IN THE COUNTY COURT
(Sitting at Willesden)

No. E02W1280

9 Acton Lane
Harlesden
NW10 8SB

Friday, 15 March 2019

Before:

DISTRICT JUDGE ANDREW HOLMES

B E T W E E N :

CHARLES JAMES McCADDEN — Claimant

- and -

DR AFSHAN NAVID MALIK — Defendant

_____

THE CLAIMANT appeared in Person.

MR. M. DENCER (instructed by Oliver Fisher Solicitors) appeared on behalf of the Defendant

_____

J U D G M E N T

JUDGE HOLMES:

1 This is one of those very sad cases which arises out of the position of leasehold law in this country. Many things have been said about it in the past, I am afraid this is a classic example of how difficulties can arise, regardless of whose fault the situation is, but it puts those who are thrust into that particular environment into an almost impossible situation once a relationship has broken down.

2 The legal position is very clear, and this is a claim that arises out and concerns 64 Boroughs Road, Kensal Rise in NW10. Mr. McCadden is a long lease holder of Flat B, Dr. Malik is the freehold proprietor of the property and she also has a long lease of the ground floor flat, Flat A. The long lease of Flat B is for a term of 189 years from June of 1984, there is therefore still a very substantial period left on lease.

3 Dr. Malik has been in occupation of the property for some considerable period of time, she purchased the freehold from the Crown shortly after she purchased her leasehold interest. Mr. McCadden purchased the lease to Flat B in April 2016.

4 Not long after that, the relationship between Mr. McCadden and Dr. Malik deteriorated. It deteriorated to such an extent that proceedings were brought in the First Tier Tribunal. That resulted in a hearing before the First Tier Tribunal on 13 November 2017, and that resulted in a decision of the First Tier Tribunal which is dated 20 November 2017 and to which I will need to return to the detail of in a few moments time.

5 The First Tier Tribunal found breaches of the lease on the part of Mr. McCadden. Armed with that decision, Dr. Malik brought proceedings in the County Court for possession based on forfeiture of the lease and those proceedings were begun on 5 March 2018. There was a hearing on 14 May 2018, which I think was before me, in which I was told that Mr. McCadden had appealed the First Tier Tribunal decision. I adjourned the matter to allow that appellate process to take its course. There is no point in making a possession order if the Upper Tribunal or another appellate court were going to reverse the First Tier Tribunal's decision.

6 Ultimately, that came to naught and on 6 August 2018, a Deputy District Judge made a possession order. That is an order which has not been subject to challenge either successfully or unsuccessfully. Subsequent to that, Mr. McCadden clearly took legal advice and a professionally drafted claim for relief from forfeiture was made to the court in September of 2018, and it is that claim which comes before me for determination this afternoon.

7 I have said this a number of times during the hearing, but it is important for the purposes of this judgment to reaffirm a number of matters. First of all, the Court's power in relation to relief from forfeiture comes from s.146 of the Law of Property Act 1925. It sets out in (2) the court's powers and it says this:

> "Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, the lessee may in the lessor's action, if any or in any action brought by himself, apply to the court for relief. The court may grant or refuse relief as the court, having regard to the proceedings and conduct of the parties under the aforegoing of this section and to all the other circumstances think fit and in case of

relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction, to restrain any like breach in the future as the court in the circumstances of each case thinks fit."

8 It is also important to remind myself that whether there has been a breach of the lease has already been determined. The decision of the First Tier Tribunal of 20 November 2017 is a decision on that issue and the Tribunal summarises in the first paragraph of that decision the following breaches. It says this:

> "1. The respondent has repeatedly failed to grant the landlord access to inspect the revised flat.
>
> 2. The respondent has carried out unauthorised structural alterations and removed landlord's fixtures without consent, and respondent has caused a nuisance to the occupants of the ground floor flat."

The Tribunal then goes on to make this warning:

> "These are serious breaches, and the next step will be for the applicant to apply to the County Court to forfeit lease. The respondent is advised to seek legal advice at the earliest opportunity."

9 Perhaps one of the reasons as to why the First Tier Tribunal included that provision in its decision is because Mr. McCadden did not attend the proceedings before the First Tier Tribunal. Whether that was done deliberately or not is a matter that I may need to make a finding of fact upon, and I will return to that again in a moment.

