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HM Courts & Tribunals Service

Residential Property TRIBUNAL SERVICE

London Rent Assessment Panel

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

Case Reference: LON/00BH/LBC/2012/0035

Premises: 23 Essex Mansions, Essex Road South, Leytonstone, London E11 1 JP

Applicants	:	**Richard James Nagle**
		Margaret Rosaleen Nagle
		Gavin Richard Nagle
Representative	:	**Mr Gavin Nagle supported by Mr Richard Nagle**
Respondent	:	**Ms Priscilla Viola Lake**
Representative	:	**Mr Daniel Dovar of Counsel**
Date of Hearing	:	**28 May 2012**
Leasehold Valuation Tribunal	:	**Mr John Hewitt** **Chairman** **Mr Neil Maloney** **FRICS FIRPM MEWI**
Date of Decision	:	**31 May 2012**

Decisions of the Tribunal

1. The Tribunal determines that:
   1.1 The Applicants' application pursuant to section 168(4) of the Act for a determination that a breach of covenant or condition in the lease has occurred shall be, and is hereby, dismissed; and

1.2 The Respondent's application for costs pursuant to paragraph 10 of Schedule 12 to the Act shall be, and is hereby, dismissed.

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.

The Application

2. On 21 March 2012 the Applicants made an application pursuant to section 168(4) of the Act for a determination that a breach of covenant had occurred. The application alleged breach of two separate covenants on the part of the lessee:

1. Sub clause 2(17)
   " Not during the said term to (i) cut or maim any of the walls floors timbers stanchions pipes girders hot water supplies or installations of the Flat ..."
2. Sub clause 2(6)
   "To observe the restrictions specified in the Third Schedule hereto"
   Paragraph 7 of the Third Schedule reads:
   "7. The exterior of the Flat shall not be decorated otherwise than by the Lessor".

3. Directions were given 23 March 2012 and the parties have complied with them.

The hearing

4. The application came on for hearing before us on 28 May 2012. The Applicants (the Nagles) were represented by Mr Gavin Nagle. He was supported by his father Mr Richard Nagle. The Respondent (Ms Lake) was represented by Mr Daniel Dovar of counsel.

5. Oral evidence was given by Mr Gavin Nagle, his witness statement is at [20] and by Ms Lake whose witness statement is at [75]. Both Mr Nagle and Ms Lake were cross-examined.

6. Opening and closing statements were made by Mr Gavin Nagle and Mr Dovar.

The issues

7. The issues turn around a metal security gate which Ms Lake has had installed on the outside wall of her flat and cross the existing entrance door into her flat. It is not in dispute that the security gate has been installed although there is a dispute as to when it was installed.
   A metal frame work holding the gate has been fixed to the wall by a number of bolts; at the hearing both parties assumed by about 8 bolts. We infer that the installer would have drilled into the brickwork, inserted a Rawlplug or similar device and then driven the bolt home into the

drilled hole. The security gate is illustrated in a number of photographs at [69 – 74] all of which were taken in April 2012.

8. The gist of the Nagles' case is the drilling into the wall which has occurred amounts to a breach of the covenant at 2(17) *" Not to ... cut or maim the walls ... of the Flat"* and separately that the installation of the security gate is a failure to observe paragraph 7 of the Third Schedule, *"The exterior of the Flat shall not be decorated otherwise than by the Lessor"* on the footing that the security gate is a decoration.

9. The gist of Ms Lake's case is first that she was given oral permission by Mr Gavin Nagle, in his then position of managing agent acting on behalf of his father, to install the security gate, such that the landlord waived compliance with the covenant as regards the gate.

   Ms Lake's alternative argument is that the landlord knew of the existence of the gate from at least 2004 and did not take issue with it until late 2011 and effectively abandoned compliance with clause 2(17) as regards the gate.

   Ms Lake's further alternative position is that the drilling of the bolt holes did not amount to 'cutting or maiming the wall'.

   Finally Ms Lake denies that the security gate is a decoration; on the contrary it is a functional security device.

The lease

10. The subject lease [24] is dated 4 April 1986. It was granted as an underlease by St Leonards Properties Limited to Peter Shek Fai U and Annie On Nei Tam U for a term of 138n years from 29 September 1937 at a ground rent of £60 pa rising to £180 pa and on other terms and conditions therein set out.
    Ms Lake was registered at the Land Registry as proprietor of the lease on 15 March 1991.

