on the conservatory.
55. The Respondents rely upon 3 separate arguments to support their position that written consent is no longer required namely: (1) that an agreement was reached with the Applicant such that he is now estopped from refusing to provide his written consent, (2) That he has unreasonably refused to provide consent and (3) that any breach has been waived by the Applicant.
56. We shall deal with each item in turn.

Agreement

57. The Respondents assert that they met with the Applicant on the 27th July 2018. It was an informal meeting which took place in the lane approaching the Applicant's house. On the Respondents evidence the meeting took place between 13.30 and 14.00 hours.
58. The first Respondent explained that they were planning on replacing the structure that had previously been erected by their predecessor, Ms. Katherine Knowles but with some changes to the roof. On Mr Hank's evidence, the Applicant said that he had no objection to their proposals as long as they obtained all necessary planning consents and sent to him a copy of the plans for the proposed works.
59. The Applicant disputes this version of events. He stated in evidence that the meeting took place on the 1st August 2018, however nothing turns on the date of the meeting. In any event, the Applicant stated that he did not give any permission to build the conservatory as he was not in a position to do so. He stated that the Respondents had no detail or information relating to the proposed works and in those circumstances, he did not reach any agreement at all.

60. When giving his evidence, Mr Hanks put forward a slightly different version of the meeting to that which appears at paragraph 7 of his statement of case. When answering a question from Mr Barrow he said that during the meeting the Applicant asked the Respondents to provide him with copies of the Plans that "he would be happy with". Clearly, that is something different to an outright agreement. The Applicant appears to have said to the Respondent that he needed to be "happy" with the Respondents proposed plans and therefore his approval was conditional. The Tribunal find as a fact that to be the case.
61. As matters turned out, the Applicant was not happy with the proposed plans. In his evidence the Applicant stated that the ground measurements were different, the structure was altogether larger than the original and that the conservatory had taken away the "charm" from the cottage.
62. Having heard the witness evidence, the Tribunal is not satisfied that any agreement was reached with the Applicant along the lines suggested by the Respondents.

Unreasonable refusal

63. It was common ground between the parties that clause 3-5 of the Lease was subject to section 19(2) of the Landlord and Tenant Act 1927, which implied a provision that any request for consent for improvements must not be unreasonably refused.
64. It is the Respondents' case that the Applicant's refusal to consent to the improvements was unreasonable such that in those circumstances he did not need consent to finish the works.
65. The first written contact from the Respondents which referred to the conservatory was made by way of an e mail to the Applicant's land agent, Mr. Ewan Lynn on the 6th August 2018. The e mail attached a drawing of the proposed conservatory. It is common ground that the drawing was insufficiently detailed to allow the Applicant to properly consider the request because on the 16th August 2018 the first Respondent sent an e mail to Ewan Lynn stating that he was going to obtain a "better and bigger" drawing of the proposed conservatory.
66. Further detailed drawings were provided by the Respondent on the 5th September 2018. These drawings included pictures of the proposed works from various angles together with dimensions.
67. On the 16th November 2018, the first Respondent wrote to Mr Lynn and notified him that he had both applied for and obtained planning consent for the conservatory.

68. On the 23rd November 2018, Mr Lynne wrote to the first Respondent. The initial part of the e mail addressed an issue relating to the boundaries. The e mail then went on to state that the Applicant had not given consent to the works the conservatory and that all work must cease. He stated that all relevant information must be supplied. It is to be noted that the e mail did not make any reference to the information that had already been supplied and neither did it seek further clarification.
69. The first Respondent replied on the 25th November 2018, stating that he had complied with the Applicants request for copy plans as the same had been provided.
70. On the 4th December 2018, the first Respondent informed Mr. Lynne that planning approval had been received and he promised to send to him copies of the Architect's drawings.
71. On the same date, the first Respondent supplied to Mr Lynn a copy of the planning permission which had been issued by the Council.
72. On the 6th December 2018, the first Respondent sent an e mail to Mr. Lynn attaching the Architect's drawings.
73. The first Respondent subsequently sent e mails to Mr Lynn on the 23rd December 2018 and the 23rd January 2019 chasing progress on his application for consent.
74. On the 2nd February 2019, Mr Lynn wrote to the first Respondent. Part of the e mail related to payment of service charge but the final sentence reminded the first Respondent that he still needed the Applicant's approval in writing to proceed with work on the conservatory.
75. On the 17th April 2019, the Applicant refused consent to the proposed conservatory. The refusal was communicated in a letter from the Applicant's solicitors, Amphletts.
76. One of the striking features of this aspect of the case is the lack of engagement by the Applicant or his land agent in promptly dealing with the Respondents request for permission. The Applicant only responded when chased by the first Respondent and he was only ever met with requests for copy plans. This is the case notwithstanding the fact that the first Respondent repeatedly stated that he had supplied all relevant drawings. There is no single piece of correspondence from the Applicant stating that the information supplied was inadequate and there were no requests for clarification.

