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LONDON RENT ASSESSMENT PANEL

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

Case Reference: LON/00AT/LBC/2013/0003

Premises: 88 Thames Road, Chiswick, London W4 3RE

Applicants: (1) Andrew Paul Douglas Ross
(2) Michael Tear (freeholders/landlord)

Representative: John Collis Solicitors

Respondent: Hon Keung Wong (leaseholder/tenant)

Representative: EDC Lord & Co Solicitors

Date of hearing: 24.4.13

Appearance for Applicants: Ms Joanna Oreibar-Reid of John Collis Solicitors

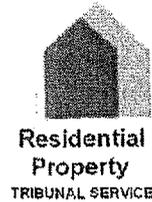
Appearance for Respondent: Mr Kevin Farrelly of Counsel

Leasehold Valuation Tribunal: Ms N Hawkes
Mr D I Jagger MRICS
Miss R I Emblin JP

Date of decision: 13.5.13



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Mr D I Jagger MRICS
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Decisions of the Tribunal

An agreement having been reached by the parties in respect of many aspects of this application, the terms of which are recorded below, the Tribunal finds that it has no jurisdiction to make a determination in respect of the remaining matters in dispute which concern alleged breaches of covenant which are said to have occurred prior to the grant of a new lease of the property to the Respondent on 19th March 2010.

The application

1. The Applicants seek a determination pursuant to subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act") that the Respondent is in breach of covenant by virtue work to carried out to the property in 1994 and in 2007 which is said to have resulted in damage to 86 Thames Road.
2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. The Applicants were represented by Ms Joanna Orelbar-Reid of John Collis Solicitors at the hearing and the Respondent was represented by Mr Kevin Farrelly of Counsel.
4. Immediately prior to the hearing the Applicants handed in further documents, namely a bundle containing new photographs and a foundation plan. It was agreed that these documents would be admitted in evidence subject to the Respondent reserving the right to make further submissions to the Tribunal should any prejudice subsequently become apparent.
5. Part-way through the evidence of the Respondent's expert, Mr Gabriel FRICS, the Respondent handed in a further document, namely an undated Schedule of Condition relating to 86 Thames Road. Both the Tribunal and the Applicants' solicitor were concerned by the fact that this document was produced so late. However, on the basis that Mr Little FRICS, the Applicant's expert, indicated that he was not prejudiced by the late production of this document, it was admitted in evidence.

The background

6. 86 and 88 Thames Road, Chiswick, London W4 3RE is a purpose built, two storey, terraced property divided into two flats with a two storey back addition. 86 Thames Road is the lower flat and 88 Thames Road is the upper flat. Both flats are let on long leases.
7. Photographs of the building were provided by the parties. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

8. The Applicants purchased 86 Thames Road in 1980. A Mr Eastaway became the long leaseholder of 88 Thames Road in 1992. In about 1994, Mr Eastaway removed all or substantial parts of chimney breasts at first floor level. Later in 1994 the Respondent became the registered long leaseholder of 88 Thames Road. In 2007, the Respondent carried out refurbishment work to 88 Thames Road.
9. The Respondent obtained a new lease of 88 Thames Road in 2010 pursuant to the provisions of the Leasehold Reform, Housing and Urban Development Act 1993 in 2010 which was registered on 1st April 2010 under title number AGL212621 ("the new lease").

The issues

10. Prior to the start of the hearing, the parties reached an agreement in respect of various aspects of the application which, at the request of the Tribunal, they drew up in writing. The written agreement which was drawn up by the parties is as follows:

"A: SCHEDULE OF BREACHES AGREED TO EXIST

1. THAT THERE IS A BREACH OF CLAUSE 2(vii) OF THE LEASE BY VIRTUE OF THE PRESENCE OF SOME SPALLED AND CRACKED BRICKS ON THE FRONT ELEVATION OF THE SUBJECT PROPERTY AND BY VIRTUE OF THE CONDITION OF THE MORTAR POINTING ON THAT ELEVATION

2. THAT THERE IS A BREACH OF CLAUSE 2(vii) OF THE LEASE BY VIRTUE OF SOME RIDGE TILE CAPPINGS ON THE PARAPET WALLS OF THE SUBJECT PROPERTY BEING MISSING AND SOME BEING LOOSE

3. THAT THERE IS A BREACH OF CLAUSE 2(vii) OF THE LEASE BY VIRTUE OF SOME OF THE MORTAR POINTING ON STACK 3 BEING DEFECTIVE