11. The lease is relatively unsophisticated. It contains no definition of the demised premises other than Flat 23 on the second floor of the building. The floor plan annexed to the lease [50] is said to be for the purpose of identification only and is of no assistance in what has or has not been demised.
    The 'Building' is defined to be:
    "the Block of flats and all structures ancillary thereto known as Essex Mansions, Essex Road ..."

12. The lessee's covenants are set out in clause 2 and are in fairly conventional form. Sub-clause 2(9) [33] is a covenant to repair and keep in good order and the condition the Flat (other than the parts comprised in and paragraphs (1) and (2) of clause 5, and its installations and the windows, window frames and exterior door giving

entry to the Flat (excluding the exterior decoration of such window frames and exterior door).
Clause 5 is a covenant on the part of the lessor. By clause 5(1)(i) the lessor covenants to maintain, repair, redecorate and renew the main structure and *"the main entrance pathways landings and staircases ... used ... in common ..."* and by clause 5(1)(ii) *"to decorate the exterior of the window frames and the door or doors giving entry to the Flat"*

13. The terms of the lease were not in issue.

14. The conveyancing history was not explained to us fully. The subject lease was granted by a head lessee. The reversionary interest and the freehold interest were in separate hands and one of them was owned by Mr Richard Nagle. Those interests came together in September 2008 when the head lease and the freehold estate merged and was registered at the Land Registry in the names of the Nagles [54].

Background matters not in issue

15. That Essex Mansions is a development of 30 self-contained one bedroom flats.

16. That the subject flat is located on the second floor and access is via a stairway to an open balcony which is partially protected from the elements by the underside of the balcony above. That the set-up is as illustrated in the photographs at [69 – 74].

17. That from at least 1991 the immediate management of the development has been in the hands of Mr Richard Nagle and that since then the development has from time to time been managed by Mr Gavin Nagle personally (with professional assistance as required) and at other times it has been managed by different managing agents appointed by or on behalf of the Nagles or one of them.

18. That at some point Ms Lake had the security gate installed.

19. That by the summer of 2004 at the latest Mr Gavin Nagle, in his capacity as managing agent for then landlord, was aware of the existence of the gate and was of the view that the presence of it amounted to a breach of the lease on the part of Ms Lake.

20. That since the summer of 2004 to date the immediate landlord has continued to demand and receive rent and service charges on a regular basis and has taken other steps with regards to the tenancy including consulting with Ms Lake and other lessees on a number of major works projects which fall within the consultation provisions of section 20 of the Landlord and Tenant Act 1985.

21. That the first challenge to Ms Lake about the presence of the security gate was made by letter dated 24 November 2011 when the Nagles' solicitors wrote to Ms Lake [60] requiring removal of the gate by 31

January 2012 and asserting that if it was not removed and injunction to order its removal was anticipated.

22. That Ms Lake's solicitors replied to that letter on 20 December 2011[61] and asserted *"... [it] was installed some ten years ago with the knowledge of Mr Gavin Nagle..."* and that breach of covenant was denied.

23. That in reply on 3 January 2012 the Nagles' solicitors denied that any permission had ever been given, asserted that *"uniformity of appearance"* was actively encouraged by the landlord and repeated that if the gate was not removed the claim for an injunction would be made.

24. That the Nagles have not made any claim to the court seeking an injunction requiring Ms Lake to remove the gate.

Findings of fact

25. As noted above we heard contested oral evidence from Mr Gavin Nagle and from Ms Lake. Our findings of fact on this evidence are set out below.

26. The evidence of Mr Nagle was that the gate was installed on some date between spring 2002 and summer of 2004.

27. Ms Lake is unable to recall the precise date it was installed save that it was at the time when Mr Gavin Nagle was acting as the managing agent. Ms Lake said that she suffered an attempted assault at her flat and that her response was to telephone Mr Gavin Nagle to obtain his permission to install a metal security gate. She said this was given to her and in consequence the gate was installed. Ms Lake could not recall exactly when this was although she thought it was 'some 10 years ago'. Ms Lake did not recall whether she wrote to Mr Nagle confirming his approval. Evidently Ms Lake has suffered water ingress into her flat and this has affected her papers and records. Ms Lake thought that the gate might have been installed as early as April 2000 because the key to the gate bears the telephone number of the locksmith and the number is prefixed 0171. Ms Lake produced a BT bill dated 15 January 2000 which contained a flash reminder that London 0171 numbers were due to change to 0207 as from 22 April 2000.

