First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	**:**	**CHI/OOML/LBC/2020/0012**
Property	**:**	**Basement Flat, 69 St Aubyns, Hove, BN3 2TL**
Applicants	**:**	**Paula Sylvia Lewis and Roy Andrew Anstead**
Respondent **Represented by**	**:**	**David Anthony Hawkins** **Emily Fitzpatrick of Commonhold and Leasehold Experts Ltd.**
Interested Party **Represented by**	**:**	**69 St Aubyns Ltd** **Emily Fitzpatrick of Commonhold and Leasehold Experts Ltd.**
Date of Application	**:**	**27th May 2020**
Type of Application	**:**	**For a determination that a breach has occurred in a covenant or condition in a lease between the parties (Section 168(4) Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"))**
Tribunal	**:**	**Bruce Edgington (lawyer chair)** **Roger Wilkey FRICS**
Date and venue for Hearing	**:**	**30th June 2020 by video hearing**

DECISION

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1. The Tribunal's determination upon the limited questions listed for hearing is that:

   (a) The application under section 168(4) of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") is struck out as being both an abuse of process and having little likelihood of success
   (b) No costs are awarded under rule 13(1)(b) as no costs schedule had been submitted

Reasons

Introduction

2. The main application is for an order that the Respondent is in breach of clause 3(5) of the lease of the property dated 27th May 1988 as extended by a Deed of Variation dated 24th September 2014 which extended the term to 99 years from 14th July 2010 namely:-

> *"3(5) Not at any time during the said term to make any alteration in or addition to the Demised Premises or any part thereof or to cut or maim alter or injure any of the walls or timbers thereof or to alter the Landlord's fixtures therein without first having made a written application (accompanied by all relevant plans and specifications) in respect thereof to the Lessor and secondly having received the written consent of the Lessor thereof"*

The Applicants attempted to alter the application during this hearing to add that the Respondent had sublet the basement flat without obtaining the permission of the Applicants. This was not permitted at this hearing because it was a very much last minute alteration and neither the Tribunal nor the Respondent and Interested Party had prior notice thereof.

3. The Respondent agrees that he undertook works to the property some years ago which included (a) installation of a timber facing to the outside, (b) removing and replacing back doors and windows, (c) installation of an en-suite bathroom in the master bedroom, (d) repositioning of the kitchen into the living room and (e) creating a second bedroom in place of the existing kitchen.

4. A Charlie Watts who appeared to be the Respondent's builder or agent wrote to the Applicant's agents, Ellmans, on the 10th March 2016 saying "*Have you heard back from the freeholder regarding the alterations? We have now put in the timber front and rear doors/windows. We are going to be letting the property out, and need to notify the freeholder. Therefore please take this as our notification to the freeholder*".

5. On the 23rd November 2016, the Applicant's solicitors, Rix & Kay Solicitors LLP wrote to the Respondent and copied this to Ellmans. This letter set out all 5 sets of works undertaken as described in paragraph 3 above. It goes on to allege a failure to comply with clause 3(5) of the lease and asks whether it is agreed that the lease terms had been breached. If not, the letters says that the landlord may make an application to this Tribunal under section 168 of the 2002 Act with a view to serving a notice of breach under section 146 of the **Law of Property Ac t 1925** as a precursor to forfeiting the lease.

6. The Tribunal has seen copies of these communications. However in the undated position statement filed on behalf of the Respondent and the Interested Party some days before the hearing, it is also alleged that "*the alleged breach was the subject matter of reciprocal correspondence between the Respondent and Rix & Kay between the period November 2016 to February 2018 where the Respondent consistently denied any breach*".

7. It is then said "*The Applicants have consented to the works. The Respondent will rely on communications between him and his agents on the one hand, and the Applicants agents on the other, during 2014 and 2015, in which the Respondent clearly applies for consent. One such communication from the Applicants agent Ellman's dated 14th September 2015 states 'Good News. Freeholder has given consent….'.*". None of these communications has been copied to the Tribunal.

8. An application for collective enfranchisement dated 2nd March 2020 was then lodged with the Tribunal following the service of the statutory notice and counternotice wherein the Applicants say that the interested party, 69 St Aubyns Hove Ltd, is entitled to enfranchise. Almost 3 months' later and less than a month before the hearing of the enfranchisement case, this application under section 168 of the 2002 Act was made and an application to strike this out has been listed for hearing on the same day but immediately before the enfranchisement hearing.

