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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOAF/LBC/2015/0068**
Property	:	**Flat 5 The Old House 36 Southend Road Beckenham Kent BR3 5AA**
Applicant	:	**Jayford Flat Management Company Limited**
Representatives	:	**Patrick Cusack of Patrick Cusack & Co; Solicitors**
Respondents	:	**Anthony Herbert**
Representative	:	**Tiffany Scott - (Barrister)**
Type of Application	:	**Application for an order that a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002**
Tribunal Members	:	**Prof. Robert M Abbey (Solicitor)** **Ms Sue Coughlin (Professional Member)**
Date and venue of Hearing	:	**12th October 2015 at 10 Alfred Place, London WC1E 7LR (reconvened on 12th November 2015 for decision making)**
Date of Decision	:	**18 November 2015**

DECISION

Decisions of the Tribunal

(1) The Tribunal grants the application for an order that a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002.

(2) The reasons for our decisions are set out below.

The background to the application

1. The Applicant seeks an order that a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002. The application concerns alleged breaches ("the alleged breaches") carried out to Flat 5, The Old House 36 Southend Road Beckenham Kent BR3 5AA ("the property.") and are in the nature of unauthorised works/alterations and additions to the property.

2. S. 168 of the Commonhold and Leasehold Reform Act 2002 provides as follows with sub-section (4) shown in bold:

> *(1)A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.*
>
> *(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 a leasehold valuation 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 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.

3. The Old House consists of a 3 storey detached house converted into 5 flats. Flats 1 and2 are on the ground floor, 3 and 4 on the first floor and flat 5 is on the second floor. There is a common stairwell serving flat 5. All the flats are all let on long leases. The Respondent is the tenant of flat 5 being the second floor premises held under a registered lease for a term of 999 years from 1 January 1995 ("the lease").

4. The Applicant asserts the alleged breaches of the lease namely of several clauses being clauses 2(b)(iii), and clauses (7), (16),(17), (18), (19) and (20) of the fourth schedule of the lease. The Respondent does not accept that there have been any continuing breaches of the lease terms, (although one breach was admitted and is referred to subsequently in relation to the removal of an internal load bearing wall).

5. The Tribunal needs to establish from the evidence presented to it whether or not, on the balance of probabilities, the Respondent has acted in such a way that he is in breach of a covenant or covenants listed above. The Tribunal needs to be satisfied that the Applicant is not estopped from relying on the covenants in the lease as a consequence of the conduct of the landlord subsequent to the discovery of the alleged breaches.

The hearing

6. The Tribunal had before it a bundle of documents prepared by the Applicant in the form of a lever arch file containing copies of documentation and authorities regarding legal submissions. A bundle was also submitted by the Respondent also containing copies of documentation and authorities regarding legal submissions.

7. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

8. First to give evidence was Frank Anatole for the Applicant. He is the lessee of flat 3, the flat situated below the property. He was followed by Julia Wedegaertner, also of flat 3. At this point and with the agreement of all parties the evidence of Diane Wall for the Respondent was interposed to take account of the time constraints for this particular witness. She was the previous tenant in occupation of the property. Thereafter the tribunal heard the evidence of Robert Gower, the

managing agent for the applicant, Tim Hughes, the tenant of flat 2, Roxana Graves, also of flat 2 and Barbara Dilworth, the tenant of flat 1, all on behalf of the Applicant. Thereafter, they were followed by the respondent who was the final person to give evidence before the tribunal.

9. With the pressure of time at the hearing and late into the afternoon of the hearing date the parties were content to agree to final submissions being made to the tribunal in writing. Both parties did so and when reference in this decision is made to final or closing submissions it is to these written documents that the tribunal refers.