28. Mr Nagle said that he acted as managing agent from 7 December 1999 to the spring of 2002 when J P Blake took over. He said he visited the development generally once per month. He made a specific visit in early February 2002 in connection with an LVT hearing that was to take place that month. He is certain that no gate had been installed at that time.

29. Mr Nagle said that he resumed the role of managing agent in the spring of 2004 and continued to do so until 2009 when professional managing agents were appointed. Mr Nagle said that the time first time he noticed the security gate was in spring 2004 when he visited the development in preparation to resume management. He thus concludes that the gate was installed sometime between the February 2002 and the spring of 2004.

30. Mr Nagle was adamant that at no time was he asked for or did he give Ms Lake permission to install the gate.

31. We found Ms Lake to be a compelling witness. She plainly has an attention to detail. It was not in dispute that Ms Lake often wrote to the managing agents on matters concerning the development or service charges and sometimes sought permission to do something when, in fact no such permission was required, e.g. replacement of windows and doors which are demised to the lessee and which the lessee has to keep in repair.

32. We did not find the evidence of the telephone number on the key helpful because it is possible that the locksmith ordered a stock of blank keys with its number on and these may have been used up over time and after April 2000.

33. Doing the best we can and with the limited and conflicting evidence before us we find that on the balance of probabilities the gate had not been installed by February 2002 but that it had been installed by spring 2002 and before Mr Nagle handed over management to J P Blake, because we preferred the evidence of Ms Lake on the point of seeking and obtaining permission.

34. Mr Nagle said, and we accept, that the first time he noticed the gate was in the spring of 2004. He said nothing was done about it over the ensuing years because he and his family were busy with other priorities. Evidently these included several major works projects and marrying up the head leasehold and freehold interests. Mr Nagle was unable to give us a convincing explanation as to why there no time to even write a short note to Ms Lake about the gate. Mr Nagle said that he took advice and was informed that the landlord had up to 12 years to raise an alleged breach of covenant and thus did not consider there any need to rush.

35. In his oral evidence at the hearing Mr Nagle said that the Applicant's concern was over safety issues in that if one lessee was allowed to 'get away' with installing a gate which swings out onto and across the balcony walkway way other lessees would follow suit and a series of gates would constitute a danger. Mr Nagle conceded that safety was not a factor mentioned in his solicitors' letters of 24 November 2011 and 3 January 2012 and that it was not a factor that had been raised with him by any of the professionals who have acted for the Applicants

over the years and that it was not a factor mentioned in any of the fire risk assessment reports which the Applicants have procured over the years since 2004. We were not persuaded that safety or means of escape issues were at the forefront of the Applicants' mind set when raising the issue of the gate with Ms Lake in 2011. We infer that if safety was a real issue Mr Gavin, as a responsible managing agent, would have raised it sooner rather than later.

It was not clear to us what prompted the Applicants to raise the question of the gate in November 2011 and why they went straight to solicitors with it rather than try to resolve matters less formally through the managing agent. Moreover as a fact since the gate was installed in 2002 there has not been a flurry of gates installed by other lessees. The evidence was, which we accept, that only one other gate was erected and this was removed in 2011 following the receipt of a letter from the Applicants' solicitors.

36. Mr Nagle said that the objective of the Applicants is to have the gate removed. The Applicants hoped that if a determination that a breach of covenant had occurred was made Ms Lake would accept it and respect it and remove the gate voluntarily. He thus hoped that it would not be necessary for the Applicants to serve a notice pursuant to section 146 Law of Property Act 1925 and follow that up with forfeiture proceedings.

Discussion

Cutting and maiming

37. Mr Dovar submitted that the effect of the grant of permission to install the security gate is that compliance with the covenant at clause 2(17) is suspended so far as the gate is concerned. The LVT has jurisdiction to determine whether, at the relevant date, compliance with the covenant was suspended by reason of a waiver or estoppel. Thus the Respondent is not in breach of that covenant he said. He cited *Swanston Grange (Luton) Management Limited v Langley-Essen* [2008] L&TR 20, a decision of HHJ Huskinson sitting in the Lands Tribunal. We accept that submission. Here the Respondent sought permission to install the gate. She acted on that permission and at her expense installed it. It may well have amounted to an improvement, in the technical legal sense from her point of view. We conclude that in the sense explained by HHJ Huskinson the landlord waived the covenant in the sense of being estopped from relying upon its rights against the tenant under the covenant.

