FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOAY/LBC/2017/0014**
Property	:	**Upper Flat, 181A Ferndale Road, London SW9 8BA**
Applicant	:	**Raj Properties Limited**
Representative	:	**Mr A Arora - In-house Solicitor for the Applicant**
Respondent	:	**Miss A K E Queiro**
Representative	:	**Mr Fain of Counsel, instructed by Radcliffes Le Brasseur Solicitors**
Type of Application	:	**Application for and Order that a breach of covenant or condition of the lease has occurred by virtue of Section 168(4) of the Commonhold Leasehold Reform Act 2002)**
Tribunal Members	:	**Tribunal Judge Dutton** **Mrs E Flint DMS FRICS IRRV**
Date and venue of Hearing	:	**10 Alfred Place, London WC1E 7LR on 29th March 2017**
Date of Decision	:	**12th April 2017**

DECISION

DECISION

The Tribunal determines pursuant to Section 168 (4) of the Commonhold Leasehold Reform Act 2002 (the Act) that there has been a breach of covenant or condition of the lease.

BACKGROUND

1. By an application dated 24th January 2017, the Applicant, Raj Properties Limited, sought a determination from the Tribunal that the Respondent Alicia Katherine Everett Queiro had breached the covenant in her lease as contained at Clause 2(11). The application also suggested that there had been potentially breaches of other elements of the lease but this was not pursued at the hearing. The allegation is that without previous consent in writing of the landlord, alterations had been made to the first floor to create an open space involving the removal of walls, the re-positioning of the kitchen and the addition of a WC. It is said that the breach is apparent when comparing the lease plan to the current floor plan obtained by the Applicants in connection with a valuation under the Leasehold Reform, Housing and Urban Development Act 1993.

2. Directions in this matter were issued on 1st February 2017 and have by and large been complied with.

3. The lease in this case is dated 9th March 2005 for a term of 99 years from 25th December 2000. The Property is demised as the upper flat by reference to plans annexed to the lease and is known as The Upper Flat, 181A Ferndale Road, Brixton, London SW9 8BA (the Flat). The lease term which is said to have been breached is to be found at Clause 2(11) which says as follows:

   "Not to erect or permit or suffer to be erected on any other building upon the demised premises nor to make or to admit or suffer to be made any alterations in or external projection on the front of or additions to the demised premises or cut, maim or injure or permit or suffer to be cut, maim or injured any of the walls or timbers thereof nor construct any gateway or opening in any of the fences bounding the said premises nor stop, obstruct, or divert any of the wires, pipes, channels, drains, sewers or other media as aforesaid upon or over the demises premises without the previous consent in writing of the lessors which shall not be unreasonably withheld."

4. Prior to the hearing we were provided with a small bundle of documents which contained the application, copies of Land Registry entries, the counter notice served under the 1993 Act, current floor plans, correspondence and the parties' statements of case with accompanying documentation.

5. It seems that following a notice served under Section 42 of the 1993 Act, the Respondents inspected the Flat prior to serving a counter notice under Section 45 of that Act. In the course of so doing, the Valuer discovered that the first floor of the subject property, which according to the lease plan contained dividing walls by the stairs and the kitchen had been altered to create an open plan room with the kitchen sited at the opposite end and without internal walls.

6. In the Respondent's statement of case, she confirms that she has been the registered proprietor since November 2013 having bought the flat at the end of October 2013. The Respondent says that she purchased the flat as it now is and that she has not herself carried out any alterations. The usual enquiries were made before the purchase and the question asked whether any alterations had been made since the lease was granted, to which the answer 'no' was given. It is said, therefore, the Respondent had no knowledge that her predecessors had carried out any alterations. The statement then goes on to record the circumstances surrounding the issue of the notice and counter notice and the various correspondence that has passed between the Applicant and the Respondent. It has to be said that most of the correspondence emanating from the Applicant indicates that an admission is required as to the alterations and that an application to the First-tier Tribunal will be made for an order under Section 168(4) of the Act leading to the preparation and service of a notice under Section 146 of the Law of Property Act 1925.

