



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference : **LON/00BD/LBC/2014/0062**

Property : **Flat 1, 21 Rocks Lane, London SW13
0BD**

Applicant : **Concerto Properties Limited**

Representative : **Not represented**

First Respondent : **Ms Hayley Suzanne Stokes**

Representative : **Not represented**

Second Respondent : **The Governor & Company of the
Bank of Ireland**

Representative : **Jamal Demachkie of counsel**

Type of application : **S168 Commonhold and Leasehold
Reform Act 2002**

Tribunal member(s) : **Ruth Wayte
Ian Humphreys FRICS**

**Date and venue of
hearing** : **2 October 2014 at 10 Alfred Place,
London WC1E 7LR**

Date of decision : **6 October 2014**

DECISION

Decisions of the tribunal

- (1) The Second Respondent is in breach of the covenant contained in Clause 1 to Part II of the 5th Schedule to the lease of the property in respect of items 3, 10 and 23 on the schedule of dilapidations, as set out below.
- (2) The Second Respondent is not in breach of that or any other covenant in respect of the remainder of the items in the schedule of dilapidations annexed to this decision.
- (3) 75% of the Applicant's costs in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the service charge payable by the First or Second Respondent.

The application

1. The applicant sought a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 that the First Respondent was in breach of several covenants or conditions contained in the lease to the property, principally Clause 1 to Part II of the 5th Schedule by which the lessee covenants to: *"Keep the Demised Premises and additions thereto and the Landlords fixtures and fittings and sanitary and electrical apparatus installed in or affixed to the Demised Premises and the window glass thereof in good and substantial repair and condition."*
2. The Second Respondent was joined to the application by a Direction of the tribunal under Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules") dated 11 August 2014. In their statement of case dated 10 September 2014 they confirmed they were in possession of the Property as mortgagee.

The statutory framework

3. Section 168 of the Commonhold and Leasehold Reform Act 2002 states:-
 1. *A landlord under a long lease of a dwelling may not serve a notice under s146(1) of the Law of Property Act 1925 (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless sub-section (2) is satisfied.*
 2. *This sub-section is satisfied if –*

(a) it has been finally determined on an application under sub-section (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 sub-section (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 a Leasehold Valuation Tribunal for a determination that a breach of covenant or condition in the lease has occurred.

5. But a landlord may not make an application under sub-section(4) in respect of a matter which-

(a) has been, or is to be, referred to arbitration pursuant to a post-dispute 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.

The Lease

4. The lease to the Property was granted on 30 July 1974 between OPK Developments Ltd and Simon Everton and Valerie Travers. The lease is for a term of 99 years from 25 March 1974.
5. By clause 3 of the lease the lessee covenants with the lessor to observe and perform the obligations set out in the Fifth Schedule, Parts I and II and the Ninth Schedule. The relevant provisions are set out in this decision, where appropriate.

Determination of the application

6. At the hearing of the application on 2 October 2014 the Second Respondent was represented by Mr J Demachkie, a barrister instructed by TLT Solicitors. Neither the Applicant nor the First Respondent attended the hearing or was represented. The First Respondent had

taken no part in the proceedings. The Applicant had previously applied for an adjournment of the hearing, which was refused by the tribunal on 25 September 2014. On making further enquiries on the morning of the hearing, the Applicant confirmed they would not be attending. The tribunal, having considered Rule 34 of the Tribunal Rules determined that it was satisfied that the Applicant had been notified of the hearing and considered it was in the interests of justice to proceed in the Applicant's absence.

7. The tribunal had the benefit of a bundle prepared by the Second Respondent in accordance with the directions and a skeleton argument which was faxed to the tribunal on 1 October 2014. The Second Respondent also relied on the evidence of their expert Mr Neil Maloney, who attended the hearing. Mr Maloney had previously been a member of the London Panel of the tribunal and in accordance with its practice in respect of potential conflicts of interest, the Chair and surveyor member can confirm that they have never sat with Mr Maloney nor in fact do they know him personally, the Chair having been relatively recently appointed to the London Panel and the surveyor member being from the Midlands Panel.
8. The application relied on a schedule of dilapidations, listing 41 items of alleged disrepair in breach of the lessee's covenants. Despite the directions setting out a requirement for witness statements, none had been provided on behalf of the Applicant which had not provided any evidence in support of its case and, importantly, no evidence by the person responsible for preparing the schedule of dilapidations or other expert evidence. By way of contrast, the Second Respondent had provided a witness statement by Mr Maloney dated 11 September 2014, who also attended the hearing.

Admitted breaches

9. The Second Respondent admitted breaches of the lessee's covenant set out in paragraph 1 above in respect of items 3, 10 and 23 in the schedule of dilapidations, to the extent admitted in the tenant's comments sections. In particular, that some of the windows are in disrepair, there is some minor damage to the doors and the w.c. seat and cover are missing in the bathroom. The tribunal therefore determines that the Second Respondent, as mortgagee in possession, is in breach of the covenant to keep the Demised Premises in repair to that extent.

Disputed breaches

10. The remainder of the items in the schedule of dilapidations were disputed by the Second Respondent. When the application for an adjournment was refused, the Procedural Judge made it clear that the Applicant needed to prove its case, in particular that the alleged facts

constitute a breach of covenants in the lease. In the absence of evidence in that regard and in the light of the objections made by the Second Respondent, supported by the evidence of their expert Mr Maloney, the tribunal determines that the Applicant has failed to satisfy its burden of proof in respect of the disputed items and therefore there is no breach of covenant in relation to the other items.

Costs

11. At the end of the hearing counsel for the Second Respondent made two applications in relation to costs: one under Rule 13 of the Tribunal Rules and the other pursuant to Section 20C of the Landlord and Tenant Act 1985.
12. The tribunal may only make an order in respect of costs under Rule 13 of the Tribunal Rules if a person has acted unreasonably in bringing, defending or conducting proceedings. Given that the Second Respondent has admitted a breach of the lessee's covenants, albeit in a limited way, the tribunal does not consider that the applicant has acted unreasonably so as to incur a costs liability under this provision and therefore does not make such an order.
13. Section 20C of the 1985 Act provides that a tenant may make an application for an order that all or any of the costs incurred in connection with proceedings before this tribunal are not to be passed through the service charge. The tribunal may make such order as it considers just and equitable in the circumstances. Taking into account the failure of the applicant to prove the majority of the allegations in its schedule, the tribunal considers that the Applicant should be limited to recovering 25% of its costs in relation to the application by way of the service charge payable in respect of the property.

Name: Ruth Wayte

Date: 6 October 2014