FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BH/LBC/2015/0078**
Property	:	**Flat 3, 103 Grange Park Road, London E10 5ER**
Applicants	:	**Mrs G. Weinberger**
Representative	:	**Mr Justin Bates of Counsel**
Respondent	:	**Princemere Investments Limited**
Representative	:	**Mr Michael Paget of Counsel**
Type of Application	:	**Determination of Breach of Covenant; Section 168(4) Commonhold and Leasehold Reform Act 2002**
Tribunal Members	:	**Judge Lancelot Robson** **Mr T. N. Johnson FRICS**
Date and venue of Hearing	:	**28th October 2015** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**10th November 2015**

DECISION

DECISION SUMMARY

(1) The Tribunal determined that a breach of a covenant or condition in the Lease had occurred and granted the application made by the landlord pursuant to Section 168(4) of the Act.

Preliminary:

1. By an application dated 19th August 2015 the Applicant applied for a determination under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 (the Act) that breaches of the lease of the property dated 14th August 1987 (the Lease) had occurred, prior to the issue of a notice under Section 146 of the Law of Property Act 1925. The Respondent is the current Lessee. An extract from Section 168 is attached as Appendix 1.

2. A Case Management Conference was held on 27th August 2015. Directions for a hearing were given on the same day. The Applicant made written submissions dated 29th September 2015 supported by a witness statement of Mr David King ARICS dated 29th September 2015. In breach of directions, the Respondent made no written submissions or produced any documents, but instructed Mr Paget to attend the hearing, who proffered a witness statement from Mr Nigel Bone FRICS dated 27th October 2015, and proposed to refer to two cases in oral submissions. Mr Bates, after reading the statement of Mr Bone, was prepared to allow Mr Bone's statement and the cases offered by Mr Paget to be put in evidence.

Inspection

3. The Tribunal inspected the subject property internally and the common parts of the building externally in the morning of 28th October 2015 prior to the hearing, in the company of Mr King, Mr Bates and Ms Coyle for the Applicant, and Mr Bone for the Respondent. The property is on the first floor of an extended two storey house standing in its own front and rear gardens with side access, built about 1890 of brick with a tiled roof. The side and rear elevations were rendered with plaster and painted white. The front elevation was brick, but had a decorative portico at the front door. At some point the main house had been divided into three flats, and also the house had been extended to one side to provide a further three small flats.

4. The building was only in fair condition. The various flat roof coverings at the rear looked patched and at the end of their useful lives. Signs of vegetation were evident at high level. A rainwater gutter at the side was open and loose. The external paint work was in need of redecoration, and in places render was missing, particularly above the rear ground floor extension to flat 2. On the rear elevation it appeared that a section of render outside Flat 3 had been renewed and painted, but the new

render looked rough and had been applied in a very amateur fashion. Also on that elevation the rainwater goods and soil pipes had apparently been renewed and altered recently, again in a rather amateur fashion. The main soil stack had been bent out of the vertical plane at the top to allow a hole to be drilled through the wall in Flat 3 to accommodate the gas water heater vent. A down pipe, apparently for draining a high level flat roof, had been cut off about two feet below the roof and dripped occasionally onto the rear wall. (This may be causing the internal dampness noted on new plaster in the alcove on the half landing of Flat 3, immediately behind the area affected). Other new pipework had been led to the hopper head at First Floor level. The pipe lengths had been incorrectly measured and gave a very untidy visual impression. The Tribunal noted on the front elevation that a new copper pipe, apparently for a gas supply, had been attached to the wall leading from Flat 3 to near ground level at the side of the portico, but it had not yet been connected. The windows of Flat 1 had been replaced with UPVC double glazed units, as had most of the windows of Flat 3. Flat 2 still had single glazed window frames. That property was unoccupied and appeared derelict, particularly at the rear, where the rear door was unglazed. The Tribunal did not inspect the remaining three flatsl, but these also had single glazed window frames, and at least one appeared empty.

4. The front and rear gardens were unkempt and littered with builders' rubbish. The parties had also had to clear the side access to the rear immediately prior to the Tribunal's visit to gain access to the rear of the property.

