First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	**:**	**LON/00AG/LBC/2021/0027**
Property	**:**	**Flat 29, 95 Avenue Road, London NW6 6HY**
Applicant **Represented by**	**:**	**95 Avenue Road Investments Ltd.** **Mahmoud Mostafavi (director)**
Respondent **Represented by**	**:**	**Moonline Company II Ltd.** **Sam Madge-Wyld of counsel (Trowers & Hamlins LLP)**
Date of Application	**:**	**6th April 2021**
Type of Application	**:**	**For a determination that breaches have occurred in covenants and/or conditions in a long lease with the Respondent as tenant (Section 168(4) Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"))**
Tribunal	**:**	**Bruce Edgington (lawyer chair)** **Stephen Mason FRICS**
Date & place of hearing:		**5th August 2021 as a video and telephone hearing from 10 Alfred Place, London WC1E 7LR in view of Covid pandemic restrictions**

DECISION

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1. The Respondent's application to strike out the main application is refused.

2. The current long lease of the property is dated 7th March 2014. The term is for 189 years (less 10 days) commencing on 25th March 1959. This application alleges that the Respondent is in breach of a number of terms of a lease, as follows:

   (a) Clause 2(7)
   "*the Tenant will not alter the internal planning or height elevation or appearance of the Flat nor at any time make any alterations or additions thereto nor cut maim or remove any of the party or other*

walls of the principal or bearing timbers or iron steel or other supports thereof (otherwise than for the purposes of applying and making good any defect therein) nor carry out any development thereto nor change the user thereof (within the meaning of any legislation for the time being relating to Town and Country Planning) without the previous consents in writing of the Lessor and of the Head Lessee such consent not to be unreasonably withheld or delayed"

The allegations are that the Respondent, without seeking the landlord's permission, has installed (a) air conditioning units involving making holes in walls and putting units on a terrace and (b) reduced the ceiling heights in the kitchen and bathrooms by installing false ceilings and spotlights therein.

Decision: There were breaches in respect of these matters but the Tribunal concludes that such breaches must have been the subject of waiver and/or *estoppel* in 2014 or beforehand by the landlord i. e. there is no breach.

(b) Fourth Schedule, regulation 12
"*not to reside or permit any other person to reside in the Flat unless the floors thereof (including the passages) are covered with carpet or felt or (in the bathroom lavatory and kitchen only) linoleum or sound absorbing tiles…"*

The allegation is that the Respondent has allowed people to live in the flat without the floors being covered with carpet or felt. A further allegation has been made that no wooden floors are permitted at all but this cannot be right because (a) the wording of this clause does not say that and (b) clause 2.3, below, states that floorboards exist in the flat.

Decision: The Respondent's case is that no-one has lived in the Flat since 2013 but there were occupiers before then. The photographic evidence shows that the wooden floors in the flat were only partially covered in carpets and felt and the Tribunal concludes, on balance, that there was a breach. Again, the Tribunal concludes that such breaches must have been the subject of waiver and/or *estoppel* in 2014 or beforehand by the landlord i.e. there is no breach.

(c) Clause 2.9.6
"*permit the Lessor or the Head Lessee or their respective agents either alone or with workmen at any reasonable hour in the daytime after reasonable notice to enter the Flat and examine the state of repair and condition thereof…"*

The allegation is that the Respondent has failed to allow the Applicant to enter the Flat to allow such an inspection.

Decision: No Breach. The Respondent says that the original notice seeking the right to inspect was never received. Thereafter there was full co-operation and the Applicant's surveyor was allowed to have a 3 hour inspection on 17th May and a further inspection on 1st July (page R4). In any event the letter relied upon by the Applicant was not a

'notice to enter the flat'. It was simply a letter advising the Respondent that the Applicant wanted to inspect the flat without giving any specific date or time i.e. it was not a 'notice to enter the flat and examine the state of repair'.

(d) Clause 2.3

"That the Tenant will from time to time and at all times during the Term well and substantially maintain and keep clean and in good repair and condition the interior of the Flat (including all floorboards plaster and other surface coverings and all window glass and window sashes frames cords catches and fastenings) and the Lessor's fixtures therein and in particular will as occasion requires thoroughly clean all windows and all cisterns boilers and water pipes and will keep all water gas and other pipes and sewers drains tubes meters wires and cables now laid or hereafter to be laid for the exclusive service of the Flat in or upon or under the Flat or any part thereof in good repair an condition"

The Applicant has produced a lengthy 'report' setting out what the surveyor considers to be breaches in this clause which will cost £282,785.96 to deal with. Many items simply say that decoration and other items are 'aged' without any real description as to why there is alleged to be a breach. The Respondent has also produced an 'inventory' dated 2012 which says that more or less everything in the Flat is in good condition. The Applicant, in response at the hearing pointed out that more recent sales particulars from estate agents suggest that the flat is in need of modernisation (page A54). That does not prove a lack of repair.

Decision: No breach proved. The Applicant's surveyor's report is not sufficiently focused to identify specific breaches in the lease terms. The 'inventory' also brings into question most, if not all, of the conclusions in the report. Further comments on this report are set out in the reasons below.