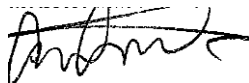
77. In evidence Mr Cusack had relied upon the lack of detail as forming the basis of his refusal. In those circumstances, one would have expected to see more correspondence raising that particular issue but it is notably absent.
78. During his cross examination of the Applicant, Mr Jackson suggested that there were ongoing issues between the parties that coloured the Applicant's approach to the application. Indeed, when asked why he had issued this application, the Applicant stated that he had "wanted to send a message to Mr. Hanks" as he felt that Mr Hanks had ignored both the lease and him (meaning Mr Cusack).
79. A consideration of the letter from Amphletts dated the 17th April 2019, shows that the Applicant stated that there had never been any formal written request from the first Respondent seeking approval for works to the conservatory. Aside from the fact that the lease does not specify a specific procedure which had to be followed, it is clear that an application had been made and the Applicant was aware of that fact. In the Tribunal's view reference to a lack of proper application indicates that the Applicant was trying to make things unnecessarily difficult for the first Respondent.
80. The remainder of the letter set out a list of items which one infers sets out the reasons for the Applicant's refusal of the application. The letter does not say so explicitly. In the Tribunal's view the letter was an attempt to provide reasons which were not genuine concerns and did not form the basis for genuine reasons for refusal. The Tribunal take the view that the refusal was not based upon a proper consideration of the application but was based upon other issues that had arisen between the parties since the Respondents had moved to the Property.
81. The Tribunal is reinforced in the above view by the evidence of the Applicant himself. He seemed to have taken things personally as he stated that he had been "ignored" by Mr Hanks and that his purpose in issuing this application was to "send a message to Mr Hanks".
82. The documentation shows that there was no genuine engagement with the request for permission, just repeated demands that work should cease until written permission was granted. The Tribunal form the view that the Applicant had no intention of granting permission.
83. Accordingly, the Tribunal find that the refusal to grant the request for consent was unreasonable as the refusal was based upon reasons other than those strictly relating to the application for consent.

Waiver

84. The Respondent also asserts that the Applicant has waived the right to rely upon any breach of Clause 3-5 of the Lease.

85. In that regard, it is submitted that on the 7th January 2019, the Applicant's land agent wrote to the Respondents demanding payment on account of service charges for the year 1st January 2019 to the 31st December 2019 in the sum of £800.00. The said sums were paid on the 17th August 2019.
86. In those circumstances, it was submitted by Mr Jackson on behalf of the Respondent that the charges were demanded in circumstances where the Applicant had clear knowledge of the breach in question. The particular breach was a once and for all breach. Accordingly, it was submitted that the Applicant has waived the breach and in consequence the right to forfeit the lease.
87. Mr Barrow submitted that the issue of waiver was an issue of enforcement and was not a matter for consideration by this Tribunal.
88. It is clear that the Tribunal does have jurisdiction to determine whether the breach and the subsequent right to forfeit the lease have been waived and indeed should make such a determination on this application.
89. It is clear from the facts as outlined that the Applicant demanded future sums due under the lease and in so doing treated the lease as continuing. The demand post - dated the date of the breach (which was a once and for all breach) and was made in full awareness of the breach. In those circumstances, the Tribunal take the view that the breach in question has been waived.

Dated this 4th day of February 2020



Andrew Grant
Chairman.