7. Solicitors for the Respondent have written to the Applicant solicitors and by a letter of 7th December 2016 the Applicants indicated that they required an unqualified admission and would propose, in addition to costs and compensation that the breaches were remedied by reinstating the Flat to the original lease plan. If that was not agreed, then the threats with respect to the application to us and the notice under the 1925 Act are repeated. This threat is repeated in a number of subsequent items of correspondence. The Applicant's attention was drawn to paragraph 6 of schedule 12 of the 1993 Act which we will set out in due course.

8. In any event, the Respondent's statement indicates that the terms of acquisition for the new lease were agreed on 13th January 2017 but such new lease has not been entered into. It is said on behalf of the Respondent that paragraph 6 of schedule 12 of the 1993 Act is effective, preventing the Applicant from pursuing the matter and that in reality this application is an abuse of process and should be struck out for the reasons set out at paragraph 15 of the Respondent's statement of case dated 23rd February 2017. The statement goes on the indicate that in the alternative we should stay the application pending the outcome of the new lease and that the Applicant was unreasonable in bringing the application and that costs pursuant to Rule 13(1)(b) of the Tribunal Procedure (First Tier Tribunal) (Property Chamber) Rules 2013 apply.

9. This statement of case had a number of exhibits attached. The Applicant responded on 10th March 2017. This denied that the application under the 2002 Act was unreasonable or an abuse of process or that the limitation in the 1993 Act applied. The Applicant also relied on a letter from the solicitors acting on behalf of the Respondent in the lease extension proceedings and by email on 14th December that firm, Wilsons, says as follows: *"We confirm the Act does not prevent your client from making an application to the First Tier Tribunal. If you obtain a determination then no court proceedings can be commenced until the new lease has been granted."* The statement from the Applicant goes on to confirm that the terms of acquisition have been concluded and indeed there is a copy letter to the Tribunal dated 8th February by Wilsons Solicitors LLP on behalf of the Respondent confirming that the parties have agreed the premium, terms and statutory costs.

10. The statement from the Applicant went on to say that the application under Section 168 of the Act was not within the 'court proceedings' envisaged under the 1993 Act. Further it is said that the Respondent has declined to complete a new lease, although invited to do so, although such new lease was expressly to be on the terms that rights and obligations relating to the alleged breach would not be prejudiced. This statement also goes on to say that whether the alterations were carried out by her or her predecessors the Respondent holds the Flat under a long lease with the lease plan as it is and accordingly is bound by any changes that were made without permission. Accordingly, the statement concludes, this is not an abuse of process and that the determination that there has been a breach should be made. There is also an indication that there may be a claim under Rule 13 as was suggested by the Respondent.

11. At the hearing, Mr Arora was asked the purpose of the application, given the requirement of the Landlord to not unreasonably withhold consent. He told us that the Applicant had not known the alterations had been undertaken until the Flat was inspected for the purposes of the lease extension application. Although the application referred to potential of other breaches, it was accepted by Mr Arora that it is only a breach under paragraph 2(11) that applies. He referred us to the leasehold questionnaire in which a negative answer is given to any alterations question when it was clear that the lease plan does not correspond to the current layout. He had no evidence to say who had carried out the alterations. A copy of a Local Authority search was exhibited which showed no applications for building control in respect of the current layout. He also felt that it was not a foregone conclusion that leave would not be given under the provisions of the 1993 Act.

12. For the Respondent, Mr Fain confirmed that in his view this was an abuse of process. Once the new lease was granted this could not be forfeited. The Respondent did not know about the alterations and bought the property as it was. She only became aware there was an issue when the counter notice was served. Accordingly, it could not be said that the notice under the 1993 Act had been served for the purposes of avoiding these problems.

13. Mr Fain further asserted that the alteration was a once and for all breach and he questioned why, if the Applicant was aware that there had been this breach since May of 2016, no injunction had been sought. It was wrong he said for the Applicant to be allowed to forfeit the lease while negotiating the terms of an extension to same under the 1993 Act. This application he said served no purpose and should be struck out as an abuse of process. Asked whether or not in fact the application under the 2002 Act was court proceedings, he conceded that it may not be but that the grounds for not making a finding under Section 168 was that it could not be taken any further and that this was "wasting everyone's time." He pointed out that all correspondence from the Applicant threatened notices under Section 146 and costs and submitted that the whole exercise was about whether the lease could be forfeited. This he said, however, could not be achieved because the new lease was to be granted.

