HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER SECTION 168 (4) OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Case Reference:	LON/00BH/LBC/2012/0130
Premises:	Ground Floor Flat, 189 High Road, Leyton, London E15 2BY
Applicant:	Meryon Properties Limited
Representative:	Circle Residential Management Ltd
Respondents:	(1) Hasan Yusuf Patel (2) Fatmaben Hasan Patel (3) Yusuf Hasan Loonat
Representative:	Vicarage Court solicitors.
Appearances for Applicant:	(1) Mr Martin Paine, FPCS, MIRPM Director of Circle Residential Management Ltd. (2) Ms Carol Nelson, Assistant Director of Circle Residential Management Ltd. (3) MS Lizzie Walpole (observer)
Appearances for Respondent:	Mr Imran Patel, trainee solicitor at Vicarage Court solicitors
Leasehold Valuation Tribunal:	(1) Mr A Vance LLB (Hons) (Chair) (2) Mr R. Potter FRICS
Date of Hearing :	28.01.13

Decision of the Tribunal

1. We determine that the Respondents erection of a single storey flat roofed extension without the Applicant's consent amounts to a breach of Clause 5(h) of their lease.

2. We make no order for costs under Schedule 12, paragraph 10 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act").

3. We make no order under section 20C of the Landlord & Tenant Act 1985.

Introduction

4. This is an application under section 168(4) of the 2002 Act for a determination that there has been a breach of covenant in relation to a property at Ground Floor Flat, 189 High Road, Leyton, London E15 2BY ("the Property"). It is asserted that the Respondents have, without the Applicant's consent and in breach of the terms of their lease, constructed a single story flat roofed extension to the rear elevation of the Property

5. The Applicant is the lessor and freehold owner of the Property whose title is registered at HM Land Registry under Title Number EGL19234.

6. The Respondents are the lessees of the Property. Their leasehold interest was registered at H. M. Land Registry on 13.09.11 under title number EGL494905

7. The relevant lease is dated 15.12.04 and is made between Madhu Bhajanehatti (1) and Emmanuel Adeniji (2) for a term of 99 years commencing 01.01.04.

8. The alleged breach of covenant relates to the following covenant:

   Clause 5(h)

   "Not to carry out alterations or additions to the Property nor erect any other buildings of a permanent or structural nature save with the prior written approval of the Landlord and the owner of the Other Premises."

9. Before us, Mr Paine stated that for the purpose of these proceedings the Applicant was not pursuing the allegation advanced in its Statement of Case that the Respondents conduct also amounted to a breach of Clause 5(j) of the lease. That is a covenant that includes ensuring that nothing is to be done on the Property that may tend to be a nuisance or annoyance.

The Tribunal's Directions

12. Directions were issued on 26.11.12 in which it was stated that the Tribunal would reach its decision on the basis of the evidence produced to it and that the burden of proof rests with the Applicant.

Inspection

13. Neither party requested that the Tribunal inspect the Property and we did not consider this to be necessary.

The Hearing

14. The hearing was attended by the representatives of the Applicant and the Respondents as identified above.

The Applicant's Case

15. The Applicant's position was that the Respondents had, without its consent or knowledge, constructed a single storey flat roofed extension to the rear elevation of the Property about 3.6 metres in length.

16. It first became aware of this construction following receipt, on 20.11.12, of a Town and Country Planning Act 1990 Enforcement Notice from London Borough of Waltham Forest ("LBWF"). This notice referred to the construction of an extension without planning permission. An earlier Enforcement Notice dated 01.06.12 had not been received by the Applicant because it had been sent to the Applicant's previous registered office address.

17. Mr Paine inspected the Property on 21.11.12 and took photographs of the extension. Copies of these photographs were provided to the Tribunal.

18. This application was issued immediately afterwards on 22.11.12. On that same day Mr Paine emailed the Third Respondent, Mr Loonat (who is also, apparently, a solicitor at Vicarage Court Solicitors) stating that an application had been made to this Tribunal for a determination that there had been a breach of covenant. He invited the Respondents to make a swift admission that a breach of covenant had occurred in order to "minimize the cost impact to the Lessor". Costs of £1,972.62 had, he stated, already been incurred. This sum comprised the costs incurred in Mr Paine travelling from Cheltenham to inspect the Property. He received no response to that invitation.

19. Mr Paine was aware that the Respondents had made a retrospective planning application and that this was awaiting determination.

The Respondents Case

20. The Respondents admitted that there had been a breach of Clause 5(h). It was admitted that the extension was built in early 2012 and that neither the Applicant's consent nor planning permission was obtained. They also admitted receving the LBWF enforcement notice referred to above on 20.11.12.

