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LONDON RENT ASSESSMENT PANEL

Commonhold and Leasehold Reform Act 2002 – Section 168

LON/00BB/LBC/2010/0014

Property	:	**GFF 238 Strone Road, Manor Park, London E12 6TP**	
Applicant	:	**Chamber Estates Limited**	**Landlord**
Represented by	:	**Mr M Paine, Circle Residential Management, Managing Agents**	
Respondent	:	**Sukhdev Goud Jarugula**	**Tenant**
Represented by	:	**No appearance**	
Date of Application:		**4 February 2010**	
Date of Hearing	:	**19 April 2010**	
Date of Decision	:	**22 May 2010**	
Tribunal	:	**Mr John Hewitt**	**Chairman**
		Mrs Jenna Davies	**FRICS**

Decision 22 May 2010

1. The decision of the Tribunal is that it determines that the breach of covenant in the lease complained of by the Applicant has not occurred.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing.

2. Background

2.1 The Applicant is the registered proprietor of the freehold premises known as 238 Strone Road [18]. Evidently that property was a Victorian house subsequently converted into two flats. Long leases of each of the flats were granted in 2006. The subject application relates to the ground floor flat.

2.2 On 4 February 2010 the Tribunal received an application from the Applicant as landlord made pursuant to s168(4) of the Act seeking a determination that a breach of covenant in the lease has occurred. The application stated:

"The Applicant believes that the following breach of the tenant's covenant has occurred:

The tenant has failed to keep the interior and the exterior of the property in good and substantial repair

In the opinion of the Applicant this constitutes a breach of the terms of the lease granted on the premises.

The Clause of the Lease that has in the opinion of the Applicant that has been breached is: ***3.6****"*

2.3 Directions were given on 9 February 2010. These were copied to Mortgage Express, Platform Funding Limited and JP Morgan Chase Bank all of whom have registered charges on the subject property. The Respondent notified the Tribunal that Mortgage Express had appointed an LPA receiver and he produced a letter from Mortgage Express dated 15 February 2010 which states that an LPA receiver, Templetons, was appointed on 2 March 2009.

2.4 The application came on for hearing before us on Monday 19 April 2010. The Applicant was represented by Mr M Paine of Circle

Residential Management Limited which he said had been appointed by the Applicant to act as its managing agents.

The Respondent was neither present nor represented. None of the chargees attended the hearing or made written representations.

3. The Lease

3.1 The lease is dated 29 September 2006 and was granted by Karamjit Singh Punni as landlord to the Respondent as tenant for a term of 99 years starting on 1 January 2006 at an initial ground rent of £100 per annum and on other terms and conditions therein set out.

3.2 The lease defines the demised premises as the Property being:

The 'Property' means Ground Floor Flat, 238 Strone Road Manor Park London E12 6TP as the same is more particularly shown edged red on the plan annexed hereto."

We were not provided with a copy of the plan but Mr Paine sought to assure us that, as recorded in paragraph 6 of his witness statement [23] he has examined the lease plan and he is satisfied that the photographs on which he relies [24-31] all depict the demised premises.

3.3 Clause 3 of the lease sets out a number of covenants to be observed by the tenant. Material to the application before us is clause 3.6 which, so far as relevant provides:

"3.6 To keep the interior and the exterior of the Property in good and substantial repair and condition (and so yield it up to the Landlord on the determination of this Lease) and if necessary to rebuild any parts that require to be rebuilt and paint with three coats of paint all the exterior parts normally painted every three years in a colour determined by agreement between the Tenant and the owner of the Other Premises [the first floor flat] *after discussion between them and in default of agreement in the same manner and colours as the Building may then bear and to carry out all the work in a good and substantial manner. If the Tenant fails to comply with this covenant the Landlord or the owner of the Other Premises may (but is not bound to) enter the Property and carry out the work at the expense of the Tenant*

who shall repay such expenses on demand as if the same were payable as rent in arrears."

Clause 3.7 of the lease obliges the tenant at the end of the term, or earlier if the lease comes to an end more quickly, to give up the Property in the condition it should be in if the tenant has complied with the obligation in clause 3.6 (the lease actually cites *"clause 3.5"* but we take this to be another typing error in the lease).