9. The Respondent and the Interested Party have asked for this application to be struck out either on the basis that it is an abuse of process and/or that it has no reasonable prospect of success.

Property Inspection

10. The Tribunal has not inspected the property both in view of the coronavirus pandemic and because the parties have, in effect agreed a description of the property as it was before and now. Further, the expert valuer for the Interested Party, Stewart Gray FRICS, has described the property and provided comparative plans of the flat before and after the work admittedly carried out by the Respondent.

11. The original 1 bedroom flat with a separate lounge/dining room now has an additional bedroom with *en suite* and the kitchen has been moved into the reception room.

The Hearing

12. Those attending the video hearing were Emily Fitzpatrick from Commonhold and Leasehold Experts Ltd. and Mr. Roy Andrew Anstead who was on the telephone only.

13. Throughout the day before the hearing a number of documents and skeleton arguments were filed and read by the Tribunal members. The documents displayed a state of total confusion. On the 19th June 2020 at 15.34, Ms. Fitzpatrick sent an e-mail to Erica Stocks who describes herself as a partner in ODT Solicitors – who were acting for the Applicants at the time – saying:

> "*In haste, I think we are agreed as follows:*
> 1. *£45k premium for freehold with leaseback of Flat 2 (as agreed already but subject to the plan being amended to remove the word 'garden' and to remove the door (which is actually there) between this building and next door – please can you let us have an amended plan urgently to approve?'*

2. *No new lease or leaseback on the GFF (our clients can deal with that when the lessee makes an application in due course for an extension in the normal way).*
3. *The section 168 application will be withdrawn but without prejudice to your clients rights to pursue costs in respect of the alleged breach (noting that my clients do not accept there is a breach and that Mr. Hawkins may have counterclaims which are also preserved). Mr. Hawkins Rules 13 costs application (in respect of the substantive application for a section 168 determination and in respect of the application for leave which was struck out) is preserved in so far as he will be permitted to raise a claim for Rule 13 costs, in the event that your client does pursue a claim for costs of the alleged breach. I think this essentially preserves the costs and substantive positions of your clients and Mr. Hawkins vis a vis the alleged breach.*
4. *Service charges (including any arrears) will be dealt with under the 1993 Act in the normal way.*

Please do confirm. If this is right, shall I draft this in detail in a letter to be signed by both of us (on Monday)."

14. On the 19th June at 16.54, Ms. Stocks replied to Ms. Fitzpatrick. She put a 'without prejudice' heading, which Ms. Fitzpatrick had not. In view of the contents of the message, however, such words lose their effect. The message said:

"*Without Prejudice*

Thank you for your email, I am pleased to confirm that my clients are prepared to settle on the basis of the terms set out in your email.

I look forward to receiving to the letter on Monday

15. At the hearing, Mr. Anstead confirmed that he represented the views of himself and his sister, Paula Sylvia Lewis, the other Applicant. He was questioned by the Tribunal chair about these e-mails. He said "I admit that I said 'yes' to the proposals but 5 minutes later I telephoned my solicitor to say that I had changed my mind. She told me that it was too late as she had sent the message agreeing".

16. Mr. Anstead's view was that it was his right to change his mind. What happened thereafter was that there was correspondence between the solicitors about the wording of a formal agreement and indeed, a draft of such agreement was submitted to the Tribunal for consideration. Minor suggestions had been made by the Tribunal chair to make it more workable.

17. It is also important to note that when making his comments at the end of the hearing, Mr. Anstead said that he wanted the extra monies relating to potential development and breach of the terms of the lease because he "wanted to get rid of the freehold and wanted the maximum possible amount to cover these things". A reasonable inference from this is that he

is not really interested in actually forfeiting the lease. This is important within the context of this hearing because the only reason for obtaining an order of breach under section 168 of the 2002 Act is to enable a landlord to serve a notice under section 146 of the **Law of Property Act 1925**. The reason for serving such a notice is to seek to enforce 'a right of re-entry or forfeiture under any provision or stipulation in a lease' (from section 164).

18. Ms. Fitzpatrick told the Tribunal that the reason she had not filed witness evidence to set out how consent to the alterations had been made was because she had understood that agreement had been reached. The purchase price in the enfranchisement had been increased to reflect the alleged breaches and other matters, and the parties had reserved their positions with regard to costs.