38. Mr Dovar also submitted that if the installation of the gate did amount to a breach, it was a once and for all breach which occurred in 2004 on the Applicants' case and earlier on the Respondent's case and that the absence of any enforcement steps over that period amounts to an abandonment of the covenant. He cited *Attorney General of Hong Kong v Fairfax Limited* [1997] 1 WLR 149 in support of the submission.

The facts of *Fairfax* were quite extreme both as regards the extent of the land holding in question and at the length of time (45 years) over which the landlord was aware of the breaches but failed to take any steps with regard to them. We prefer and accept Mr Nagle's submission that on that basis alone we can distinguish *Fairfax*. We do not find that the Applicants have abandoned the whole of clause 2(17) in the sense that the Respondent is free to carry out any of the matters prohibited by the clause.

39. Finally on this part of the application Mr Dovar submitted that the act of drilling about eight holes into the external brickwork of the walls and inserting bolts into them holding the frame for the gate is de minimis so as not to amount to a breach. Mr Dovar was unable to cite any authority to support the submission. Mr Nagle submitted that drilling into a wall is plainly cutting into it and also maiming it.

40. Drawing on the accumulated experience and expertise of the members of the Tribunal we conclude that a covenant not to 'cut or maim' main timbers, the structure or walls is an obligation to be found in many leases; both commercial and residential. It is often (but not exclusively) deployed as part of a covenant not to carry out alterations. The expression not to 'cut or maim' is usually used in conjunction suggesting that there might be a difference in the two actions or qualities of actions.

41. The absence of any assistance from the parties on the nature and extent of the obligation we have sought guidance from *Woodfall: Landlord and Tenant* a leading loose-leaf text book on the subject. Paragraph 11.258 discusses a covenant not to 'cut and maim' in the context of 'What is an alteration? It stated that a covenant not to cut or maim any of the principal walls or timbers is broken by the erection of a large electric light iron advertisement attached to the façade of a building by T-irons and iron brackets cemented into holes in the stone-work and cited *London County Council v Hutter* [1925] Ch 626.

42. The instant case is not so serious as *Hutter*, but holes have been drilled into the brickwork. That said, Mr Nagle did not assert that damage to the wall had occurred or that the effectiveness or strength of the brickwork had been impaired. Nor did he submit that there was any damage to the reversion.

43. Having decided that permission was given our conclusion on the de minimis submission will not affect the outcome of this application but in case this matter goes further we deal with it. We are not aware of any general proposition that a de minimis breach of covenant does not amount to a breach at all. If as a fact there is a breach then a breach has occurred. The nature and extent of the breach may be matter for a judge considering relief from forfeiture but it dies nit go the question, breach, yes or no. Our jurisdiction is to determine whether or not a breach has occurred. We consider that *Hutter* offers us some guidance

and we conclude that drilling holes into the brickwork would have amounted to a breach of clause 2(17) had it not been for the fact permission to do so was given.

Decoration

44. We have no hesitation in concluding that the installation of the security gate does not amount to decoration of the exterior of the Flat. The security gate is a functional security feature. It is a utility with a practical use. It is not in any sense decoration or ornamentation.

45. We conclude that paragraph 7 of the Third Schedule and the expression '*The exterior of the flat shall not be decorated otherwise than by the Lessor*' properly construed in the context of the lease as a whole is a prohibition on the lessee from carrying out works of decoration, that it say painting and decorating (or redecorating) the walls or windows and window frames and door and door frames of the flat. It does not mean that the outside cannot be 'decorated' by the display of garlands or bunting or similar.

46. We are reinforced in this conclusion by reading the lease as a whole and bearing in mind the context in 1986 when it was granted. We note that although the windows and doors and their frames are to be kept in repair by the lessee, the landlord has expressly reserved to itself the obligation in clause 5(1) *"(ii) to redecorate the exterior of the window frames and door or doors giving entry to the Flat"* and the costs of so doing form part of the service charge obligation. The prohibition in paragraph 7 has to be read in context with that reservation. We infer that it was inserted to enable the landlord to have some control on the external decorative appearance of the development.

47. Accordingly we find that the Applicants have not made out a case that a breach of clause 2(6) and paragraph 7 of the Third Schedule has occurred.

48. On an application for a determination under section 168(4) of the Act the burden of proof is on the landlord. Rightly that burden is a high one. This is because the determination sought can be the first step in a series of steps which might lead to the forfeiture of the lessee's home or a valuable asset owned by the lessee.