5. The Tribunal particularly noted other items relevant to the application;

a) There was an old flue projecting from the side elevation at high first floor level adjacent to Flat 3, which appeared to be made of white asbestos. There was no sign of this flue internally.

b) Immediately inside the main front door was a small lobby. The door to Flat 3 was at ground level off the lobby, with stairs inside the flat leading to the first floor. The flat was being renovated internally throughout with a new kitchen and bathroom units, apparently to a good standard. It was a two bedroom flat with a large kitchen/diner and internal bathroom/wc/shower. It had new kitchen appliances and a central heating system, although the new hot water heater (in an alcove on the half landing) had not yet been connected.

c) As the relevant areas had been plastered and decorated, the Tribunal was unable to inspect the construction of the new internal partition wall between the kitchen and the stairs complained of by the Applicant, nor was it able to verify if the wooden lintel above the access from the stairs into the alcove had been replaced with a concrete lintel as alleged.

d) The Tribunal noted plaster and other debris clogging the mouth of the drain at the rear of the property.

e) The soil stack appeared to have been altered and replaced with plastic pipe work of various grades and colours then painted black. As noted above it looked odd, as it had been bent out of the vertical plane at the

top. A new branch had been attached to serve the bathroom in flat 3, which had a minimal fall where it was visible externally.

Hearing

Applicant's Case

6. The Applicant's statement of case noted the following items allegedly in breach of the Lease;

a) Replacement of the timber windows with double glazed units

b) Relating to the external walls and exterior; several holes had been drilled through the walls (including holes for a new branch soil pipe and boiler gas flue,

c) Alterations to the communal soil stack and rainwater goods had been made,

d) The soil stack had been removed and refitted incorrectly,

e) Works carried out to the external surface of the rear elevation.

f) Removal and replacement of a load bearing and fire break partition wall to an unknown standard

g) Copper pipe work on the front of the building from 1st floor level to the ground floor which is not in keeping with the remainder of the pipework to the rest of the building

h) Removal and replacement of supporting lintels over the opening to the alcove on the 1st floor half landing

Further;

i) Debris from the works had blocked the rear drain

j) Builder's rubbish had not been removed from outside the flat

k) The asbestos flue on the side elevation should have been removed

l) The works may have rendered void the insurance policy as they had not been declared to the Building's insurers.

7. The Applicant submitted that the above items were in breach of the Lease as follows:
Clause 3(IV) (consents) (– items a), b), c), d), f), and h)
Para. 7 of the 1st Schedule (exterior decoration) – items a) and g)
Clause 4(a) (keeping premises in good and tenantable repair) – items a), b), c), d), f), h), and k)
Para. 4 of the 1st Schedule (not to throw refuse into waste or soil pipes e tc.) – items i) and j)
Clause 4(c) (Insurance) – items a), b), c), d), f), and h)

8. Mr King gave evidence following his witness statement. He had been originally engaged to carry out a survey to prepare dilapidations schedules and for major works to the building, which would entail a Section 20 notice. His client had also informed him that works were going on at the subject property. He attended the site in January, 31st March, May and September 2015. He had taken the photographs appended to his statement on various dates. The photographs DK15 and DK16 relating to the replacement of the structural partition and timber lintels had been taken in March. At the time he had discussed the necessary safety measures required to provide the necessary support with the builder. He was unable to say if the work had been done as he had suggested. The work shown on the photographs

appeared to be substandard. He did not believe any consents had been asked for by the Respondent, although he had written to it after his March inspection setting out the process for seeking consent. He received no reply, but was informed in June 2015 that four double glazed units had been fitted. Photographs DK2, DK3, and DK4 showed the windows before and after the fitting. No certificates had been provided relating to the units, as they should have been.

9. In May 2015 he had written to the Respondent to inform it that the "underground" fittings should be removed from the soil stack, and the other pipework made good. He also stated then that the asbestos flue needed removal. In his opinion the landlord's proposed work to the guttering would be impeded in that area by that flue. On 2nd September 2015 he was informed that there was a large amount of rubbish in the garden, and verified by him on 4th September. The debris in the drains was from building work. He had attempted to resolve the issues by corresponding with the Respondent, but without success.

10. Mr Bates referred to the specific Lease terms noted above, and the case of Sheffield City Council v H St Clare Oliver; LRX/146/2007 (LC) which, he submitted, confirmed that external windows were both part of the structure and part of the exterior of the building. Timber windows at Flat 3 had been removed and replaced with UPVC units. He had accepted that the issue of rubbish in the garden was not a breach of the Lease, although it might be a trespass. He maintained the Applicant's position on all other matters, but urged the Tribunal not to become bogged down in the quality of the work done. Whatever the quality of the work, the main point was whether the failure to request consent for the work was a breach of the Lease, as he argued. The Respondent appeared to be suggesting that the windows were not part of the structure and therefore replacing them was not a structural alteration, but Sheffield v Oliver (see above) at Para 15 onwards disposed of that point. Mr Bone had also suggested that the original windows had already been replaced and therefore the landlord was deemed to have impliedly consented, however the fact remained that the consent was required to be in writing. No permission had been sought. The Respondent was well aware that consent was required as it had been made clear in Mr King's letter of 31st March 2015.