Discussion Generally

19. The way in which the main application has been drawn displays a clear misunderstanding of the law relating to these applications. It seeks the leave of the Tribunal to bring the Application in view of the enfranchisement case and, in particular, paragraph 7 of Schedule 3 of the **Leasehold Reform, Housing & Urban Development Act 1993** ("the 1993 Act").

20. This paragraph says that when a claim has been made for an enfranchisement, "*no proceedings to enforce any right of re-entry or forfeiture terminating the lease of any flat held by a participating member of the RTE company shall be brought in any court without leave of that court*". It goes on to say that leave shall only be granted if the court is satisfied that such member is not participating in the application in order to avoid such enforcement.

21. An application under section 168 of the 2002 Act is simply to establish whether there has been a breach of the terms of a lease. This Tribunal cannot make any order enforcing any right of re-entry or forfeiture. Thus, this Tribunal cannot deal with any application for leave because leave must be obtained from the court dealing with that application. This is reflected in paragraph 15 of the decision of Judge Tildesley OBE dated 17th June 2020.

22. Mr. Anstead went further in his submissions by, in effect, giving evidence as to what happened about the alterations to the basement flat. He said that whilst he accepted that his agents, Ellman's had said, on the 14th September 2015, 'Good News. Freeholder has given consent….', this comment had come from someone in the agent's office who did not have the authority to make such a comment. How the Respondent was supposed to know that at the time was not explained. In any event, Mr. Anstead did not seek to suggest that a staff member at Ellmans had told lies. He merely said that he or she had insufficient seniority to make that assertion.

23. The Applicants say, in their application, that no consent has been given for the works and they add that "*if asked for consent, would have refused consent.*". When questioned about this, Mr. Anstead then said that plans for the alterations to the property had been submitted to him. This was

the first time that this seems to have been said. He said that the installed back doors and windows were in plastic or uPVC and this was contrary to the planning permission obtained by Mr. Hawkins.

24. Mr. Anstead had told Mr. Hawkins this and he, in turn, was unable to get the Local Authority to change its mind. He had to apply for a new planning permission with wooden framed doors and windows and this was granted. Such windows and doors were installed and are referred to in the communication sent by Charlie Watts to the Applicant's agents, Ellmans, on the 10th March 2016 referred to above.

25. Mr. Anstead did not supply any expert evidence to suggest that the alterations to the flat were unreasonable save for work to a party wall. No evidence of any objections from anyone else was produced. The reasons given for objecting were merely that Mr. Anstead did not like the alterations.

Discussion on Strike Out Application for Abuse of Process

26. This aspect of the case can be summarised as follows:

(a) It is alleged that the application has been made specifically to interfere with the enfranchisement case rather than as a precursor to forfeiture
(b) It is alleged that the Respondent has applied to the Applicants and has been granted permission for the works

27. There have been many cases over the years when the principles behind applications to strike out for abuse of process have been discussed.

28. In **Michael Wilson & Partners Ltd. v Sinclair and others** [2017] EWCA Civ3, the Court of Appeal Civil Division, discussed and set out the basic principles. Its starting point was the House of Lords case of **Hunter v Chief Constable of the West Midlands** [1982] AC 529 where Lord Diplock said:

> "*…this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied…*".

29. **In re Norris** [2001] 1 WLR 1388, Lord Hobhouse referred to the **Hunter** case and then said:

> "*These are illustrations of the principle of abuse of process. Any such abuse must involve something which amounts to a misuse of the litigation process. Clear cases of litigating without any honest belief in any basis for doing so or litigating without having any legitimate interest in the litigation are simple cases of abuse*".

Conclusions

30. As to whether this application is an abuse of process, the Tribunal is concerned about the actions taken by the Applicants and those concerns can be summarised as follows:-

