FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/26UE/LBC/2022/0007**
Property	**:**	**1st Floor Chasegate House, Southgate Road, Potters Bar, Herts EN6 5DR**
Applicant	**:**	**Richard Male and Richard Agarwala**
Representative	**:**	**Mr Jonathan Upton of Counsel**
Respondent	**:**	**Chasegate Limited**
Representative	**:**	**Mr Maurice Rifat of Counsel together with Mr Adrian Jeremiah of instructing solicitors Setford and Mr Sean Savage and Mr Anthony Cristofou, Directors of the Respondent Company**
Type of Application	**:**	**Application to determine a breach of covenant/condition of a lease pursuant to s168(4) of the Commonhold and Leasehold Reform Act 2002**
Tribunal Members	**:**	**Judge Dutton** **Miss M Krisko BSc (Est Man) FRICS**
Date and venue of Hearing	**:**	**Mercure Hatfield Oak Hotel, Hatfield on 18th October 2022**
Date of Decision	**:**	**8 November 2022**

DECISION

DECISION

Under provision of Section 1684 of the Commonhold & Leasehold Reform Act 2002 (the Act) the Tribunal determines that there has been a breach of covenant or condition of the lease for the reasons set out below.

INTRODUCTION

1. On 5th July 2022 the Applicants, Mr Richard Male and Mr Richard Agarwala through their representative Mr B R Maunder-Taylor FRICS MAE made an application to the Tribunal that there had been a breach of the covenant or conditions in a lease dated 23rd August 2013 (the Lease) made between the Applicants of the one part and a Mr Chris Savva of the other part. Accompanying the application was a statement of case on behalf of the Applicants which listed a number of breaches of schedule 3 to the Lease which dealt with lessee's proposed building works at the property at the First Floor of Chasegate House, Southgate Road, Potters Bar, Herts EN6 5DR (the Property). We will return to the various allegations in due course.

2. On 22nd July 2022 directions were issued for this matter to come on for a hearing at a date to be fixed. Subsequently the matter was fixed for hearing on 18th October 2022 before us held at the Mercure Hatfield Oak Hotel in Hatfield.

3. Prior to the hearing we were provided with a bundle of documents running to some 143 pages. These included the application, the statement of case, directions, a copy of the Lease, planning consents, Land Registry entries, photographs and a witness statement of Mr Male. A final certificate from London Building Control dated 21st January 2015 was also included.

4. For the Respondent we were provided with a witness statement of Mr Sean Terrence Savage, a Director of the Respondent Company together with a number of exhibits which were largely unnumbered and for which no index was provided.

5. There was a document headed Respondent's response to the Applicant's statement of case, which again we will refer to as necessary. This itself spawned a supplemental statement of case made by the Applicants on 28th September 2022.

6. Counsel for both parties had provided skeleton arguments although these were sent by email somewhat late in the day before the hearing. Nonetheless we had the chance to consider both and we are grateful to Counsel for these submissions.

INSPECTION

7. Prior to the hearing we inspected the subject premises. It is a three storey, purpose-built block with commercial properties at ground floor level and a car park to the rear, which was in need of some attention. Also to the rear was a metal staircase rising to the first floor where there was a part-balcony giving access to the entrance to the common parts serving five of the six flats. We understand that Flat A has access from the ground floor, which would seem also to service the flats on the second floor. We have noted the terms of the planning

permission TP/12/0717 and in particular the layout of the flats to the interior of the Property at first floor level and also the arrangements that were provided for in the planning permission in respect of a rear walkway/balcony, which was not created. To the front of the Property, it appears from the planning that there should have been some form of door with Juliette balconies but that had not been put in place.

BACKGROUND

8. Briefly the background to this matter is that the Lease dated 27th August 2013 was acquired by the Respondent in January of 2014 before any building works had been carried out as provided for under the terms of the Lease. It appears that the acquisition of the Lease b the Respondent completed on 31st January 2014 when the price paid was £450,000 and registration of title was concluded on 12th February 2014. It seems that by January 2015 the Respondent had completed the conversion works although it was said not in accordance with the terms of the Lease, in particular Schedule 3. The original planning permission was dated 5th July 2012 under planning number TP/12/0717. It seems that some time later under application number 14/0172/PD56 the Respondents submitted amended plans and they appear in a planning decision dated 7th April 2014.