11. Relating to the lintels, he submitted that no one was sure if they had been replaced, although the builders were advised that they should be by Mr King. He was not instructed to supervise the work. The Respondent could easily have got the builders to make a statement confirming what they had done.

12 Relating to the partition wall, the landlord did not know if the work was done properly, but even if it had been, it was agreed that it was a structural wall, and this work (as shown in the photograph of 30th March 2015) was a structural alteration.

13. Relating to the point on landlord's fixtures and fittings, the exterior pipes had been removed. There was no dispute on that point. Mr Bone considered that work was an improvement, but consent was needed. Some pipes exclusively served the property, but whether they did or not, the work still needed the landlord's consent. Also, even if the pipework was not a landlord's fixture or fitting, drilling holes in the wall for the pipes was a structural alteration, see Pearlman v Harrow School 1979 1QB 56.(CA) at pp. 67 and 72

13. Dealing with other breaches, Clause 4a) had been breached in two ways, firstly by the removal of the internal wall. While the landlord could not prove if the wall was defective, it was up to the Respondent in this case to provide evidence that it was not defective. Secondly, not removing the asbestos pipe was a failure to keep the property in good repair and condition. Some of it must be inside the wall.

14. Relating to insurance, it was not up to the landlord to show that the insurance had been affected, only that it may be affected.

15. Relating to 1st Schedule para. 4, the rubbish was in the mouth of the drain and pipes leading into that drain were from the inside of this flat, and it was reasonable to assume that the Respondent had, on the balance of probabilities, been responsible for the rubbish. Thus the Applicant considered there was a breach.

16. There were two breaches of 1st Schedule, Para 7; firstly there was no evidence of support for the work from other leaseholders, and secondly the copper gas pipe would have to be decorated at some point. The 1st Schedule was intended to give other lessees some say on the question of redecoration.

17. In reply to Mr Paget's submissions on legal points, he submitted that Beaufort Park Residents Management Ltd v Sabahipour 2011 UKUT 436 (LC) did not support Mr Paget, as he might suggest. The case stood purely on its own facts. The Tribunal did not have the power to decline to make a determination under Section 168. That matter was one for the County Court judge. If Mr Paget wanted to say the windows were not structural , he quoted no evidence, or law, or a surveyor's report. It was effectively being suggested against the Applicant that its interpretation of the Lease would require consent to put a nail in the wall, but Pearlman v Harrow School (see above) made it clear that was incorrect. Hagee (below) relied upon by Mr Paget, was not laying down a general rule of law. The issue at stake in that case was the replacement of ugly plant (air conditioning) with ugly plant. It was a County Court case where Section 146 was being invoked. The Respondent was running the two issues (i.e. S.168 and S.146) together. Section 168 only deals with a breach. The Applicant cannot apply for a Section 146 order until it has an order under Section 168. Also the Tribunal was not allowed to decide if a breach was still subsisting, but only if it had occurred, see e.g. Forest House Estates v Al-Harthy 2013

UKUT 479. Questions of Relief and Loss would be relevant at the County Court stage.

Respondent's Case

18. Mr Bone gave evidence and was examined on his statement. The factual parts of his statement largely accorded with those of Mr King. His client had purchased the Lease on 23rd February 2015.. He had not been advised by his client that any load bearing walls or lintels had been removed. He had not been asked to supervise the works. He initially inspected the flat on 28th July 2015. He accepted that work had been done to the property, and that it required full refurbishment. It was accepted that wooden windows had been replaced with UPVC as they were totally rotten. He considered the old windows were themselves replacements, and thus the freeholder had consented to an alteration. On the authority of BIR/00FY/LVA/2004/0002 (copy not produced in evidence) the replacement of the windows did not amount to structural alterations. He accepted that a new boiler had been fitted and holes had been drilled in the wall. It was a minor matter and very common, to be able to fit modern apparatus. Defective pipework had been replaced and new pipes were run with making good works undertaken. Any redecorations undertaken were for the benefit of the freeholders and other lessees and at the sole cost of the Respondent. The Respondent was prepared agree to rerouting of the gas pipes. The asbestos pipe had been in place for some time, and was not in use at the time of purchase. The Applicant should have been aware of its existence. It was denied that any of the works undertaken by the Respondent would render the building insurance voidable, but if a copy was provided the matter could be considered further. He had not seen a copy of Mr King's report until the day of the hearing, and had had limited communication from him.