14. Mr Arora was asked why the Applicant was proceeding along these lines bearing in mind that there was a structural survey on behalf of the Respondent indicating that the changes had no structural impact and of course the lease required the landlord not to unreasonably withhold consent. He told us that the Applicant had

tried to deal with matters of this nature before but they had not been successful and in those circumstances considered that this was the appropriate way forward.

THE LAW

15. The law at Section 168 is succinct. It provides that a landlord may not serve a notice under Section 146(1) of the Law of Property Act 1925 in respect of a breach unless the circumstances set out in sub-section 2 of Section 168 are satisfied. That is either that there has been a determination of an application under sub-section 4 or the tenant has admitted the breach. Sub-section 4 enables a landlord under a long lease of a dwelling to make an application to a Leasehold Valuation Tribunal for a determination as a breach of covenant or condition of the lease has occurred. Our role is merely to determine whether or not there has been a breach. Any relief from forfeiture is a matter presently seised of the County Court.

16. The 1993 Act contains a restriction at paragraph 6 of Schedule 12 which says as follows: *"6. Where by a notice under Section 42 a tenant makes a claim to acquire a new lease of a flat, then during the currency of the claim (a) no proceedings to enforce any right of re-entry of forfeiture terminating the lease of a flat shall be brought in any court without the leave of that court, and (b) leave shall only be granted if the court is satisfied that the notice was given solely or mainly for the purpose of avoiding the consequences of the breach of the terms of the tenant's lease in respect of which proceedings are proposed to be brought; but where leave is granted the notice shall cease to have effect."*

FINDINGS

17. This is an unfortunate case. Our consideration of the evidence as to the circumstances surrounding the alteration, scant though it is, leads us to accept that it was not the Respondent who made any alterations to the subject property. That alterations have been made appears to be clear from the lease plan and the plan now prepared in preparation for the lease extension claim. It is quite clear that on the first floor the living accommodation has been substantially altered. Not only have walls been removed but the kitchen has been re-sited to the opposite end. No evidence was adduced to us to show that the landlord had ever been approached or that its consent had been obtained.

18. The breach is continuing. We must, however, say that we find the Applicant's position adopted in this case to be somewhat unreasonable. The lease clearly indicates that consent must not be unreasonably withheld and having received the structural survey, a copy of which was within the papers prepared by WJC Engineers and Surveyors and dated 16th August 2016, it should perhaps have prompted the Applicant to be more approachable in the terms of resolving this issue rather than continuing to threaten forfeiture proceedings. It is correct, it seems to us, that some building regulation consent should be obtained for the works. We did urge the parties to try and resolve this matter but the Applicant's stance appeared to be that an admission was required, possibly some form of monetary compensation and reinstatement of the flat to its previous format. It will be for others to decide whether this is reasonable but we again urge the parties to try and resolve this matter.

19. It is with reluctance, therefore, that we find that there has been a breach of the lease and make such a determination.

20. Quite whether this provides any assistance to the Applicant is a moot point. We have considered the provisions of paragraph 6 of the 12th schedule. It does not seem to us that our determination under the 2002 Act equates to court proceedings. It does seem, however, for the moment in any event, if an application for forfeiture is made by the Applicant, there is no ability to do so without leave of the court. We are satisfied, if it is reasonable as to make such a finding, that the notice was not given solely or mainly for the purpose of avoiding the consequences of the breach. It seems clear to us on the evidence before us that the Respondent was not aware that there had been a breach and this only came to light after she had issued her initial notice under Section 42 of the 1993 Act. Where this leaves the Applicant, therefore, is a matter for it. Both parties have indicated they may be considering applications for costs under Rule 13. We do not propose to deal with that matter at the moment. Following the issue of this decision it will be for either party to consider whether such an application should be made and they are then free to do so as long as they comply with the time limits contained in the Rules.

Judge: Andrew Dutton

A A Dutton

Date: 12th April 2017

ANNEX – RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-Tier at the Regional Office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional Office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28-day time limit, such application must include a request to an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.