

Y TRIBIWNLYS EIDDO PRESWYL
RESIDENTIAL PROPERTY TRIBUNAL
LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0044/01/22

In the Matter of No 11A St Osyth Court, Barry, Vale of Glamorgan, CF62 6RT

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

APPLICANT: St Osyth Residents Co Ltd
RESPONDENT: Ms J Lamey
TRIBUNAL: Mr AR Phillips (Tribunal Judge)
Mr E Jones (Lay Member)
Mr R Baynham (Surveyor Member)

DECISION

The Tribunal determines that there has been no breach of the lease.

Reasons

1. The Applicant has made an application pursuant to Section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination as to whether there has been a breach of the lease by the Respondent.
2. The application was listed for a hearing on 14th March 2022 at which the Tribunal heard evidence from the Applicant and Respondent.
3. Following the hearing on 14th March 2022 the Tribunal issued Further Directions on 23rd March 2022 which have been complied with by the Applicant and the Respondent.

Inspection

4. Due to Covid 19 restrictions the Tribunal's Surveyor Member, Mr Baynham, inspected the Property alone on behalf of the Tribunal on 14th March 2022. There was no attendance on behalf of the Applicant who was aware of the time and date of the inspection. The Respondent was present.
5. The Property, which was built approximately 45 years ago comprises a 2 bedroomed flat on the third floor of a development which consists of a total of 26 flats. The

development is conventionally constructed having brick exterior walls with a bitumastic roof. Plastic rain-water goods and double glazed Upvc windows and doors.

6. The accommodation consists of an entrance hall, large living room with patio doors leading to a balcony, kitchen, 2 double bedrooms and a bathroom with a walk-in shower, wash hand basin and a w/c.
7. The Respondent has removed the previous floor coverings in the entrance hall, living room and kitchen and replaced them with underlay on top of which has been laid bamboo flooring. The two bedrooms have fully fitted carpets.
8. Mr Baynham was informed by the Respondent that she intends to put rugs in the living room that would cover, circa 80%, of the floor area in that room.

The Background

9. The Applicant is the owner of the freehold of the property known as St Osyth Court, Barry, Vale of Glamorgan CF62 6RT.
10. The Respondent is the owner of a lease of Flat 11a, St Osyth Court, Barry, Vale of Glamorgan, CF62 6RT ("the Property").
11. The original lease of the Property is dated 2nd February 1978 and was made between (1) Provincial Properties (Wales) Limited, (2) St Osyth Resident's Company Limited and (3) Mary Atkins ("the Original Lease") for a term of 99 years from 25th March 1975. The lease attached to the Application Form from the Applicant is not the lease for the Property but is the lease for 19 St Osyth Court. The leases would however have been in a standard format and the provisions of all the leases would have been identical for all the leases.
12. The term of the Original Lease was extended under the terms of a Deed of Variation dated 30th December 2010. The Tribunal has obtained a copy of the Deed of Variation from the Land Registry.
13. The term of the lease was extended to 999 years from the 1st July 2010 and the ground rent reduced to £1.00 per annum. Otherwise, the terms of the Original Lease were unaltered.
14. Clause 10 of the First Schedule of the Original Lease states:

"The floors of the demised residence shall be at all times covered with a close fitted carpet of at least the equivalent quality and texture of that supplied and fitted at the date hereof".
15. The Respondent moved into the Property on 17th August 2020 and in June 2021 replaced parts of the old carpet with underlay and a bamboo floor.

16. The Respondent has not applied to the Applicant for consent to the replacement of the existing carpet with the bamboo flooring.
17. The Applicant has sought the determination by the Tribunal that there has been a breach of the terms of the Original Lease.

Summary of Applicant's Evidence

18. Linda Callow, the Secretary of St Osyth Residents Co. Limited attended the hearing and gave evidence on behalf of the Applicant.
19. Ms Callow confirmed that she had nothing to add to her Statement of Truth dated 25th January 2022.
20. In response to questions from the Tribunal Ms Callow confirmed that there had been 2 complaints about noise prior to 4th November 2021.
21. The Applicant became aware of the installation of the bamboo flooring when the Property was inspected as part of the Fire Risk Assessment procedure for the building.
22. No application had been received from the Respondent to request consent for the installation of the bamboo floor at the Property.
23. A letter from solicitors acting on behalf of the Applicant had been sent to the Respondent advising the breach of the terms of the lease on 4th November 2021.
24. The service charge for the Property is £95 per calendar month and the monthly payment includes the ground rent. Ms Callow indicated in her evidence that the ground rent was £50 per annum, however, under the terms of the 2010 lease extension it would appear to have been reduced to £1 per annum. It was confirmed that the Respondent was continuing to pay the service charge including the ground rent (whatever that may be).
25. Following the Further Directions issued on the 23rd March 2022 the Applicant provided a further statement dated 30th March 2022 confirming the date of the Fire Risk Assessment was 25th October 2021.