19. Mr Paget submitted that Sheffield City Council v Oliver (above) and Irvine 's Estate v Moran 1992 24 HLR 1QBD were distinguishable as they dealt with Lessor's responsibilities, while in this case the issue was what was demised by the Lease. Oliver was also a "right to buy" lease. The lessor in that case had imposed the right to carry out improvement works, and it was on that basis that the Upper Tribunal allowed it. It was an unusual clause. In the Moran case, it was decided that the lessor had the necessary power, but it was going too far to interpret that case so as to conclude that the windows in this case were part of the structure. In Mr Paget's view Clause 3(IV) required consent if the work was structural AND it was an alteration. There was no guidance in the Lease itself. Replacing like with like is not an alteration. Replacing the windows with the modern equivalent was in fact replacement.

20. Relating to the question of the internal alterations, Mr Paget submitted that it was not proved that there had been a structural alteration to the lintel, only that it had been exposed. Mr King had produced no evidence as to whether the partition wall was load bearing or structural. There

was no evidence that the asbestos pipe had been cut by the leaseholder. There was nothing in Mr King's report saying that the property was not in good and tenantable condition. The demised premises did not extend to the brick wall, only the internal wall of the property. In fact Mr Bates had little to go on. It was clear, in Mr Paget's view, that the Lease was not to be construed as Mr Bates suggested. Drilling holes for waste pipes was de Minimis. There was conflicting evidence as to whether the insurance premium was affected or not. The Applicant accepted that the pipework at the rear of the property belonged to the Respondent and thus Clause 1(d) of the Lease was engaged. The holes were de Minimis, as were the lintels and the insurance policy points. He referred to Hagee London Ltd v Co-operative Insurance [1992] 1 EGLR 57. There, there were two breaches, one was not relevant to this case, but the second item was. The Respondent was updating the windows at the front. UPVC had been used elsewhere. The alleged breach relating to the windows was also de Minimis. The Respondent had to apply for consent, but that could not be unreasonably withheld. The Applicant's motive appeared to be to obtain a premium for the consent.

21. On legal issues, Mr Paget submitted that Beaufort Park was relevant to this case. The Tribunal did have power to delay its Order under Section 168 for a few days. In Beaufort Park (above), the judge had given the Respondent 6 weeks. In this case Mr Bone suggested that the work complained of would only take 2 - 3 weeks. In essence, his case was that the issues complained of were de Minimis, and/or that an Order should be delayed while a request for consent was made.

22. On the questions of rubbish and redecoration, firstly there was no evidence as to where the rubbish in the drain had come from, only that there was rubbish in the drain outside the property, and secondly the claim that the Respondent had redecorated the property (in breach of 1st Schedule Para. 7) had no validity. The Respondent had done no redecoration of the exterior of the premises, within the normal understanding of the word.

Decision

23. The Tribunal considered the evidence and submissions. The relevant Lease provisions are:

Clause 3(IV)

"Not to make any structural alterations or structural additions to the demised premises nor to erect any new buildings thereon or remove any of the landlord's fixtures and fittings without the previous consent in writing of the Lessor such consent not to be unreasonably withheld"

Para. 7 1st Schedule

" the exterior of the demised premises shall not be decorated otherwise than in manner to be agreed to by a majority of the owners of the flats and the house comprised in the Building or (failing such agreement) in the manner (as near as may be) in which the same was previously decorated"

Clause 4(a)

"To keep the demised premises (other than the parts thereof comprised and referred to in paragraphs (d) and (f) of Clause 5 hereof) and all party walls sewers drains pipes cables wires and appurtenances thereto belonging in good and tenantable repair condition and in particular so as to support shelter and protect the parts of the Building other than the demised premises"

Para. 4 of the 1st Schedule

"not to throw dirt rubbish rags or other refuse or permit the same to be thrown into the sinks baths lavatories cisterns or waste or soil pipes in the demised premises"

Clause 4(c)

"not to do or permit to be any act or thing which may render void or voidable the policy or policies of insurance of the Building and other parts of the building or any policy or policies of insurance in respect of the contents of any of the flats .... comprised in the Building or which may cause any increased premium to be payable in respect of such policy".