9. The transaction is governed by the terms of the Lease and at Schedule 3 there are detailed provisions relating to the lessee's works. These lessee's works are defined at 1.25 of the Lease as meaning the works to be carried out by the lessee of converting the premises into six self-contained residential units as described on the layout plans annexed thereto numbered 0644/P4 and 0644/P5 in accordance with the terms of the planning permission and provisions of schedule 3. The planning permission is defined as being the permission dated 5th July 2012 issued by Hertsmere Borough Council authorising the permitted user.

10. The grounds of the application contain a number of alleged breaches by the Respondent, which are listed also in Mr Upton's skeleton argument. These include a failure to submit plans for approval within four months, a failure to submit a method statement for approval, a failure to apply to the lessor for consent to variations and a breach by carrying out works which were not in accordance with the lessee's plans and planning permission and a failure to complete the works by the due date, or it is said at all. Finally, there is an allegation that the copy of practical completion was not provided.

11. In addition to these alleged breaches from Mr Male's witness statement it appears to be alleged that there have been non-payment of ground rent and service charges as well as the wrongful removal of a fire alarm from the building.

12. We can record now that Mr Upton confirmed that these subsequent matters were not being pursued on the case before us on 18th October.

13. In Mr Rifat's submission to us the first point in his skeleton argument raised a preliminary issue on jurisdiction. This was to the effect that within the Lease and included in the 3rd Schedule at paragraph 14.1 was reference to a referral to arbitration if there was any dispute or question arising between the parties as to the provisions of the Schedule.

14. Mr Rifat's submission was that this was a mandatory requirement and that accordingly any issue for a breach of Schedule 3 to be heard before us should be dismissed as we had no jurisdiction to make such a determination in the face of what he asserted was a mandatory arbitration agreement.

15. As a backup to this point, he also submitted that there must be an actionable breach, which we must assess on the balance of probabilities, the burden of proof resting with the Applicants and that we would need to be satisfied that the Lease included the covenants relied upon and that if the facts were supported, that they constituted a breach of those covenants.

16. Going on from this point it was asserted that the Applicants had waived compliance with the relevant covenants, which amounted to them being estopped from relying on their strict rights and in this regard, we were referred to the Upper Tribunal case of *Swanston Grange (Luton Management Limited) v Langley Esson*. He asserted that the Respondents would need to show that by words or conduct the Applicants had a made a promise or an assurance whereby the Respondents had altered their position on the strength of such promise or assurance. It was said that the Applicants had made numerous unreserved demands for payments of insurance from the Respondent and then had in February of 2019 amended those demands to include 'without prejudice' wording, which included notice of forfeiture, which was not at that time pursued. It was also pointed out that from 2014 until May of 2022 no steps had been taken to enforce the alleged breach of covenants.

17. Under the heading 'Evidence of Breach' it was submitted there was no proper evidence to show a breach on the part of the Respondent. No explanation as to the alleged deviations from the original plans had been produced but merely a bare assertion from Mr Male that the works were different. The skeleton argument dealt with matters relating to the fire alarm, ground rent and service charges, which were not pursued before us and with the final assertion that the claim should be dismissed and that an order under section 20C should be made.

18. For the Applicants Mr Male's evidence was in the bundle at page 98, which we noted. Much related to matters not pursued at this hearing. He did give short oral evidence to us and produced for the first time a copy letter dated 12th February 2015 to Peter Brown & Co the then solicitors for the Respondent, where it raises some 24 points of concern. These included a failure to submit plans for approval, non-compliance with various matters contained in the Lease, a failure to carry out the works in accordance with Schedule 3, non-production of the method statement and non-compliance with works in accordance with the planning permission. In addition no certificate of practical completion had at this time been produced and there were various other allegations which are noted. The letter did indicate a wish to attend a site meeting presumably for the purposes of endeavouring to reach some form of agreement. It does not appear that that site meeting ever took place. This letter in March 2015 followed on from a similar letter sent on 1 August 2014 to the Respondent raising the Applicants concerns about non-compliance with Schedule 3 to the Lease and other issues.

19. He was asked by Mr Rifat whether the issuing of this application in 2022 was because the Respondents were threatening the Applicants with proceedings in respect of lack of repair. Mr Male did admit that this had acted as a trigger but had not commenced proceedings before because exchanges with Peter Brown & Co concerning the costs if the matter were pursued had weighed on his mind.

