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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00AC/LBC/2015/0064**
Property	:	**49 Beaufort Park, Falloden Way, London NW11 6BT**
Applicant	:	**Beaufort Park Residents Management Limited**
Representatives	:	**Mr Samuel Tucker, BLR Property Management Ltd**
Respondent	:	**Mr A Kompani**
Representative	:	**Mr P Mandelsohn, solicitor**
Type of Application	:	**Determination of an alleged breach of covenant**
Tribunal Members	:	**Judge W Hansen (chairman)** **Mr Cairns MCIEH, Mr Miller**
Date and venue of Hearing	:	**18 September 2015 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**23 September 2015**

DECISION

Decision of the Tribunal

The Tribunal determines that there has been no breach of the covenant contained in Clause 5(x) ("the Covenant") of the lease dated 25 March 1978 alternatively that the Applicant has waived the Covenant and/or become estopped from relying on the Covenant. It is therefore determined under section 168(4) of the Commonhold and Leasehold Reform Act 2002 that a breach of covenant has not occurred.

The Application

1. The Applicant seeks an order under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002" Act") that a breach of covenant has occurred.

2. The particular breach alleged is a breach of Clause 5(x) in the Lease by reason of the fact that "*The Lessee has enclosed the open balcony area of the Flat using double glazed panels which are both an addition and alteration of the flat affecting the external appearance*". It is alleged that "*the lessee does not have the consent of the lessor for the works and made no request for the consent of the lessor prior to undertaking the works*". We shall hereafter refer to the work undertaken by the Respondent to his Flat as the Works.

Background

3. The Applicant is the landlord of the ground floor flat known as 49 Beaufort Park, Falloden Way, London NW11 6BT ("the Flat"). Its freehold title is registered at HM Land Registry under title number NGL534433. The Respondent is the lessee of the Flat and holds under a lease dated 25 March 1978 for a term of 126 years from 29 September 1976 ("the Lease"). His title is registered at HM Land Registry under title number NGL736614.

4. On 21 July 2015 Judge Barran gave directions for the conduct of the hearing. She noted that the burden of proof was on the Applicant and that the tribunal would reach its decision on the basis of the evidence produced to it. She then ordered the Applicant to produce a bundle of documents which was to include, amongst other things, any signed witness statements of fact and any other documents upon which the Applicant wished to rely by 10 August. The Respondent was ordered to produce a statement of case and any evidence in reply by 1 September 2015 and the Applicant was permitted to reply by 7 September 2015. The directions noted that the Tribunal might decline to hear evidence from a witness who had not provided a statement in accordance with the directions.

5. Mr Tucker accepted that the Respondent had complied with the directions. In fact, the Respondent's solicitors posted his statement of case and witness statements on 28 August and they were received on 2 September but Mr Tucker sensibly took no point about the fact that they were received one day late. By contrast, the Applicant served no evidence or other documentation in compliance with the directions. The only "evidence" produced by the Applicant in support of its case apart from the application itself was an email from Sean Walsh dated 16 September 2015 in which he denied giving consent for the Works. Mr Mandelsohn objected to this late evidence and in any event invited us to place no weight on it in the absence of Mr Walsh. We return to this subject below.

The Alleged Breach

6. The relevant clause in the Lease is Clause 5(x). This is a tenant's covenant "*not without the previous written consent of the Lessor Management Company and any Superior Lessor which shall not be unreasonably withheld to make any structural alterations or additions to the Flat or erect any new buildings thereon or to move any of the fixtures except by way of erecting or altering any internal partitions or arrangements thereof*".

7. We inspected the Flat on 18 September 2015. The Flat is a 2-bedroom ground floor flat in a purpose built development comprising 141 flats. The Lease provides that "the Flat" means the flat and premises described in the First Schedule. The First Schedule identifies the Flat as "*ALL THAT the private residential flat known as Number 49 on the ground floor of Beaufort Park the position of which is shown edged red on the plan numbered 1. There is included in the Flat:-*

   ...

   (vi) the balcony (if any) adjoining and forming part of the Flat."

8. It was apparent from our inspection that there was indeed a balcony adjoining and forming part of the Flat. The balcony was previously "open" as shown in the photograph of the adjoining ground floor flat at page 85 of the Respondent's bundle but the effect of the Works has been to enclose the balcony. The enclosure of the ground floor balcony simply involved fitting a door and window infill panel which, with the existing guardrail and overhang, provided an additional small room. The Tribunal noted that the design and type of the units used matched all the windows on the estate and appeared to be of good quality and to be well installed.