The issues

10. A preliminary issue was identified quite early on in the hearing when it became clear that the tribunal would need to consider the extent of the property as described as the demised premises in the lease. The lease does contain a list of definitions but sadly they are not as clear as they might be given the nature of the property. "The Development" is defined as being all the land including the demised premises shown edged green on the lease plan. This would appear to include the building and grounds at this address. "The building" is defined as the building of which the demised premises form part. "The demised premises" is defined as the premises described in the first schedule of the lease. The first schedule defines the property as

> *"ALL THAT flat known as flat 5 The Old House 36 Southend Road Beckenham in the London Borough of Bromley comprising all of the second floor of the building including :-*
>
> *(a) All internal non-structural walls and one-half severed medially of any such wall which separates the flat from any adjoining premises*
>
> *(b) The entrance door and frame, the windows their frames and surrounds, the ceiling, the floor and the interior surface of all external walls*
>
> *(c) All Service Installations serving the Demised Premises alone but excluding all other Service Installations within the Demised Premises"*

"Service Installations are defined as ""Sewers drains pipes wires cables channels and other service conducting media now or within the Perpetuity Period to be construed on or under the Development or elsewhere serving the Development or any part thereof." Finally it is important to note the definition of "the common parts" where the lease states that these comprise:-

"All parts of the building (including without prejudice to the generality of the foregoing the roofs foundations thereof not forming part of the Demised Premises or any other dwelling in the building) and all paths drives roads gardens garages parking spaces....and Service Installations within the Development insofar as they do not form part of the Demised Premises or any other dwelling...."

11. One area affected by the dispute is a roof terrace adjacent to the rooms that form the property. The applicant says this is a common part while the respondent maintains it forms part of the demised premises. As may be seen from the above extracts the definition of the property is not helpful. There is no mention of the roof terrace and indeed all that it states is that the property comprises all of the second floor of the Building. The applicant maintains that the area in question is a roof structure and not a terrace and latterly has been maintained by and at the cost of the lessor. As such it cannot be part of the property as it is in effect an integral element of the common parts.

12. On the other hand the respondent is of the view that the roof terrace is a part of his property. He does so because of the description in the lease as the property comprising all of the second floor of the building and the fact that the title plan at the land registry shows the extent of the registered title as including the roof terrace. Furthermore the evidence of Mrs Wall tended to show that she regarded the roof terrace as part of her premises and that she used the roof terrace as part of the flat both before and after the lease was granted in 1996. (It should be noted that at the time the lease was granted she was a director of the lessor company and her husband was the company secretary).

13. Although confusing in part the tribunal did accept her evidence to the effect that Mrs Wall had indeed used the roof terrace as described. Counsel for the respondent also made the point that the lease contemplates that a particular roof might belong to a lessee, only roofs not forming part of a demised premises fall into the common parts, (see above definitions). Furthermore, in the lease it is the responsibility of the lessor to maintain the "roof", singular, not all "roofs" as might be expected otherwise.

14. In the light of the above the tribunal agrees with the respondent that the roof terrace does form part of the property and as such comes within the definition of demised premises in the lease. The tribunal found the evidence of Mrs Wall to support this contention and that the lease terms as outlined by counsel for the respondent taken together support this view.

15. The tribunal was also invited to consider if the loft space in the building and adjacent to the flat formed part of the demised premises. It seems from the evidence of the respondent that access is obtained to this

space via a hatch in his en-suite bathroom at the end of his internal hallway. Within this loft space can be found water tanks for flats 2, 4 and 5. There is no mention in the lease of a definition of the loft space and there is no mention of the loft space in any other definition. Accordingly, and bearing in mind the existence of the three separate water tanks in this space, two of which serve other flats in the block, the tribunal is of the view that the roof space is not part of the property and is therefore a common part covered by the lease definition of non-demised premises.

16. The respondent has removed an internal load bearing structural wall within the property. For the avoidance of doubt the tribunal is of the view that this wall is not part of the demised premises because the lease definition excludes structural walls such as this one. The lease states that the flat includes all internal non-structural walls and as such the removed load bearing wall must be of a structural nature and therefore outwith the demised premises.

17. Finally, part of the dispute between the parties affects the coping stones on the outside structural walls that are on the perimeter of the roof terrace. Again for the avoidance of doubt the tribunal is of the view that the coping stones are part of the structure of the building as they form part of the outside wall and being there to provide protection that wall must be an integral part of the main outside wall of the building that is not part of any demised premises.