20. The evidence from the Respondents was to be found in the witness statement of Mr Sean Terrence Savage, which was submitted to us but was not the subject of any evidence in chief nor cross examination. He did however confirm that the layout of the flats was in accordance with the amended planning permission the Respondent had obtained.

21. The evidence therefore from the parties was very limited and the matter settled upon legal argument. In that regard Mr Rifat re-asserted his view that the arbitration clause trumped the jurisdiction of the Tribunal. He was, however, referred by Mr Upton to section 169(1) of the 2002 Act which says as follows:

169(1) An agreement by a tenant under a long Lease of a dwelling (other than a post-dispute arbitration agreement) is void insofar as it purports to provide for a determination –

(a) in a particular manner, or
(b) on particular evidence of any question which may be the subject of an application under section 168(4).

We adjourned for a short while to give Mr Rifat the chance to consider this section and his response was that the Lease, which is the subject of dispute, was a development Lease and that accordingly section 168 and 169 did not apply. The Lease was in effect a commercial Lease for the tenant to develop. He went on to submit that the arbitration clause ousted the jurisdiction of the Tribunal, that there was no actionable breach and any there was was subject to arbitration. In addition, the argument was put to us that the Lease was not a long Lease for the purposes of section 168 and 169.

22. Initially Mr Upton was concerned that this was raised at the very last minute and that he would need time to respond. There was some discussion as to whether the matter should be adjourned. In consideration thereof some discussion took place as to what might happen with regard to the costs of the day. The question as to whether or not the Lease was one to which section 168 applied was, we were told the subject of authority, and this authority was provided to Mr Rifat over the luncheon adjournment. As a result, when we returned after lunch Mr Rifat confirmed that the arguments raised with regard to the arbitration clause in the Lease were no longer proceeding and he conceded that section 168 and 169 of the 2002 Act applied. Accordingly the only issue for us to decide was whether or not waiver applied.

23. His view was that we had jurisdiction to deal with waiver or estoppel by reference the Swanston Grange case. He said that there was conduct on the part of the Applicants to infer a waiver and that the Applicants had only been triggered to commence an action when it was alleged that they themselves had breached the terms of the Lease. He reminded us that insurance monies appeared to have

been demanded and the delay lead in his view to an inference that the Applicants were consenting to the breach of the Lease.

24. He went on to assert that Schedule 3 to the Lease related to the early stages of development and it was some six years later, after the works had been completed and the 'water was under the bridge' that the application was made. In his view there had been a right for the Respondents to rely on the lack of action by the Applicants. Had they been approached early on it might have given the Respondents the opportunity to put matters right but the inactivity had prejudiced them.

25. Mr Upton's response was that it was not 'water under the bridge'. The Respondents had carried out the development not in accordance with the Lease and there had been damage to the reversion, as the changes to planning, in his submission, made the reversion less valuable. He said there were three elements that we needed to consider, one was the waiver of the covenant in whole, the next was the waiver of the breach of covenant and the next was the waiver of the right to forfeit. In this regard he relied on a number of authorities which he had provided us. This included the Swanston Grange case as well as *Bedford v Paragon Asra Housing Limited [2022]L&TR as well as Kyriacou v Linden [2021]UKUT288(LC).*

26. In the Swanston Grange case we were drawn to paragraph 19 thereof, which contained the following wording: *"Accordingly in answering the question posed by section 168(2)(a) as to whether the breach has occurred, the LVT needs to decide (and must consequently have jurisdiction to decide) whether at the relevant date the covenant was suspended by reason of a waiver or estoppel (in which case it will not have occurred) or whether at the relevant date the covenant was not suspended (in which case a breach will have occurred if the facts show non-compliance with terms of the covenant*)."