10 Tempting though it is always for somebody in Mr. McCadden's position to seek to challenge decisions of the Tribunal that he disagrees with, the court system has a structure to ensure that decisions cannot keep on being challenged forever and a day. It is important for everyone concerned that there is finality of decisions that have been taken by competent courts or Tribunals.

11 The remedy, if Mr. McCadden disagreed with what the First Tier Tribunal found was to appeal to the Upper Tribunal. He clearly intended at some stage to do so, and I have seen an email that he wrote to the Upper Tribunal.

12 Whether there actually was a formal application to the Upper Tribunal for permission to appeal or not is unclear. I am not satisfied necessarily, on the evidence before me, that there was a proper application, rather than simply an intention on the part of Mr. McCadden to do so. Whether that is because at the time he was representing himself, and one has to accept that these are complex procedures for people who are representing themselves or rather as Dr. Malik would have it, that that was an untruth that was said to me to obtain an adjournment. It does not seem to me actually to make a substantial difference to the outcome of this case.

13 The First Tier Tribunal judgment has not been overturned on appeal and therefore, I have to accept that as being accurate and I could not, even if I wished to (and I do not), but even if I wished to, I could not go behind the conclusions which the First Tier Tribunal has reached.

14 That of course is not the end of the matter because it is common in relief from forfeiture cases for the person in the position of Mr. McCadden to come along and say, "Right, I

argued this through in the First Tier Tribunal, I don't agree with them but they've made their decision, but I am going to put these things right. I will remedy the breaches that there have been and therefore, I shouldn't lose what is an extremely substantial asset simply because of what are relatively small breaches of the terms of a lease." That is the usual argument which is advanced.

15 As has been said, I think in Mr. Dencer's skeleton argument, if not it is elsewhere, it is very unusual for a lease forfeiture to actually take place. Forfeiture orders are relatively common, but it is almost invariably the case that a court will grant relief from forfeiture once somebody has remedied the breaches. That is why although it is an extremely draconian remedy for a lease to be forfeited, that the law remains the way that it is. Because it is extremely unusual, and only in extreme cases that forfeiture ever actually reaches the ultimate termination of ownership. It is not difficult to see why many people would regard losing a £600,000 asset, as has occurred here, because somebody has breached the various terms of the lease, as being draconian.

16 Likewise though, it is necessary to remind oneself that the person in the position of the freeholder has to have some sensible means by which they can enforce their rights under the lease. If a long leaseholder is making structural alterations without permission, is causing damage to an adjoining flat, is interfering with the quiet enjoyment of the other occupants in the building, the remedies have to be available. Although injunctions could be obtained, committals to prison could take place for breaching injunctions, one of the remedies which remain in the court's armouries is the forfeiture, tempered by the power to grant relief from forfeiture.

17 Therefore, the decisions I have to make in this case is whether or not, as against the factual background as I find it to be, this is a case, first of all, as to whether I should give relief from forfeiture at all or if I do, on what terms that relief could be.

18 I could simply give open-ended relief, I could give relief on the basis that Mr. McCadden comply with the terms of his lease. I could give relief on the basis that he does that and also pay compensation, damages and any other expenses, or I can make what is now referred to by Mr. Dencer as a "Freifeld order". The law loves to make itself more complicated and less understandable by parties, it simply comes from a case that was decided between parties called, *Freifeld v West Kensington Court Limited* [2015] EWCA Civ 806, a decision made by the Court of Appeal in July of 2015. As is not uncommon, you end up taking the first name of a party, and it becomes known as a "Freifeld order".

19 The terms of that order was that relief from forfeiture would be made conditional upon the lessee selling the property within a period of time. Those orders are useful in circumstances where the court concludes that there had been substantial breaches of the tenancy, that a court takes the view that the parties' relationship is not going to be remedied, there is no way in which it is sensible to think or I could be satisfied that a person in Mr. McCadden's position is going to remedy his breaches adequately and therefore, forfeiture should take place, but that he should not be denied all of the value of his asset, because that would be out of proportion to the failures that he has made.

20 It seems to me, for reasons I will explain in a moment, that that is the appropriate order to make in this case, but having canvassed the matter through submissions, ultimately I think Mr. McCadden accepts that that is the appropriate order to make. Although he was trying to persuade me it should be nine months rather than six months, I will explain in a moment why I think six months is long enough.