- It is absolutely clear that on the 23rd November 2016 i.e. at least 3½ years ago, the Applicants knew exactly what the Respondent had done to the flat and they now accept that plans had been submitted. From the limited evidence supplied, it is likely that all of this was known before then.
- When asked by the Tribunal why nothing had been done to take the Respondent to task following the solicitors letter of the 23rd November 2016, Mr. Anstead simply said that it has taken all this time to establish that Mr. Hawkins had not obtained consent to the works. If the Applicants had not given consent, then it is difficult to understand why they could not just rely on their evidence to that effect.
- When asked by the Tribunal what the Applicants' intentions were, Mr. Anstead said that they wanted to get rid of the freehold title and wanted compensation for the breaches. He did not say or imply that he wanted the property reinstated or the lease forfeited.
- The Applicants knew that the Respondent was a participating member of the RTE company i.e. the Interested Party and that because of the number of flats in the building, his involvement was essential to ensure that the enfranchisement could proceed. There are 5 self contained flats in the building with the lessees of 3 of them participating. One of those is the Respondent and if his lease were forfeited, there will only be 2 participating flats which is less than the proportion required by the 1993 Act. With full knowledge of the facts and with legal advice being received, the Applicants not only confirmed that the Interested Party was entitled to collective enfranchisement but (a) engaged in negotiations to transfer the ownership of the building to the RTE company and (b) allowed the participating members to run up legal and expert costs.
- The fact that the Applicants left this application until the last minute indicates to the Tribunal that one of the main intentions was to obstruct both the Tribunal and the Interested Party with a view to increasing the enfranchisement price.
- As has been said by those representing the Respondent and the Interested Party, this Tribunal has the power to exercise county court jurisdiction and if a proper application for forfeiture had been made in the county court, it could have been transferred to this Tribunal so that the section 168 application and the forfeiture application could have been dealt with together to save all parties a considerable sum in costs. This Tribunal chair is authorised to deal with county court matters having been a Deputy District Judge for many years. The fact that this was not done gives a further indication that the sole purpose of this late application is to obstruct matters.
- As has been said, the Applicants' application form states specifically that if application for consent to these alterations to the basement flat were to be received, it would be refused. Bearing in mind the

timing of this application under section 168 of the 2002 Act, the Tribunal simply does not accept that this is either an honest and/or reasonable statement bearing in mind that consent being unreasonably withheld is unlawful.

31. In these circumstances, the Tribunal concludes that the test described by Lord Hobhouse in the **Norris** case is satisfied and the Applicants are 'litigating without any honest belief in any basis for doing so or litigating without having any legitimate interest in the litigation'. This takes into account the clear view from Mr. Anstead that he and his sister want to get rid of the freehold and, thus, are not interested in forfeiture.

Forfeiture

32. Whilst this Tribunal has no jurisdiction to make any ruling on the issue of forfeiture, one of its members is a chartered surveyor and both members have seen the expert evidence and have a great deal of experience in these matters. It is therefore felt that the following comments are relevant in any event.

33. Before the works were undertaken, this was a 1 bedroom flat. It is now a 2 bedroom flat with the main bedroom having an *en suite*. It was presumably the intention of the Respondent to increase rental income which is what should have been achieved. Thus the flat is now possibly more valuable than before. At the end of the term, the Respondent can either restore the flat to its previous condition or leave it as it is now. Thus the Applicants will not have lost anything at all and may in fact have a more valuable flat than before.

34. The fact that the Applicants clearly decided not to take enforcement proceedings when, without any doubt at all, they knew about the breach in 2016, gives a clear indication that either they had decided not to take any action to remedy any breach or, as may be more likely, their inaction has acted as acquiescence extending to implied consent to the work.

35. Mr. Anstead has said that unreasonably withholding consent is not relevant in this case as the lease does not use those words. It is clear from sub-section 19(2) of the **Landlord and Tenant Act 1927** that if a proper application for consent to the works had been served, then it would have been in breach of that Statute to withhold consent if it was unreasonably withheld. The clear intention of the Applicants not to take any action before now suggests, at the very least, that withholding consent would have been unreasonable. It is known that planning permission was obtained and, presumably, Building Regulation approval needed.

Costs

36. It is unfortunate that no costs schedule was provided as the Tribunal is likely to have found that the Applicants have behaved unreasonably in the sense defined by the Upper Tribunal in **Willow Court Management Co. Ltd. v. Alexander and others** [2016] UKUT 290 (LC). However, rather than just adjourn the matter (and incur yet further costs), the Tribunal concluded that the extra costs incurred by the section 168 Application would not have been that great.

37. The arguments about development potential and compensation for these breaches would have had to have been thought about and argued in any event as part of the enfranchisement application. The Respondent and Interested Party have to bear those costs. Thus, as a matter of proportionality as much as anything else, the Tribunal did not consider that a further hearing and determination were reasonable.

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Judge Edgington
1st July 2020

ANNEX - RIGHTS OF APPEAL

i. 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 Tribunal at the Regional office which has been dealing with the case.

ii. 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.

iii. If the application is not made within the 28 day time limit, such application must include a request for 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.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. 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.