3. No order as to costs.

Reasons

Introduction

4. The Applicant has applied to the Tribunal for a determination that the Respondent is in breach of the terms of a long lease so that it can serve a forfeiture notice pursuant to section 146 of the **Law of Property Act 1925** ("the 1925 Act").

5. Each party has filed a bundle of documents with the Tribunal for the purpose of the hearing. Each has numbered pages and any numbers quoted will be from those bundles i.e. A1 etc. for the Applicant's bundle and R1 etc. for the Respondent's bundle.

6. The Tribunal has issued a directions order timetabling the case to this hearing. Further, a decision has been made refusing the Respondent's application to strike out the application by saying, in effect, that this Tribunal can consider such application further at this hearing. The

Tribunal has also decided that it will consider the alleged breach of clause 2.3 even though it is not referred to in the application. The purpose of this is to dispose of all disputes between the parties because the Applicant has stated that if the matter is not dealt with at this stage, a further application will be made.

7. There are serious allegations by the Respondent of misbehaviour by the Applicant by, in particular, using this application as a means of preventing the Respondent from selling the Flat. Matters of motive and the reasonableness of the actions taken by parties are matters for the county court when it comes to decide whether a lease should be forfeited. This Tribunal is only concerned to make a decision about whether the terms of a lease have been breached.

The Law

8. Section 168 of the 2002 Act introduced a requirement that before a landlord of a long lease could start the forfeiture process and serve a notice under Section 146 of the 1925 Act, it must first make "*...an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred*".

9. On 1st July 2013, the Leasehold Valuation Tribunal was subsumed into this Tribunal which took over that jurisdiction.

10. In the case of **Forest House Estates Ltd. v Al-Harthi** [2013] UKUT 0479, LRX/148/2012, Peter McCrea FRICS considered the matters which should be determined by this Tribunal in fulfilling its duty under this legislation. He said, at paragraph 30,:-

> "*The question of whether a breach had been remedied by the time of the LVT's inspection was not an issue for determination by the LVT. Questions relating to remedy, damages for breach and forfeiture are matters for the court. The LVT was entitled to record the fact that the breach had been remedied by the time of its inspection, but that finding was peripheral to its main task under section 168(4) of the 2002 Act. The LVT should have made an explicit determination that there had been a breach of covenant, notwithstanding that the breach had subsequently been remedied at the time of the LVT's inspection*"

11. That decision is binding on this Tribunal and means, in effect, that the law as it stands is that the only task of this Tribunal in an application under sub-section 168(4) of the 2002 Act (which is all this application is) is to say whether there has been a breach, even if there was no longer a breach at the date of the Tribunal's determination. The reason for that is that this Tribunal is not determining whether to forfeit the lease or grant relief against forfeiture. That is a matter for the court.

12. The case of **Swanston Grange (Luton) Management Ltd. v Langley-Essen** [2007] WLUK 275 being a Lands Tribunal decision is also

relevant. In that case, it was held that if a covenant had been suspended because of waiver or *estoppel*, a breach will not have occurred.

The Inspection

13. The members of the Tribunal did not consider it necessary to inspect the property in order to determine the issues raised. There are many photographs in the bundles of the inside of the property and the terraces.

The Hearing

14. Those who attended the video hearing were Mr. Sam Madge-Wyld, counsel for the Respondent, together with the witness Amina El-Youssoffi. There were also representatives from Mr. Madge-Wyld's instructing solicitors and from the Respondent company.

15. There was no-one present from the Applicant at the start of the hearing. Efforts were made to try to contact Mahmoud Mostafavi as the Tribunal had been notified in advance that he would be attending. It transpired that he had tried to make contact but his internet had let him down. Eventually he was able to contact the Tribunal by telephone and both he and the Tribunal were happy to proceed in that way.

16. The Tribunal Judge introduced himself and the other Tribunal member. He then explained that he would ask some questions which arose from the papers and then invite each side to put their case. The Tribunal wing member would be invited to put any questions he had at the appropriate time. That was how the hearing proceeded.

17. In essence, the hearing was dealt with on representations but Mr. Madge-Wyld and Mr. Mostafavi asked each other questions. Mr. Mostafavi confirmed that the Applicant's surveyor, Mr. R.A. Shulter FRICS, had not been asked to attend the hearing despite the Applicant wanting a determination to be made on the surveyor's evidence relating to lack of repair.

18. There were many arguments put for each side which are dealt with in the decisions or below so far as they are relevant to this Tribunal's task.

Discussion

19. As is set out in the **Forest House Estates Ltd.** case above, all the Tribunal has to determine is whether there has been a breach in the terms of a lease. Any reason, mitigation or rectification is a matter for the court in determining whether there should be forfeiture and/or relief against forfeiture.

20. In disputing this application the Respondent makes 4 main points i.e. (a) that the application is false and/or without any merit and should be struck out (b) that there has been no refusal to allow an inspection of the Flat (c) that the application relating to the general condition of the property was not in the initial application and should be ignored and (d) that the alleged breaches of clause 2.7 cannot be considered as the alleged breaches took place before the date of the lease.