49. In the present case we find that the Applicants have failed to discharge the burden upon them and thus we have dismissed their application.

Costs

50. Mr Nagle told us that the Applicants had not incurred any costs in connection with the application and did not intend to do so. No application in relation to costs was made by Mr Nagle.

51. Mr Dovar made an application for costs pursuant to paragraph 10 of Schedule 12 to the Act. Mr Dovar said that his fee for appearing on

behalf of Ms Lake exceeded £500. The application was opposed by Mr Nagle.

52. In support of the application Mr Dovar submitted that the application was doomed from the outset in that even if a breach has been made out the landlord had long since waived the right to forfeit for the breach because rent and service charges have been demanded ever since the landlord was aware of the alleged breach – on their own case since the spring or summer of 2004 – some eight years. He said to set in train a forfeiture process by seeking a determination in a case where on its own evidence it has waived the right to forfeit so that it has precluded itself from obtaining an order for possession amounted to an abuse of process. He also asserted that the application was vexatious and frivolous being and part of a process to harass Ms Lake with whom the Applicants have a very poor relationship. At the very least he said that bringing and pursuing the application amounted to unreasonable conduct. Mr Dovar also questioned whether the Applicants had any genuine intention to bring forfeiture proceedings because no such relief had been mentioned in either of the two solicitors' letters in which the remedy threatened was limited to seeking an injunction.

53. Mr Dovar's submissions were powerful and we have considered them carefully.

54. In relation to a determination of an application under section 168(4) the Tribunal is not concerned with the question of waiver of a right to forfeit for breach because this is a matter for the county court judge. The Tribunal's jurisdiction is limited to determining whether or not a breach has occurred. However, in the context of an application for costs under paragraph 10 of Schedule 12 we consider that the question of waiver of the right to forfeit for the breach complained of is material to a decision on whether making the application under section 168(4) amounts to conduct within the ambit of paragraph 10.

55. In a case where a landlord has stated unequivocally that it proposes to pursue a claim for forfeiture to court where on its own evidence it has plainly waived the right to forfeit for breach such that its claim is doomed to failure we have no doubt that the making of application under section 168(4) can amount to conduct of the type mentioned in paragraph 10 so as satisfy the high threshold of paragraph 10 and justify the making of a punitive costs order.

56. However, on balance we find that the present case does not quite meet that high threshold. This is because Mr Nagle said that the Applicants had brought the application in the hope that it would be granted and that if it was Ms Lake would do the right thing and remove the gate. He said, and we accept, that the Applicants had not definitely ruled out or ruled in forfeiture proceedings. Although we are in doubt as to the Applicants' real motives in bringing the application we find that we have to give the benefit of that doubt to the Applicants. As we have said the

threshold for a punitive costs order under paragraph 10 is a high one and we find it has not quite been met in the present case.

57. We have therefore dismissed the application for costs.

58. In conclusion we wish to add that we were disappointed that the Applicants had not taken proper professional advice before embarking on the application under section 168(4). It is a very serious application to make and it is not one to be undertaken lightly. It has plainly caused Ms Lake worry and anxiety and no little expense. It has not advanced the Applicants cause or standing in any way and has not achieved any of the Applicants' apparent objectives. We would hope that on any future occasion much more thought would be given to and advice taken before such an application was made.

John Hewitt

Chairman

Date: 31 May 2012

Appendix of relevant legislation

Commonhold and Leasehold Reform Act 2002

Section 168
Subsection (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 (c20) (restriction on forfeiture) in respect of a breach by the tenant of a covenant or condition in the lease unless subsection (2) is satisfied.
Subsection (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.

Subsection (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.

Schedule 12, paragraph 10

(1) A leasehold valuation tribunal may determine that a party to proceedings shall pay the costs incurred by another party in connection with the proceedings in any circumstances falling within sub-paragraph (2).

(2) The circumstances are where—
  (a) he has made an application to the leasehold valuation tribunal which is dismissed in accordance with regulations made by virtue of paragraph 7, or
  (b) he has, in the opinion of the leasehold valuation tribunal, acted frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the proceedings.

(3) The amount which a party to proceedings may be ordered to pay in the proceedings by a determination under this paragraph shall not exceed—
  (a) £500, or
  (b) such other amount as may be specified in procedure regulations.

(4) A person shall not be required to pay costs incurred by another person in connection with proceedings before a leasehold valuation tribunal except by a determination under this paragraph or in accordance with provision made by any enactment other than this paragraph.