21 To get to that point, I have to satisfy myself that there have been continuing breaches of the lease or there are other substantial grounds upon which I should not grant relief from forfeiture. I will take this relatively briefly, given the positions the parties have taken in this litigation.

22 First of all, I remind myself as to what the breaches were that the Tribunal identified. The first is that there has been a repeated failure to grant the landlord access to inspect the demised flat. The Tribunal has made findings as to various occasions upon which agents acting on behalf of the freeholder made requests. In para.27 of the judgment there is reference to Corker Clifford making six requests over a period of time in July 2017 for access.

23 What Mr. McCadden says about that is that he was not aware as to who Corker Clifford were, he was not aware that they were agents acting on behalf of Dr. Malik and therefore, he denied access.

24 In some ways, I do not need to make a determination as to what Mr. McCadden thought at the time, because the First Tier Tribunal have made findings of fact and I cannot go behind those findings. For the exercise of the discretion I have to make, I need to, in some ways, look at what has happened between the First Tier Tribunal's determination and today and what I think the position will be going forward.

25 There was an inspection in December of last year, access was granted by Mr. McCadden. There is some dispute about whether access was for forty minutes or two hours. Nothing turns on that, access was clearly given, but that was access which was given after protracted dispute between the parties. It seems to me that there is significant cause to fear that if this relationship were to continue, if relief from forfeiture were to be granted and if access to be requested, access would either be impeded in its entirety or it would be impeded to some considerable degree.

26 It was only after a protracted period of time, in the throes of this litigation after a relief from forfeiture application had been made that access was granted. I think at the time, Mr. McCadden had the benefit of solicitors acting on his behalf and they, no doubt, told him that if he wanted to have any prospect at all of obtaining relief from forfeiture, that he would have to grant access to the property.

MR. McCADDEN: They were granted access (<u>inaudible</u>).

DISTRICT JUDGE HOLMES: I am afraid, I am really sorry, you cannot interrupt me. I now it must be tempting Mr. McCadden, but I am entitled to have my say. If you think I have something terribly wrong you can tell me at the end.

27 The reality of the situation is, it was only in the extremist of a situation where proceedings were under way, where it was absolutely essential, and no real alternative available to Mr. McCadden at that stage that access was granted. It does not give me a substantial amount of comfort that once the threat of this litigation were lifted, that access would be any more forthcoming.

28 The second issue found by the Tribunal is that there had been unauthorised structural alterations. Again, that is a finding of fact, and although it was based on inference and circumstances where Mr. McCadden says that he did not get proper notice of the hearing, without inspection of the inside of his flat, it is based upon at least this factual finding,

which is that when the Tribunal inspected the lower flat they found hairline cracks which are clearly consistent with fairly heavy work having been done above.

29 Ultimately, again as I have said a number of times now, I cannot go behind the factual findings of the Tribunal. They could have been challenged, but they have not been.

30 One of the issues which arises in this case is about a kitchen and about whether a kitchen was in the position that was shown on the original lease plan or whether it was not. The position appears to be this; that a previous long lessee of Flat B had placed a kitchen, either when the flats were originally converted or thereafter, but before Mr. McCadden purchased it, in a position that is shown otherwise than where it is shown on the lease plans. It may be open to argument as to the extent of the breach of a lease as to moving a kitchen back to where it is shown on a lease plan.

31 What concerns me though about the structural alteration and moving of this, is that the whole tenure of the lease is that any substantial alterations to the interior of the flat should be done with the consent of the freeholder. No doubt, it says that consent should not be unreasonably withheld or words to that effect, or those words would be implied.

32 To undertake to move a kitchen which would normally be regarded as structural alteration, it is very difficult to move a kitchen without making structural alterations, the reality of it is that was done after the First Tier Tribunal's decision was made, in circumstances where consent was certainly not obtained in writing, and I am satisfied, having heard the evidence, without at least proper consent even orally from the freeholder. That, again, is a worrying indicator as to the trends in this relationship.