27. Further, at paragraph 23 his Honour Judge Huskinson said this: *"For the Appellant to be prevented by waiver or promissory estoppel from relying on the relevant covenants the Respondent would need to be able to show an unambiguous promise or representation whereby she was lead to suppose that the Appellant would not insist on its legal rights under the relevant covenants regarding under-lettings either at all or for the time being. The Respondent would need to establish that she had altered her position to her detriment on the strength of such a promise or representation and that the assertion by the Appellant of the Appellant's strict legal rights under the relevant covenants would be unconscionable."*

28. In the case of Bedford v Paragon the summary of the decision by Martin Roger QC says as follows: *"The First Tier Tribunal was correct to refuse to strike out as an abuse of process an application to determine whether there had been a breach of covenant. Although it was permissible to determine whether the breach had been waived in considering the strike out application, forfeiture was not the only remedy for such a finding was required and in any event it was necessary to determine whether there had been a breach in order to establish whether it had been waived."*

29. Mr Upton went on to assert that there was no waiver in any event and that we should determine the breaches as set out in his skeleton argument. He asserted that we did not have jurisdiction to deal with what appeared to be potential claims for damages within the witness statement from Mr Savage and also there was no justification for any costs orders.

FINDINGS

30. The witness statement of Mr Savage confirms the company's acquisition of the Lease and the steps taken to carry out the works. It confirms that an application was made to vary the planning and that consent was granted on 7th April 2014. He asserts that the relevant notices had been displayed around the Property and he could see no reason why these details had not been provided to the Applicants. Certainly, by reference to the letter of 1st August 2014 in which the Applicant's objected to the present position, it was clear they were not aware of the changes, which the Applicants confirmed by communication with the Council. It is clear that by then they were aware that planning had been changed. The witness statement went on to address other matters such as the fire alarm, ground rent and repairs as well as problems caused to the flats apparently by water ingress, which is not the subject of these proceedings.

31. In the Respondent's response to the Applicant's statement of case, much is agreed. The Applicants are put to proof that there had been changes, which lead to the allegations of breach and that these were not carried out with the knowledge of the lessor. It was asserted that the Applicants had informally decided not to be bound by the provisions of the Lease and by its knowledge of the alternative works they had acquiesced to them or were stopped from taking issue some eight years after the alternative works had been carried out.

32. Our inspection of the Property and a review of the plans both relating to the original planning and the amended planning, to our mind clearly show that there has been a departure from the original planning permission. The layout of the flats on an internal basis is different. The Respondents have not constructed the external walkway to the Property. The proposed access at the rear was to have included an enclosed stairway from the car park to the first-floor entrance. To the front of the Property the plans indicate that there were to be some form of door with Juliette balcony at the first floor level but these do not exist. Instead what appears to be the case is that there are six flats. The layout for Flat A at the extreme left had of the Property when looking at it from the rear, appears to be pretty much as was drawn on the original layout plans. However, the other properties are different because there is an internal landing, which gives access to the remaining five flats, which in the original planning permission would have had access from the external walkway. We have no doubt, therefore, that on our inspection and indeed was not denied by the Respondents, there has been a departure from the original planning permission, which is referred to in the Lease at Schedule 3 and elsewhere. There is no evidence that they notified the Applicants of these changes, or sought permission.

33. It is perhaps somewhat surprising that there has been no action taken in respect of this breach since it was first raised in 2014. However, we accepted Mr Male's evidence that discussions with the Respondent's previous solicitors, Peter Brown

& Co and the issue of costs had to an extent put them off taking the matter any further. However, when the Respondents began threatening legal action against the Applicants for alleged breaches of the Lease, the Applicant's position changed, and this application was made.

34. It is not a matter for us to consider whether or not forfeiture would in fact be granted. We have considered the various authorities put to us. We do not consider there is any evidence to support the proposition that actions or inactions on the part of the Applicants had caused the Respondents to change their position to their detriment so that some form of promissory estoppel arose. Indeed, it would seem that the application for change of planning was made before any involvement with the Applicants In our finding there has been a breach of covenant but there has been no waiver of that breach which would lead us to making a decision other than the fact that a breach has occurred, as we are required to determine under section 168(4) of the Act.

35. We make no order under section 20C of the Landlord & Tenant Act 1985. The Applicants have been successful, and it is for them to consider whether costs can be recovered under the terms of the Lease.

36. No claim under Rule 13 was made by either party and the claims that were "hinted at" in Mr Savage's statement are not matters that form the jurisdiction of this applicant and indeed would seem to us to be matters that if they are to be pursued would have to be pursued through the County Court.

Judge: Andrew Dutton

A A Dutton

Date: 8 November 2022

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.