Repairing obligations

4. Before dealing with evidence in this case it may be helpful to make some general observations about the repairing obligations of tenants of long leases of residential property.

5. The general subject of repairs or dilapidations is considerable as can be seen from the size of *Dowding & Reynolds: Dilapidations: The Modern Law and Practice* Fourth edition published in 2008 which is well acknowledged as being an authoritative work on the subject.

6. Context is everything and we must, of course, construe the subject lease as drawn in 2006 having regard to what the parties had in mind at that time.

7. At the time of grant in 2006, 238 Strone Road was a house built some 100 years beforehand in what is now a modest part of East London and which had at sometime been converted into two flats. Both flats have been let on long leases.

8. It is evident from the evidence we mention below that at the time of the grant of the lease of the subject property it was not in pristine condition throughout.

9. The lease granted a term of 99 years and the Property was to be used as a dwelling-house. We conclude that at the time of grant the parties must have intended that over the life of the lease parts of the Property

will be renewed and replaced, modernised and refurbished. For example new kitchens, bathrooms, fitting and boilers might be installed every 10 to 15 years or so. Elements of the Property will from time to time become dated and tired and will be ripe for replacement or renewal. The timing of this will, to some extent, be a matter of taste and perhaps resources for the tenant. For example a tenant occupying the flat as his or her residence might prefer to modernise and refurbishment frequently if they have the money and taste to do so. Some tenants will be willing to live with dated fittings for longer periods than others. On the other hand a tenant who has purchased the Property as an investment may choose to redecorate or refurbish frequently depending on the investment strategy adopted and the level of rental income sought to be achieved. Further we bear in mind that the nature of quality of the immediate neighbourhood is likely to wax and wan over the term of the lease.

10. In these circumstances we find that it is unrealistic to expect the Property and its fittings to be in pristine condition at all times. It is likely that in practice there is never a clear and certain moment in time when the Property (or its fittings) suddenly changes from being in repair to being out of repair. There will be periods of time, perhaps quite lengthy periods of time when some part of the Property is ripe and ready for renewal and replacement and yet remains functional and adequate on some level.

11. We also consider that there is some distinction to be drawn between routine repair, maintenance and decoration and more substantial repairs which have a material effect on the value of the leasehold and freehold interests.

12. Against this background we note that the obligation in the lease is:
"To keep the ... Property in good and substantial repair and condition (and so yield up...)..."

We also note the discussion about qualifying expressions set out in paragraph 9-03 of *Dowding & Reynolds* and the view of the authors that the words *'good'* or *'substantial'* reinforce the general principle that a covenant to repair does not require the premises to be kept in perfect repair.

13. In *Commercial Union Life Assurance Co Limited v Label Ink Ltd* [2001] L & TR 29 the covenant was: *"to keep the demised premises in good and substantial repair..."*. The judge held that 'good and substantial' does not mean pristine condition or even perfect repair. He accepted that 'substantial' was not the same word as 'tenantable' and that it fell short of perfection. He went on to hold that minor defects did not amount to a breach of the covenant. We are mindful however that the context of this case was the extent of repair as a condition precedent to the exercise of a break option and that the judge's construction of the condition precedent was subsequently disapproved by the Court of Appeal.

14. We note that in both *Riverside Property Investments v Blackhawk Automotive* [2005] EWHC 993 (TCC) and in *Carmel Southend v Strachan & Henshaw* [2007] 3 EGLR 15 it was held that a covenant 'well and substantially' to repair does not require the tenant to put the property into perfect repair or into pristine condition.

15. In *Plough Investments Ltd v Manchester City Council* [1989] 1 EGLR 244 it was held that cracks in the brickwork of a building which was over 60 years old when the lease was granted did not constitute a breach of covenant to repair. Similarly cracks in plaster work have been held to be insufficiently serious to amount to a breach of covenant to repair.

16. In *Quick v Taff-Ely Borough Council* [1986] QB 809 it was held that the mere existence of damp is not 'disrepair'.

17. We conclude from our review of the authorities that not every defect in the subject matter of the covenant will necessarily amount to a breach of covenant to repair. We propose to adopt the general principle as set out in paragraph 9-05 of *Dowding & Reynolds:*
"The standard of repair under the general covenant is such repair as, having regard to the age, character and locality of the premises, would make them reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take them. The test applies to functional items (for example, an air handling plant as well as to the building fabric itself)."