33 The removal of the landlords' fixtures without consent, there is nothing to indicate whether that is going to continue beyond that which I have already indicated. The most serious breaches that were found by the First Tier Tribunal is the nuisance to the occupants. In the words of the paragraphs of the Tribunal's decision which refer to this, they set out the terms of cl.2 of the lease and also the first schedule, para.1 and that says,

> "Not to use the flat nor permit for same to be used for any purpose whatsoever other than as a private dwelling house in the occupation of one family one, nor for any purpose from which a nuisance can arise to the owners, lessees or occupiers of other flats in the building or in the neighbourhood."

The Tribunal then go on to find the following:

> "1. The respondent has caused damage to the ground floor flat, he has damaged the ceiling in the main bedroom, he has caused cracks to the bedroom ceiling, he has caused dust to penetrate the ceiling above the kitchen and has settled on a false ceiling below. This has caused damage to the spotlights in the kitchen.
>
> 2. The respondent has left large quantities of building waste and rubber in the front garden. It has been left there for some months. The rubble has included a toilet.
>
> 3. The works have been executed without any regard to the impact on the ground floor flat. The respondent has failed to liaise with the applicant, the works have been noisy, they have been executed at unreasonably times namely at night, early in the morning and at weekends. On occasions, works have been executed at 4.00 a.m., the works have been executed over a period of eighteen months and have still not been completed. This is an unreasonable length of time, there has been excessive dust,

several builders have banged on the applicant's door demanding payment, because the respondents doorbell does not work."

34 Anyone who has ever lived in a flat knows that from time to time works have to be undertaken, people are entitled to do works to the insides of their flat, as long as they have the appropriate consents if they need them. That is going to cause a relatively short-lived unpleasantness to those who live in the adjoining flats. That is a necessary affect of living in flats.

35 The Tribunal light upon the issues that flow from that. First of all, it is a question of the length of time those works are undertaken for, it is a question of the time during the day or night at which those works are undertaken which affects the lives of those in the adjoining buildings and also about the way which items from building works are disposed of properly as are, again, referred to in the Tribunal's judgment.

36 Again, rather worryingly in circumstances of this case, despite the First Tier Tribunal's decision, very little appears to have been done to remedy the damage that has been caused to Dr. Malik's flat. Again, what one would expect to see in a case such of this is there being a clear and open offer from somebody in Mr. McCadden's position, for a joint structural surveyor to be instructed to inspect, with his agreement that he would pay for any damage which has been caused to be rectified. He would, no doubt, be making offers to say that he will ensure that any future work he does is done in a reasonable fashion.

37 None of those sorts of assurances have been done in this case and, indeed, contrary in many ways there reality of it is that the situation where the flat continues to be in a difficult or a state of disrepair has continued, and that is clearly causing a nuisance to Dr. Malik. In those circumstances, the failures have not been remedied.

38 In the circumstances therefore, I am quite satisfied that in the circumstances of this case it is appropriate –

DISTRICT JUDGE HOLMES: Mr. McCadden, I cannot keep you here, if you want to go, you are very welcome to, but I have almost finished the judgment so I would be grateful if you would just stay and bear with me for a few moments.

39 I am therefore satisfied that it is appropriate to deny the request for relief from forfeiture, save to the extent that I have indicated, which is that the order will be that Mr. McCadden will have six months in which he can sell the property, if he does sell the property within six months, then he will be granted relief from forfeiture to that extent. If he does not, then the forfeiture will take effect.

40 Six months seems to me as against the background of this case where it has been ongoing since certainly the mid-part of 2017, if not earlier, is a fair balance between the parties. Dr. Malik would, no doubt, like this all to come to an end today, but it seems to me that six months is a fair period for Mr. McCadden to be able to market the property, to ensure that as many people as possible can view it, that as much can be done to maximise the amount of money he can obtain for his interest in the property so that he can mitigate his loss.

41 I accept he is probably not going to get back the money that he paid for it and that pains me, because nobody wants somebody in Mr. McCadden's position to suffer any greater financial loss than they need to. But what I am prepared to do is to allow him, hopefully, to obtain

the vast majority of what he paid, so that he has a sizeable amount of money that he can take out of this property, can rehouse himself and can move on as he probably needs to, as much as anybody else does, to move on with his life as soon as possible, certainly within the next six months, to ensure that what I have read from his GP as to the effect this has had on his health is brought to an end as quickly as it can be.

———————

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

This transcript has been approved by the Judge