Summary of Respondent's Evidence

26. The Respondent, Ms Lamey, attended the hearing and gave evidence.
27. Ms Lamey confirmed that she moved into the Property on 17th August 2020 and had installed the bamboo flooring (with underlay) in June 2021. This had replaced the old carpet.
28. The bamboo flooring was softer than wood and it was her intention to put large rugs on 80% of the floor.

29. Following the Further Directions issued on the 23rd March 2022 the Respondent provided a further statement (undated).

Tribunal's Findings

30. The Tribunal is satisfied upon the evidence that the Respondent did not obtain the consent of the Applicant to replace the carpet with the bamboo flooring at the Property.
31. The provisions of the Original Lease may now be of an age and it may well be that a more modern lease may allow alternative flooring to be installed, subject to it providing similar, or improved properties of sound insulation. This is not however the case here and the provisions of the First Schedule of the Original Lease are still applicable.
32. It is not for the Respondent to choose which of the provisions in the lease she wishes to comply with.
33. The provisions of the Original Lease are clear and the Tribunal is satisfied that on the face of it the Respondent is in breach of the terms of the Original Lease.
34. The timeline of the matter is as follows:

7th August 2020 the Respondent moves into the Property

17th September 2020 the Applicant sent to the Respondent a letter regarding the future service charge payable.

June 2021 the Respondent installs the bamboo floor.

25th October 2021 the Fire Risk Assessment is carried out on behalf of the Applicant who then become aware of the bamboo floor.

4th November 2021 Respondent receives letter from the Applicant's solicitor advising as to the breach of the terms of the lease.

7th January 2022 Applicant makes application to the Residential Property Tribunal for determination of breach of the terms of the lease.

35. Since 4/11/21 the Respondent has continued to pay the service charge and ground rent at £95pcm and these payments have been accepted by the Respondent.
36. The letter dated 17th September 2020 predates the Applicant's knowledge of the breach of the terms of the lease which came about on 25th October 2021. The Tribunal is not aware of any further service charge demands since 17th September 2020.
37. The Tribunal has to consider further, although there is on the face of it, a breach of the terms of the lease, whether the breach has been waived by the Applicant. Put simply,

has the Applicant treated the lease as continuing by accepting the continued payments of ground rent and service charge.

38. In the case of *Matthews v Smallwood* [1910] 1 Ch. 777, 786, per Parker J:

“Waiver of a right of re-entry can only occur where the lessor, with knowledge of the facts upon which his right to re-enter arises, does some unequivocal act recognising the continued existence of the lease”.

39. The case of *Central Estates (Belgravia) v Woolgar (No. 2)* [1972] 1 W.L.R. 1048, 1054, per Buckley L.J. provides further assistance re the waiver issue:

“If the landlord by word or deed manifests to the tenant by an unequivocal act a concluded decision to elect in a particular manner, he will be bound by such an election. If he chooses to do something such as demanding or receiving rent which can only be done consistently with the existence of a certain state of affairs, viz. the continued existence of the lease or tenancy in operation, he cannot thereafter be heard to say that that state of affairs did not then exist”.

40. The Respondent has continued to pay the service charge and ground rent since the time the Applicant became aware of the breach and after the application was made to the Tribunal and payments were continuing as at the date of the Tribunal hearing.

41. Where a breach of a lease by a tenant is a continuing breach, a fresh right to forfeit accrues each day a breach continues and any waiver will only affect the breach carried out prior to the date of waiver. Where a breach is a “once and for all breach” the right to forfeit is lost if waived.

42. Alteration of a property in breach of the terms of a lease, as is the case here, is a once and for all breach and the right to forfeit is lost by waiver.

43. The Tribunal is satisfied that the breach in question has been waived because of the continued acceptance of the payments of service charge and ground rent.

44. In the circumstances, the right to forfeit the lease has been lost by the Applicant.

Dated this 17th day of May 2022

AR Phillips

Tribunal Judge