18. Having considered the preliminary issue regarding the extent of the property, the core issue for the Tribunal to decide is whether or not a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002. Having heard evidence and submissions from the Applicant and from the Respondent and having considered all of the documents provided, the Tribunal determines the issue as follows.

19. The Tribunal partially preferred the evidence of the applicant which appeared to show to the tribunal that there had been breaches of covenant and details of these are set out below. The Tribunal was not satisfied that there had been breaches of other covenants as also set out below. Clause numbers mentioned below are all clauses from the lease of the property.

20. Clause 2(b)(iii) of the lease of the property requires the tenant

> *"Not to do or cause or permit to be done anything calculated or likely to cause damage or injury or prevent access to any Service Installations and to take all reasonable precautions to prevent such damage or injury".*

In the applicant's closing submissions the argument was put forward that the removal of the internal load bearing wall was a breach of this clause. The tribunal takes the view that on the proper construction and interpretation of this clause, it only refers to the damage or injury to the Service Installations. The tribunal neither saw nor heard any convincing evidence to support this form of breach. The tribunal rejects the argument that this clause applies to the removal of the load bearing wall. Tthis clause only relates to damage or injury to Service Installations and not damage or injury e.g. by removing an internal wall of the property, which could possibly be an alteration governed by the consent provisions elsewhere in the fourth schedule. In these circumstances the tribunal does not find the respondent in breach of this clause of the lease.

21. Clause 7 of the fourth schedule in the lease is an extended and broadly drafted provision which in essence requires the tenant to co-operate at all times with the landlord in all measures necessary for the repair and maintenance of the building and to permit the landlord upon giving written notice to enter the property for inspection and repairing purposes. The applicant says the respondent has indeed failed to cooperate with the lessor as required by the provisions of this lease clause. In particular the applicant says the respondent has not allowed an inspection by an expert engineer which was requested since the issue of the application to the tribunal.

22. On the other hand, the respondent asserts that access to the property was requested by the applicant and it was granted by the respondent on 20th May 2015. Access was then sought again at the AGM of the lessor company in July 2015 – but the respondent says that was not a request that was made in writing as required under paragraph 7. These proceedings were issued 7 days after the AGM, on 22nd July 2015. The respondent then asserts that he asked to know what the inspection was for at that stage. As tribunal proceedings were on foot at that point in which he was accused of breaches of covenant in removing the internal wall etc., then the respondent says it was appropriate to ask whether access was sought to gather evidence for the purposes of the tribunal application. In the light of the evidence before it the tribunal was of the view that there had not been a breach of this covenant. It seemed to the tribunal that the respondent had tried to co-operate and to afford access.

23. Clause 16 of the fourth schedule requires the tenant:-

> *"Not without the written consent of the landlord to erect any structure upon the Demised Premises nor make or suffer to be made any alteration or addition to the Demised Premises".*

Several issues arose in regard to potential breaches of this provision and in particular, the removal of the load bearing wall, the

repositioning of the water tanks, the boarding up and or conversion of the loft space and the drilling of the coping stones on the boundary of the roof terrace being the top of the external walls of the building and the installation of the balustrade and decking. Each issue will now be considered in turn, starting with the removal of the load bearing wall. In each case the tribunal will first consider if there is a breach of this lease clause and thereafter will consider, in turn, if subsequent behaviour or conduct of the parties has in some way amounted to consent for that work.

24. Dealing first with the matter of the load bearing wall, the respondent stated in final submissions that he "accepts that he made first alterations to internal wall without seeking consent and that this was a breach of paragraph 16". The tribunals accept this as an admission that the removal of the internal load bearing wall was indeed a breach of clause 16 of the fourth schedule of the lease.

25. Secondly the next issue relates to the repositioning of the water tanks in the loft space. The respondent, at the hearing had confirmed that he had relocated the water tanks in the loft space in relation to the three tanks serving his and two other flats in the building. The applicant says that this work was carried out without the written consent of the landlord and amounted to an alteration or addition to the Demised Premises. It is the last part of this that seems to the tribunal as a stumbling block to this assertion, namely that the work had to be in the demised premises. The tribunal has expressed the view that the loft space is not within the property and as such is outside the demised premises. This being so, there cannot be a breach of this lease covenant and the tribunal so finds there is no breach.