The Evidence

9. Mr Tucker called no evidence to prove the Applicant's case. He admitted that he had only recently become involved in the dispute and had no personal knowledge of the events in question. He was reliant on instructions from the Board of Directors of the Applicant. However, there was no witness statement from any member of the Board. Mr Tucker told us that Mr Sean Walsh had been a Director at the relevant time but was no longer on the Board and had been difficult to contact. This was the explanation for the fact that the only evidence provided by the Applicant apart from that contained in the Application was an email from Mr Walsh to Mr Galliers of BLR Property Management Ltd dated 16 September 2015 in which Mr Walsh said this:

"My involvement with this flat was when he asked me to check his surveyors report with regard to moving some walls ... Sometime after that I was asked for the instalment and enclosure of the balcony; at that stage I said it might be possible, however he must send a plan to the committee for final decision. Unfortunately he went ahead without supplying a plan and so no official permission. He was asked on many occasions to comply".

10. Mr Walsh did not come to the Tribunal to give evidence. Mr Tucker explained that he was suffering from ill-health and that it had been too difficult to obtain a statement from Mr Walsh following his resignation from the Board in or about March 2015. Nonetheless Mr Tucker sought to rely on the e-mail from Mr Walsh as showing that no consent, not even oral consent, had ever been given for the Works.

11. In addition, Mr Tucker submitted that even if Mr Walsh had given consent orally, as alleged by the Respondent, Mr Walsh had not had authority to give a binding consent on behalf of the Applicant and further that oral consent was not in any event sufficient.

12. The Respondent gave evidence in accordance with his written statement, the truth of which he confirmed. Paragraph 7 of his statement is the key paragraph in which the Respondent said this:

    "Accordingly I invited Mr Walsh into my flat and discussed with him the changes which I wished to implement. We met in March 2014. Primarily I wished to create an open-plan design internally. I also told him I wished to close the balcony as many others had done in block for not only security reasons but to enable my washing machine to plumbed outside. He approved the works which were discussed. I relied on what he said. I thought I could trust him given his position".

13. In his oral evidence to the Tribunal, the Respondent firmly maintained that Mr Walsh had indeed given consent to the Works when they had met to

discuss them in or about early March 2014 before the Works were undertaken. When asked to comment on Mr Walsh's email by his solicitor, the Respondent said: "*Mr Walsh's statement is completely untrue*".

Findings of Fact

14. The Tribunal has no hesitation in accepting the Respondent's evidence. It was given firmly, clearly and consistently and we accept the evidence given by the Respondent. The Respondent was not cross-examined by Mr Tucker and there was no cogent evidence adduced by the Applicant to challenge the Respondent's evidence. We cannot place any weight on the untested evidence contained in Mr Walsh's email. We accordingly find that Mr Walsh acting for and on behalf of the Applicant gave oral consent for the Works. We also find that Mr Walsh had authority to give such consent on behalf of the Applicant as the Director responsible for estate management issues who had been identified as the appropriate point of contact by the Applicant's property manager: see paragraph 5-6 of the Respondent's witness statement. We also find that at no time was it suggested by Mr Walsh that his consent was conditional or dependent on being reduced into writing. We further find that the Respondent relied to his detriment on, and altered his position on the faith of, the oral consent given by Mr Walsh by then incurring expenditure on carrying out the Works.

Determination

15. The Tribunal was not addressed by either side as to whether the Works fell within the scope of the Covenant. However, we accept that they did. The issue then arises as to whether Mr Walsh's oral consent was sufficient for the purposes of Clause 5 (x). Mr Mandelson submitted that it was and relied on *Aubergine Enterprises Ltd v. Lakewood International Ltd* [2002] EWCA Civ 177. That was very much a case on its own facts and we are not persuaded that it is authority for the proposition that an oral consent will suffice when what is required by the lease is a written consent: see Halsbury's Laws, Volume 63,

paragraph 695. However, the necessity for a written consent may be waived by the landlord (see Halsbury's Laws, Volume 63, paragraph 695) and we are satisfied that Mr Walsh did indeed waive the need for any written consent when he met the Respondent and gave his approval for the Works in the circumstances set out above. On that basis, there has been no breach of the Covenant. In any event, even if we are wrong in accepting that the need for a written consent was waived, the Tribunal finds that the Applicant has waived the Covenant and/or is estopped from relying on the Covenant having regard to our findings of fact in paragraph 14 above: see e.g. *Swanston Grange (Luton) Ltd v. Langley-Essen* [LRX/12/2007]. In the alternative, on the supposition that consent had not yet been given, the Applicant's statement of case served on 2 September 2015 contained a request (in paragraph 4) for such consent and Mr Mandelson sought to persuade us that the Applicant had unreasonably withheld its consent in the face of that request, thereby entitling the Respondent to proceed without consent. We are not persuaded of the merits of this contention and in any event consider it inappropriate to decide the case on the basis of an "application" made in the course of proceedings shortly before the hearing.

16. There were no other applications made by either side to the Tribunal.

Name: Judge W Hansen **Date:** 23 September 2015