24. On the question of consent, the Tribunal generally preferred the argument of Mr Bates. Mr Paget urged us to accept that no breaches had occurred, or that the breaches were de Minimis. However, the Tribunal considered that the windows, pipes and conduits came within the relevant definition as being part of the structure. In that case consent was required by the terms of the Lease. Mr Paget sought to suggest that the windows in particular were like for like replacements, however that cannot be right. It is not difficult to have new timber frames made but the cost of doing so will be considerably more than using UPVC double glazed frames. A

25. It was unclear what had been done to the internal partition and the lintels and the drain, but in this case only the Respondent's contractor could confirm what had been done, and in that case the burden of proof on those points should rest on the Respondent. In the absence of such evidence the Tribunal was reasonable in inferring that the work alleged by the Applicant had been done, and thus the work required consent.

26. The Respondent did not dispute that the external walls had been drilled through, but claimed the work was de Minimis. The Tribunal accepted Mr Bates' view of the effect of the Al-Harthy case. The Tribunal's task was to decide if a breach had occurred when considering an order under Section 168(4). It was not for the Tribunal to decide what the effect of the breach was, that was a matter for the County Court if and when a Section 146 notice was served. The Tribunal decided that the removal of old pipework and insertion of new pipework (including the copper pipe at the front) were breaches of the Lease.

27. The Tribunal decided that there was doubt about the claims to a breach of the redecoration covenant in 1st Schedule Para. 7. The essence of the Applicant's claim was that replacing, moving and adding to external the pipework was a breach of this covenant, which is an unusual submission. The Tribunal decided that the evidence was equivocal, and thus the Applicant's claim relating to that matter was not substantiated. In view of the other breaches already determined, the Tribunal considered that a finding against the Applicant on this item would have little, if any, practical effect. It did not appear that the parties had made any useful submissions relating to redecoration of the rear elevation. There appeared from the photographs to be signs of recent work there, but any work done appeared to have been painted white, the pre-existing colour. The Tribunal decided that no breach had been proved in this application.

28. The Tribunal decided against the Applicant's claim relating to the asbestos flue. It accepted that the property should be kept (or more accurately, put and kept) in good and tenantable condition, but without either party having had an asbestos survey done, there was no reliable evidence one way or the other. Contrary to the Applicant's view, it might be that leaving the flue undisturbed in situ was legally acceptable, and the most advisable course. If the Applicant wished to do work to the gutters and was concerned about the flue, she needed evidence that the guttering work would be obstructed. That item seemed premature in this application, and the Tribunal decided to make no order under Section 168 on it.

29. Relating to breach of the insurance covenant, the Tribunal accepted the Applicant's submissions, despite the lack of a copy of the insurance policy in the bundle. Contrary to the Respondent's submissions, such extensive building works would normally limit the buildings insurance cover in many respects. Also work which was not done competently or with inappropriate materials would not be covered, nor would work requiring the production of certificates, if they were not produced (referred to by the Applicant). Notice of any significant works should be given to the insurer as a matter of good practice.

30. Thus in summary, the Tribunal found breaches relating to the following covenants following the lettering and numbering of items noted in paragraphs 6 and 7 above;

Clause 3(IV) (consents) (– items a), b), c), d), f), and h)
Para. 7 of the 1st Schedule (exterior decoration) – No breach
Clause 4(a) (keeping premises in good and tenantable repair) – items a), b), c), d), f), and h),
Para. 4 of the 1st Schedule (not to throw refuse into waste or soil pipes etc.) – item i)
Clause 4(c) (Insurance) – items a), b), c), d), f), and h)

31. The Tribunal thus decided to make the order under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 requested by the Applicant, that breaches of covenant had occurred.

Judge Lancelot Robson **10th November 2015**

Appendix 1

Section 168 Commonhold and Leasehold Reform Act 2002

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

169 Section 168: supplementary

(1) – (6) ....

(7) Nothing in Section 168 affects the service of a notice under Section 146(1) of the Law of Property Act 1925 in respect of a failure to pay-
(a) a service charge (within the meaning of section 18(1) of the 1985 Act), or
(b) an administration charge (within the meaning of Part 1 of Schedule 11 to this Act).