21. The problem with the last of those points is that the lease is in fact a lease renewal under the terms of section 56 of the **Leasehold Reform, Housing and Urban Development Act 1993** ("the 1993 Act"). As is set out on page A20, the 'existing' lease is dated 23rd December 1960. The 2014 lease is described in the recitals on page A21 as being for the term of 189 less 10 days from the 25th March 1959. On page A20 it is said that the 1993 Act "*has required the Lessor to grant them a new lease of the flat for an extended term under the Act in substitution for the term granted by the Existing Lease*" i.e. not a completely new lease but an extended term in substitution for the existing lease.

22. Section 56 of the 1993 Act also makes it clear that the lease renewal is "*in substitution for the existing lease*". Section 57 then says that the renewed lease "*shall be a lease on the same terms as those of the existing lease*" subject to one or two exceptions which are not relevant to this case.

23. Accordingly, if, as is stated by the Respondent, the various alterations to the property were undertaken in 2001, then the terms of the original lease are encapsulated into the renewed lease and if there was a breach, then it remains a breach of what the 1993 Act says is the 'existing lease'.

24. Similarly, the Respondent says that no-one has lived at the property since 2013 (page R2) and the provision relating to carpeting is not relevant under a lease dated 2014. For the same reason as above, that is not the case.

25. When this was pointed out to Mr. Madge-Wyld, he was very clear that he disagreed profoundly with that. He pointed out that many new flats or leasehold houses have leases dated on completion of such leases where the term started some time before then. The new leaseholder could not be liable for a breach before the date of the lease because the parties had not then been in a contractual relationship. That must be right.

26. However, in this case we have the landlord and tenant in a contractual relationship before the lease is renewed. Thus any breach of the 'existing' lease will still be a breach of such lease and because the new lease is a substitution for the 'existing' lease, the breach does not simply go away.

27. It may be that Mr. Madge-Wyld had not fully understood the point being made. The **Forest House Estates** case referred to above makes it clear that if a breach has been rectified, a Tribunal must still make a finding that there has been a breach. By the same logic, if there has been a breach of an 'existing' lease which has been renewed, then the breach does not just disappear on renewal. The court's ability to do anything of an enforcement nature changes, but that is not a matter for this Tribunal.

Waiver and/or *estoppel*

28. Much has been made about the age of most of the alleged breaches. The Respondent's evidence, which is not disputed, is that the flat was substantially updated and renovated in 2001 without the landlord's permission in breach of the 'existing' lease. The evidence that no-one has lived in the flat since 2013 is also uncontested.

29. What is also clear is that a lease renewal process under the 1993 Act is complex and with a premium being paid of £720,000.00, it is inconceivable that the parties would not have obtained valuers' reports which would have involved an inspection. Mr. Mostafavi says that the Respondent should have provided copies. He also suggested that there may not have been reports.

30. Mr. Mostafavi does not appear to have made any effort himself to find out the true position. The Tribunal's clear conclusion is that on the balance of probabilities, which is all it has to consider, surveyors' reports were obtained and that it would have been clear to any landlord at the time of the lease renewal that there were breaches of the terms of the 'existing' lease but he/she or it decided to take no action when entering into the new contractual arrangement. That would constitute waiver and/or *estoppel* would apply. In those circumstances, **Swanston Grange** says that there is no breach.

Conclusions

31. The Tribunal does not dismiss the application because any motivation issue is a matter for the court to consider.

32. As far as the alleged breach of the repairing covenant is concerned, most of the entries just assume that something might be wrong. As one specific example, the work to electrics simply says that the systems for each room are over 10 years old, in poor and worn condition and 'appear to have minor miscellaneous faults'. These are unspecified and, in total, need work costing £36,739.98 plus professional fees, profit and VAT. It is respectfully suggested that the cost of completely rewiring this flat would be much less than that figure.

33. The report does not contain the notification required by the Royal Institution of Chartered Surveyors that the opinions stated are objective and professional and include a duty to the Tribunal. It is unsigned and contains the following endorsement "In the opinion of the surveyor all the works set out in this schedule are reasonably required in order to put the premises into the physical state required by the lease. Landlord's intentions have been sought and taken into account".

34. There is no indication that the surveyor has any idea of the condition of the property at the commencement of the term or, indeed, in 2014 when the substituted lease was dated, It gives the overall impression of being a list of everything the Applicant says should be done rather than a reasoned and professional opinion of a surveyor that there have been specific breaches of the terms of the lease.

35. What is a most telling feature of this allegation is that the Surveyor was not asked to attend the hearing so that he could be cross-examined on behalf of the Respondent and questioned by the Tribunal.

36. As far as the other alleged breaches are concerned, the Tribunal has considered all of the evidence and submissions made by the parties and its conclusions, on the balance of probabilities, are set out in the decisions above.

37. As far as costs are concerned, Mr. Mostafavi confirmed that he would be looking to the Respondent to pay his costs but he provided no indication of what those might be. Mr. Madge-Wyld simply said that any application for a costs order under rule 13 of **The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013** would be considered when the Tribunal's main decision was received. He had no details of any costs claim at this stage.

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Judge Edgington
6th August 2021

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.