26. Thirdly there is the question of the works to the loft space whereby the respondent boarded out and converted this space to a storage area when the tanks had been repositioned. As has already been noted, the tribunal has expressed the view that the loft space is not within the demised premises and as such is outside the property. This being so, there cannot be a breach of this lease covenant and the tribunal so finds there is no breach.

27. Fourthly, and for the same reasoning as set out above, the tribunal finds that there is no breach of this clause in relation to the drilling of the coping stones on the boundary of the roof terrace being the top of the external walls of the building and the installation of the balustrade. These works took place outside the extent of the property as more particularly defined in the earlier part of this decision.

28. However, in regard to the decking that was placed on the roof terrace, the situation is different. The decking had been installed on the roof terrace now considered to be part of the property/demised premises as a consequence of the findings made by the tribunal as set out above.

The respondent's view as set out in closing submissions is that no consent was required for these works which were minor and do not affect the structure or fabric of the property. The respondent goes on to note that "the decking is simply laid on top of the roof terrace and planning permission has been granted for that". The tribunal do not consider the works to be minor. The evidence is that this is a substantial structure and extends across a wide area. It is a significant construction recently erected on the demised premises. This being so, the tribunal considers that this work has been completed without the written consent of the landlord and amounts to an alteration or addition to the Demised Premises and as such is a breach of clause 16.

29. There are therefore two apparent breaches of clause 16 of the lease, relating to the removal of the load bearing wall and the roof terrace decking. The Tribunal need to be satisfied that the applicant is not estopped from relying on the covenants in the lease as a consequence of the conduct of the landlord subsequent to the discovery of the breach or breaches. In the case of *Hughes v Metropolitan Railway* (1877) 2 App Cas. 439 it was made clear that if one party leads the other to suppose that the strict rights arising under the contract, (here the lease), will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which had taken place between the parties. Conduct of the parties will thereby give rise to estoppel.

30. The respondent asserts in closing submissions that "there is no representation that comes close to justifying the notion that the applicant has acquiesced in, given consent for (or waived the requirement for consent for) or is estopped from objecting to the works proposed by the respondent". The applicant says that there being no express written consent the respondent should not have gone ahead with the works. The respondent says "the documents indicate that consent was discussed at the AGM in June 2014 when inspection of the flat took place. It is not disputed that the Respondent was not asked or required by the Applicant to cease works immediately upon that inspection taking place, or at any time thereafter; nor was it suggested at any point that he should reinstate the section of wall that had been removed."

31. The tribunal noted that in the written evidence before it there were copies of an email exchange of correspondence between the managing agent (Bob Gower) and the respondent. This followed the AGM that took place on 25 June 2014. In the minutes of that AGM it was clear that much discussion took place regarding the "....new works on flat 5 and the question of shareholder consent....". Ultimately in the minutes it was noted ".... As so much was yet to be decided, the AGM should be adjourned and reconvened when decisions had been reached on the consent issues". The subsequent emails made it clear that in relation to the removal of the load bearing wall that any consent from the

company was conditional upon consents being obtained from the local authority. (In fact eventually retrospective consent was obtained by the respondent but not until much later and after the breach had first arisen).

32. It is the tribunal's view of the evidence that the lessors consent was conditional upon obtaining all necessary consents from the local authority. For example the email from Mr Gower dated 27 June 2014 stated that "It is therefore urgent that approval is achieved before any further work is carried out.....Until this matter is resolved there is nothing further to be done." Similarly in the AGM minutes of 25 June 2014 it was stated that "there was further discussion on the need for consent on the works carried out. RG", (Mr Gower), "affirmed that the removal of part of the load bearing wall was subject to Building Regulations and was likely to need inspection by the Bromley Planning Department". Accordingly, the tribunal takes the view that there has not been any estoppel or other approval of the work and as such there remains a breach of covenant by the removal of the internal load bearing wall.