Evidence

18. Mr Paine gave evidence. He said that he had not instructed a building surveyor to prepare a schedule of dilapidations. He said that he had been passing by and noticed that the property was empty. He took opportunity to take some photographs upon which he wished to rely in support of the Applicant's case.

19. It was not entirely clear to us what objective the Applicant sought to achieve in making this application. Mr Paine told us that the Applicant wanted the Tribunal's view on the alleged disrepair. He said that the Applicant did not propose to serve a notice pursuant to s146 Law of Property Act 1925 in respect of alleged disrepair. He said that if such a notice was served and if the tenant served a counter-notice claiming the benefit of Leasehold Property (Repairs) Act 1938, the extent of the disrepair was so limited that a court would not give permission to issue forfeiture proceedings because the landlord would not be able to make out any of the grounds set out in s1(5) of that Act.

20. Mr Paine took us through his photographs:

[24] Mr Paine submitted that this showed evidence that the wall was not painted and that a vent was missing. Mr Paine was unsure if the vent was really missing or in the process of being replaced.

We were not persuaded that this photograph shows disrepair within the context of the lease and the relevant law as set out above.

[25] Mr Paine submitted that this photograph showed lack of external redecoration. Mr Paine accepted that it showed the installation of two new air bricks and the installation of new windows, but he said that when he was at the Property there was no evidence of on-going works. We were not persuaded that this photograph amounts to evidence of disrepair.

[26, 30 and 31] Mr Paine submitted that these photographs showed evidence of damp. We find that they do not show evidence of damp. We find that at most they show blemishes on part of the walls of the Property. There was no material before us from which we could properly conclude that such blemishes were due to damp. They might simply be grubbiness or perhaps signs of black mould but neither of those, nor damp itself constitutes disrepair such as to amount to a breach of covenant.

[27 and 28] Mr Paine submitted that these photographs showed evidence of the poor condition of landlord's fixtures and fittings and general disrepair of the kitchen. As to the tape across the sink, Mr Paine told us that his experience was that when a mortgagee repossessed a property it was common practice to put such tape across sinks, baths and boilers. Mr Paine told us that the presence of the tape did not necessarily mean that the sink was not functional and safe to use. The impression we gained from the photographs was that the tiling and fittings were rather dated and had probably been installed some time prior to the grant of the lease in 2006. We find that we cannot conclude from the photographs that the kitchen is in such disrepair as to amount to a breach of the repairing covenant. It seems to us that the photographs are not inconsistent with a kitchen undergoing refurbishment. The kitchen is plainly not pristine, but the impression given by the photographs is that the defects are mostly cosmetic. We also wish to note that clause 3.6 upon

which the Applicant relies imposes obligations in respect of exterior decorations; it does not impose any obligation as to interior decorations.

[29] Mr Paine submitted that this photograph showed evidence of the poor condition of the boiler and general lack of decoration of the kitchen. Again we find that the presence of the tape is not evidence that the boiler is unsafe or defective; we accept Mr Paine's evidence that such tape is applied as a matter of routine. We were not persuaded that the photograph amounts to evidence of disrepair such as to amount to a breach of covenant.

20. Mr Paine submitted that when he inspected the Property it was not in a tenantable condition such that it could be let for a short term let in the market. We reject this as the appropriate test. We have identified above the correct test to be adopted as between landlord and long leaseholder. However we do agree with Mr Paine that if the Respondent tenant proposed to offer the Property for a short term let in the market it is inevitable that Property would need to be tidied up. In the experience of the members of the Tribunal the photographs show a property that has been let and not particularly well cared for. Landlords in the short term residential lettings market will often receive properties back in such a condition and will often have to carry out tidy up works in order to put them into a suitable condition for re-letting. We have no doubt that properties in such a transient stage and in need of tidying up cannot be said to be in disrepair such as to amount to a breach of covenant. We have no doubt that when the lease was granted the parties would have had in their minds that from time to time such refurbishment and tidying up works would be carried out on several occasions during the course of the term of 99 years.

Inspection

21. The Tribunal concluded that it did not require to inspect the Property in order to arrive at its decision.

John Hewitt

Chairman

22 May 2010