21. However, the Respondents argued that their breach of covenant had been waived by the Applicant. This was because a demand for ground rent (sent for the year 01.01.13 – 31.12.13 under cover of a letter dated 21.11.12) was paid by cheque sent on 27.11.12 and cashed on 30.11.12.

22. It was asserted that by demanding and accepting rent the Applicant had waived both the right to forfeit and also the breaches themselves.

The Applicant's position on the issue of waiver

23. Mr Paine submitted that this Tribunal had no jurisdiction to determine questions of waiver once a breach had occurred. He relied upon the decision of the President of

the Lands Tribunal in *GHM (Trustees) Limited v Barbara Glass and David Glass* [LRX/153/2007].

24. He accepted that rent had been demanded on 21.11.12 and that the cheque tendered by the Respondent was subsequently cashed. However, this rent demand was sent prior to his inspection of the Property on 21.11.12. The Applicant did not have knowledge that a breach of covenant until after his inspection had occurred. Rent had therefore been demanded without knowledge of the Respondents breach of covenant.

25. He pointed out that at no point had the Applicant indicated that rent was being accepted on the basis that the breach of covenant was being waived. He also considered it arguable that as whether or not a breach of covenant had occurred was a matter for the LVT to determine, no issue of waiver could arise until after such determination had been made

The Law

26. The relevant parts of s.168 of the Act provide as follows:-

> *(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) .....

(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.*

The Tribunal's Decision and Reasons

27. The Respondents have admitted that a breach of clause 5(h) has occurred. As we informed the parties at the start of the hearing it is the Tribunal's view that s.168 does not exclude the Tribunal's jurisdiction notwithstanding such admission.

28. In respect of waiver, we consider that we have jurisdiction to determine whether or not a landlord has 'waived' or 'suspended' the operation of a covenant or if a landlord is estopped from relying upon such a covenant.

29. What we do not have jurisdiction to determine is an argument that although a breach has occurred a landlord has waived the right to forfeit the lease (see the decisions in *Swanston Grange (Luton) Management Limited v Langley-Essen* [LRX/12/2007] and *GHM (Trustees) Limited v Barbara Glass and David Glass.*

30. It has been admitted and we are satisfied that the construction of this extension constitutes a breach of clause 5(h) of the Respondents lease.

31. There is, in our view, no evidence to indicate that the Applicant has waived or suspended the operation of clause 5(h). This was not suggested by the Respondents. Nor was it argued that any issues of estoppel arise.

32. It follows that the Respondent's submission that there has been waiver of forfeiture by demand and acceptance of rent is a matter outside of our jurisdiction. All we have jurisdiction to determine is whether or not a breach has occurred, not whether the

Applicant has, by its actions or ommissions, waived the right to seek forfeiture notwithstanding that breach.

Costs

33. The Applicant sought an order in its favour under Schedule 12, paragraph 10 of the 2002 Act. This enables a Tribunal to determine that one party to proceedings should pay the costs incurred by the other party in connection with the proceedings.

34. In order to make such an order we need to be satisfied that the Respondents have acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings. We do not consider that any of these criteria are met.

35. Mr Paine submits that the failure of the Respondents to accept his invitation to make an early admission that a breach had occurred had led to an unnecessary hearing before this Tribunal.

36. However, these proceedings were issued before such an invitation was made and the day after Mr Paine's inspection. In order to make an order under Schedule 12, paragraph 10 we would need to be satisfied that the Respondents have acted frivolously, vexatiously etc. *in connection with the proceedings*. Their conduct prior to and outside of these proceedings is not relevant.

37. After the issue of proceedings but before this hearing the Respondents admitted that a breach had occurred. It did so in submissions prepared by counsel on their behalf. We do not consider that the time taken to make this admission was unreasonable. The Respondents were entitled to seek legal advice before responding to Mr Paine's invitation especially bearing in mind that these proceedings had already been issued.

38. It was in submissions made by counsel on behalf of the Respondents that the issue of possible waiver was identified. Whilst we have concluded that we do not have jurisdiction to determine this issue we do not consider that reliance upon this potential argument amounts to unreasonable conduct.

Section 20C Application

39. The Respondents seek an order under section 20C of the Landlord & Tenant Act 1985 Act that none of the costs of the Applicant incurred in connection with these proceedings should be regarded as relevant costs in determining the amount of service charge payable by the Respondents.

40. They argue that the Applicant acted hastily in issuing this application without first allowing them the opportunity to remedy the breach of covenant.

41. We do not consider it just and equitable to make an order under s.20C limiting the costs the Applicant can recover as relevant costs given that the Respondent has unsuccessfully resisted this application. In our view the Applicant was entitled to issue proceedings when it did given the clear breach of covenant by the Respondents and the threat of enforcement action by LBWF.

Chairman:

Amran Vance, LLB

Date: 13/2/13