33. With regard to the roof terrace decking, the respondent says that "the Applicant was made aware of the intention to install decking at the June AGM and photos were provided. No objection was raised and consent was deemed to be given." It seemed to the tribunal that this was not borne out by the evidence before it. The evidence was unclear whether the decking was in fact discussed at the AGM. It is possible that the topic was raised in discussion after the AGM but the minutes are silent with regard to decking. In the light of the evidence and the terms of the covenant requiring written consent it seems to the tribunal that the position was not changed by the conduct of the parties and that consequently there is a breach of covenant in regarding to the decking on the roof terrace.

34. Clause 17 of the fourth schedule stipulates that the tenant is -

> "*not to commit or permit or suffer any waste spoil or destruction in or upon the demised Premises or any Service Installations (or any of the) therein*".

This covenant relates to the ancient doctrine of waste. The law over centuries has taken the view that a "tenant for life" has such a limited an interest in land that special restrictions should be imposed upon his or her right to use the land. These rules are known as the doctrine of waste. Waste is of two significant kinds, first, voluntary waste. This is any positive act which alters the land to its detriment. Secondly, permissive waste is allowing the land to deteriorate for want of attention, e.g. by failure to maintain property in repair.

35. In this dispute waste has been construed to cover, by way of voluntary waste, the removal of the load bearing wall and the drilling to the coping stones. To in some way allow waste to arise, the party involved must change the nature of the land. The respondent says that the removal of the wall does not change the nature of the land. The tribunal prefers the respondents view in this regard and applies it to the drilling of the coping stones as well and therefore does not find any breach has occurred in relation to clause 17.

36. Clause 18 of the fourth schedule requires the lessee/respondent not to store on the demised premises anything dangerous and

> *"....not to do or suffer or permit or suffer to be done anything by reason whereby any insurance effected on the demised premises or any part of the development may be rendered void or voidable or whereby the premiums thereon may be increased...."*

The applicant says that works carried out by the respondent are in breach of this clause. In final submissions it was said by the applicant that "There is evidence that the effect of the works is that it is likely to affect adversely the landlord's position with insurers." However it also goes on to say, "The applicant concedes that there is no evidence from insurers." The argument is based upon the likely position. In the light of this concession the tribunal agrees with the respondent when he says there is no evidence of a breach of this covenant and the tribunal so finds.

37. Clause 19 of the fourth schedule requires the tenant/respondent

> *"Not to use or permit or suffer to be used the Demised Premises for any purpose from which a nuisance can arise to the residents of Other Dwellings comprised with the Development nor any other purpose than as a private residence in single family occupation and not to hold any auction on the Demised Premises"*

In relation to this covenant the applicant limits its allegations of breach to the period of the works and relies on the evidence of residents. The applicant says the works generated noise. While the tribunal did hear evidence in that regard it did not consider that this was sufficient to amount to a breach of this covenant and as such there is no breach of clause 19.

38. Clause 20 of the fourth schedule is a short but critical covenant so far as this dispute is concerned. It states that the tenant/respondent is

"not to interfere with or alter the exterior decorations or painting or appearance of the Demised Premises"

39. The applicant says that the drilling of the coping stones and the installation of the iron balustrade are clear interferences with and or alterations to the exterior appearance of the property. The respondent says in closing submissions that "Appearance" must be construed in the same vein as "decorations" and "painting" – this covenant relates to the cosmetic appearance of the exterior of the walls of the demised premises. It is not intended to include the erection of something on or within the Demised Premises. If the roof terrace falls within the demised premises, then the erection of the balustrade on the roof terrace for its better enjoyment (which includes ensuring that it is safe to use) cannot be an alteration to the exterior of the demised premises...."

40. The tribunal is of the view that the appearance has been altered by the erection of the balustrade. (Indeed, it noted that the local authority at the time of the hearing had refused planning consent for the balustrade). On the other hand with regard to the decking the tribunal is not convinced that this amounts to an alteration of the appearance. It takes this view due to its lack of visibility bearing in mind the location of the decking.

41. In the light of the above the tribunal finds that there has been a breach of covenant 20 of the fourth schedule of the lease by the installation of the iron balustrade.

Name: Judge Prof. Robert M. Abbey **Date:** 18.November.2015