B: SCHEDULE OF BREACHES AGREED NOT TO EXIST

4 THAT THERE IS NO BREACH OF COVENANT IN RESPECT OF THE WINDOWS AT THE SUBEJCT PROPERTY

C: SCHEDULE OF MATTERS AGREED TO BE PRACTICAL

5. THAT STACK 2 SHOULD BE REMOVED DOWN TO BELOW THE ROOF SLOPE LEVEL AND THE OPENING IN THE ROOF SLOPE BE MADE GOOD

6. THAT STACK 1 AND STACK 3 SHOULD BE CAPPED OFF WITH VENTED CAPS

FOR THE AVOIDANCE OF DOUBT, THE RESPONDENT IS WILLING AND DESIROUS OF

(1) REMEDYING THE BREACHES IDENTIFIED IN PARAGRAPHS 1-3 INCLUSIVE ABOVE AND

(2) CARRYING OUT THE WORKS IDENTIFIED IN PARAGRAPHS 5 AND 6 ABOVE,

SUBJECT TO

(1) THE APPLICANTS GRANTING THE RESPONDENT, HIS SERVANTS AND AGENTS WITH OR WITHOUT EQUIPMENT AND MATERIALS ALL SUCH RIGHTS OF ACCESS AS ARE REASONABLY NEEDED TO CARRY OUT THE WORKS

(2) THE APPLICANTS NOT UNREASONABLY WITHHOLDING CONSENT TO THE WORKS"

11. The Tribunal commends the parties and their legal advisors for having reached this agreement notwithstanding the long history to this application. The parties identified the remaining issues as follows:
- (i) Whether or not the Tribunal has jurisdiction to make a determination of breach of covenant in respect of the pre-2010 lease ("the old lease").
 - (ii) In the event that the Tribunal finds that it does not have jurisdiction to make a determination of breach of covenant in respect of the old lease, the Tribunal (having heard evidence from the parties' surveyors) was invited to give an indication as to whether or not if it had had jurisdiction it would have found that:
 - (a) the removal of the chimney breasts in 88 Thames Road in around 1994; and/or
 - (b) the works of renovation carried out by the Respondent to 88 Thames Road in 2007;
- caused cracking in 86 Thames Road. The Tribunal was not invited to make any further observations.

12. Having heard evidence and submissions from the parties and having considered all of the documents referred to by the parties, the Tribunal has made determinations on the various issues as follows.

The jurisdiction issue

13. Mr Farrelly accepted that there is a potential action in damages against the Respondent in respect of any breaches of the old lease and, as is apparent from the agreement between the parties which is recorded above, he accepted that some of the matters complained of in the Applicants' application amount to on-going breaches of covenant.
14. However, he argued that the Applicants cannot forfeit the new lease on the basis of breaches (if established) of an earlier lease. The works about which complaint is made were carried out in about 1994 and in 2007 and are not on-going. "The lease" referred to in subsection 168(4) is the lease in respect of which forfeiture is sought.
15. Ms Orlebar-Reid argued that the only aspect of the new lease which differs from the original lease is the term and that it would be unjust if the Applicants' were unable to forfeit the new lease by virtue of breaches of the old lease when the material covenants are identical.
16. The Tribunal prefers Mr Farrelly's submissions and finds that it is not possible to forfeit the new lease on the basis of breaches of an earlier lease. Accordingly, the Tribunal finds that it does not have jurisdiction to determine whether or not there has been a breach of the old lease.

The expert evidence

17. As stated above, the Tribunal was invited to give an indication as to what its finding would have been in respect of the cause of the cracking in 88 Thames Road, in event that it had found that it did have jurisdiction. Its findings on this issue would have been as follows.
18. The Tribunal accepts that it is likely that there is long standing movement in 86 and 88 Thames Road which is evidenced by external cracking. The lath and plaster in 86 Thames Road is over 100 years old and has exceeded its life expectancy. The Tribunal finds that there would have been some cracking to the lath and plaster in 86 Thames Road, regardless of the 1994 and the 2007 works, due to the history of movement to the property and due to the age and type of the materials concerned.
19. However, the Tribunal finds that the work carried out to 88 Thames Road in 1994 added to the cracking to 86 Thames Road because of the location of some of the cracks directly below where the chimney breasts were removed and because the removal of all or significant parts of chimney breasts would

lead to a high level of vibration whilst the work was being carried out. In a property of this type with suspended timber floors it is likely on the balance of probabilities that the cracking in 86 Thames Road would have been significantly exacerbated by the removal of sections of chimney breast.

20. The work carried out in 2007 included the removal of part of a wall and the fitting of a new kitchen and bathroom. The Tribunal accepts Mr Ross's evidence that he heard crashing noises emanating from 88 Thames Road during the course of this work. The Tribunal finds that this work is also likely on the balance of probabilities to have increased the extent of the pre-existing cracking in 86 Thames Road.
21. However, the Tribunal notes that these additional cracks to 86 Thames Road are not structural and can be filled during the normal course of decoration. The Tribunal hopes that, having reached an agreement in relation to many of the issues which were initially in dispute, the parties will be able to reach an agreement regarding this relatively minor residual matter without incurring the time and expense of a County Court action for damages.

Chairman:



Naomi Hawkes

Date:

13.5.13

Appendix of relevant legislation

The Commonhold and Leasehold Reform Act 2002

Section 168

168 No forfeiture notice before determination of breach

(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) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(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.

(5) But a landlord may not make an application under subsection (4) in respect of a matter which—

- (a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
- (b) has been the subject of determination by a court, or
- (c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.