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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BE/LBC/2014/0050**
Property	:	**Flat 3, 72 Western Street, London SE1 3QG**
Applicant	:	**AHGR Ltd.**
Representative	:	**George Ide LLP Solicitors**
Respondent	:	**Mr Taman Powell**
Representative	:	**Huttons Solicitors**
Type of Application	:	**Determination of an alleged breach of covenant**
Tribunal	:	**Judge Dickie**
Date of Decision	:	**25 September 2014**

DECISION

SUMMARY

The application is dismissed.

REASONS

1. The Applicant is the registered freeholder of premises. The Respondent is the holder of the leasehold interest in the subject premises. The lease is dated 26 March 1999. The Applicant seeks a determination under subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the Act"), that the Respondent is in breach of various covenants contained in the lease. In particular the Applicant asserts that the Respondent is in breach of clauses 2.6.1 – 2.6.3 of the lease by making

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or permitting to be made alterations to the subject premises without the consent of the landlord, and is in breach of Clause 3.3.1 by using or permitting the premises to be used so as to cause a nuisance or annoyance to other tenants or occupiers of the building.

2. In the application the Applicant gave consent to a paper determination if the tribunal considered it appropriate. The tribunal issued directions dated 30 June 2014 notifying the parties that the application would be determined on the papers in the week commencing Monday 8 September 2014 unless by 31 July 2014 either party requests a hearing. Those directions further advised that the case file would be received in the week commencing 25 August 2014 in relation to the need for a hearing / inspection.

3. The parties complied with the directions that they should each file a bundle of documents. In a letter dated 12 August 2014 the Applicant's solicitors requested an extension of time thereafter to send a brief Reply. The Respondent's solicitors did not object but observed it was a matter for the tribunal to determine having regard to the issues and the effect of the request.

4. On 26 August the application for a variation of the directions was refused and reasons for given for that decision, (though the tribunal varied the date for filing a Reply to 29 August 2014 since the date for original compliance had already passed). In that Reply, filed on 8 September, the Applicant now requests an oral hearing since "Following receipt of the Respondent's submissions, given the content of these and that access for inspection continues to be denied the Applicant considers that it is consequently inappropriate for this matter to be considered on the papers, or the parties will be prejudiced and not receive a fair hearing with all relevant evidence before it. The papers do not contain the relevant evidence, and the Applicant is currently being denied the opportunity of presenting its case fully and fairly".

5. Pursuant to Rule 31(3) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, since the Applicant has been given not less than 28 days' notice of the tribunal's intention to dispose of the proceedings without a hearing, and no objection under Rule 31(3)(b) has been received within that time, the Applicant shall be taken to have consented to to the tribunal proceeding without a hearing. In any event, the Applicant having first requested an oral hearing on 5 September 2014, in the circumstances I would not exercise my power under Rule 6(3)(a) to extend time for applying for an oral hearing. I have therefore proceeded to determine this application on the papers.

6. I do not agree that the Applicant is being denied the opportunity to produce relevant evidence in support of the application. The Applicant brings this application and must produce sufficient evidence to make it out. I shall deal with each alleged breach of covenant in turn.

Alterations

> *2.6.1 Subject to sub-clause 2.6.3 hereof not to make or permit any alterations or additions to the Demised Premises or any part thereof of whatsoever nature or to cut maim alter or injure any of the walls or timbers thereof nor to alter the Landlord's fixtures therein*
>
> *2.6.2 Not to drill any holes in or hammer any nails or affix any screws into the floor to the surface of the balcony/terrace thereto (if any)*
>
> *2.6.3 Not to make any internal non-structural alterations to the Demised Premises without the prior written consent of the Landlord (such consent not to be unreasonably withheld).*

7. At present, there is no evidence of the nature of the works which have been carried out which would entitle me to conclude that they have been carried out in breach of the terms of the lease.

8. The landlord will have rights of access to the subject premises and, in the absence of cooperation from the Respondent in providing it, may consider if there are grounds to apply to the County Court for an injunction requiring such access, though it is not at all clear on the evidence that such a step would be necessary. The Tenant covenants:

> *3.1.2 To permit the Landlord and any tenant of any other part of the Block and any person respectively authorised by any such person to enter the Demised Premises upon reasonable prior written notice (except in emergency) to inspect the state of repair thereof and of any adjoining and neighbouring property.*

9. A suitably qualified independent expert (such as a chartered surveyor), should be able to establish the cause of this ongoing leak. The Applicant has latterly identified the need for an inspection of the premises, but the tribunal has no power to order the Respondent to provide access. This is a matter which could have been addressed before deciding whether to bring this application, and the tribunal will not adjourn the proceedings at this late stage. It cannot be the case that the Applicant was unaware before making the application that such evidence would be required. The tribunal will not act on inadequate evidence to find a breach of a lease, which is a serious matter which can lead to a liability for costs under the lease and in some cases to forfeiture.

10. Accepting the view that non structural works do not constitute a breach of the lease if consent is obtained under Clause 2.6.3 or unreasonably withheld, there is no evidence before me that the works carried out were structural, nor are there submissions as to the meaning of that term.

11. The application at paragraph 6 appears to invite an inference that the lease has been breached since "the works have been carried out

clandestinely, which is a further indication that the tenant is fully aware that the works are being carried out in breach of the Lease." However, plainly I cannot reach such an inference without evidence as to the nature of the works. The Respondent's architect provided a description as to the works intended, but there is no argument as to whether they are structural in nature.

12. In any event, the Applicant must give reasonable prior written notice of an inspection, but has not yet done so. The Applicant's solicitor's letter of 7 April 2014 (making certain conditions for allowing the work to continue, including payment of costs and a premium) does not constitute such notice.

13. It is therefore unnecessary for me to conclude whether consent has been unreasonably withheld. However, I would say that on the evidence produced by the Applicant, I am satisfied that consent was unreasonably withheld under Clause 3.6.3. The Applicant occasioned a delay by insisting on an initial cap on costs of £2000, though this was unnecessary given the responses of the Respondent's solicitors. The Applicant then repeatedly sought a premium. There is no evidence before me that it was entitled to demand one.

Nuisance

14. By Clause 3.3.1 the tenant covenants:

> *"Not to use or permit the use of the Demised Premises or any part thereof for any dangerous offensive noxious noisome illegal or immoral activity or in any manner that may be or become a nuisance or annoyance to the Landlord or to the tenant or occupier or any other part of the Block or any other neighbouring property."*

15. The Applicant's reliance on this covenant is misconceived. Evidence of nuisance within the common parts is relied upon. However, the covenant refers to the use of the Demised Premises, and not to the common parts.

Name: F Dickie **Date:** 25 September 2014