

565



**FIRST TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case Reference** LON/OOBK/LBC/2013/0098

**Property** 7 RIVER LODGE 128 GROVESNOR  
ROAD LONDON SW1V 3JY

**Applicant** RIVER LODGE MANAGEMENT LTD

**Representative** Mr D Falkowski of Counsel instructed  
by Kingfields, Solicitors

**Respondent** EMBANKMENT HOLDINGS LTD

**Representative** Ms M Stacey of Counsel instructed by  
Seifert & Co, Solicitors

**Type of application** Determination of whether there has  
been a breach of covenant pursuant  
to Section 168(4) of the Commonhold  
and Leasehold Act 2002

**Tribunal Members** JUDGE T RABIN  
MR J BARLOW FRICS

**Date and venue of  
Hearing** 12<sup>th</sup> March 2014 at 10 Alfred Place  
London WC17LR

**Date of Decision** 30<sup>TH</sup> MARCH 2014

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**DECISION**

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## **Decision of the Tribunal**

- (1) The Tribunal determines that the Respondent has been in breach of the terms of the lease under which it holds the Property

## **FACTS**

1. The Tribunal was dealing with an application by the Applicant landlord, River Lodge Management Ltd under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the Respondent long leaseholder, Embankment Holdings Ltd (incorporated in Guernsey), was in breach of covenant under the terms of the lease under which it held 7 River Lodge 128 Grosvenor Road London SW1V 3JY ("the Property")
2. The Property is held under a lease dated 1<sup>st</sup> December 1997 for a term from 24<sup>th</sup> June 1987 to 11<sup>th</sup> December 2101 ("the Lease"). A copy of the Lease is in the trial bundle and the tenant's obligations are set out Clauses 6 and 7. The Applicant alleged that the Respondent was in breach of Clauses 6 (5) (i), 6(5)(ii), 6(11), 6(12), 7(1), 7(2) and 7(5) of the Lease
3. The Tribunal made directions that stated (inter alia) that the application would be determined on paper track and upon consideration of the documents only unless either party requested a hearing. The Respondent alleged that there were issues between the parties as to the disclosure of documents to be included in the bundle and the Tribunal made further directions agreeing to a hearing in order to avoid any procedural irregularity that may arise.

## **HEARING AND EVIDENCE**

4. The hearing took place on 12<sup>th</sup> March 2014. Mr D Falkowski of Counsel represented the Applicant and Ms M Stacey of Counsel represented the Respondent. There was a hearing bundle and the Respondent submitted a bundle of disputed correspondence.
5. There was some discussion regarding the admissibility of the disputed documents and, after a very short discussion, during which the Respondent's representative made some clarification, the bundle was admitted with the exception of a single letter marked "without prejudice" and these contained all the relevant documents that each party intended to rely upon.
6. The application before the Tribunal is for a determination that a breach of the Lease has been committed by the Respondent that would entitle the Applicant to seek an order for forfeiture of the Lease from the County Court. Under Section 168 (1) of the 2002 Act a landlord of a long lease may not serve a notice under Section 146 of the Law of Property Act 1925 in respect of a breach of covenant unless the requirements of Section 168(2) of the 2002 Act are complied with. For the purposes of these proceedings,

no forfeiture proceedings can be commenced until the Tribunal has made a determination under Section 168(4) of the 2002 Act that a breach of covenant in the Lease has occurred.

7. The provisions in the Lease in respect of which the Applicant seeks a determination that there has been a breach are as follows:

- 6(5)(i) Not at any time during the said term to make any alterations in or additions to the Demised Premises or any part thereof or to cut main alter or injure any of the walls or timbers thereof or to alter the Landlords' fixtures therein without first having made a written application accompanied by all relevant plans and specifications or copies thereof in respect thereof to the Lessor's and secondly having received the Lessor's consent thereto which consent the Lessors shall not unreasonably withhold
- 6(5)(ii) Not to cut any hole or opening in the windows to the Demised Premises nor in any way alter the external appearance of the building
- 6(11) Not at any time to do or permit or suffer to be done any matter or thing in or in respect of the Demised Premises which contravenes the provisions of the Town and Country Acts 1947-1972 or any enactment amending or replacing the same and to keep the Lessors indemnified against all claims demands and liabilities in respect thereof
- 6(12) To comply in all respects at the Tenant's own cost with the provisions of any statute statutory instrument rule or regulation and of any order direction or requirement made or given by nay authority or the appropriate Minister or Court so far as the same affect the Demised Premises (whether the same are to be complied with by the Lessor the Tenant or the occupier) and forthwith to give notice in writing to the Lessors of the giving of such order direction or requirement as aforesaid and to keep the Lessors indemnified against all claims demands and liabilities in respect thereof
- 7(1) Repair maintain renew uphold and keep the Demised Premises and all parts thereof including (so far as the same forms part or are within the Demised Premises) locks, fastenings and hinges sanitary water gas and electrical apparatus and walls and ceilings drains pipes wires and cables and all fixture and additions in good and substantial repair and condition save as to damage in respect of which the Lessors are entitled to claim under any policy of insurance maintained by the lessors in accordance with their covenant in that behalf hereinafter contained except in so far as such policy may have been vitiated by the act or default of the Tenant or any person claiming through the Tenant or his or their servants, agents licensees or visitors
- 7(2) In every 5<sup>th</sup> year calculated from the earlier date specified in Paragraph 7 of the Particulars and in the last year of the term (howsoever determined) but not twice in any successive years to paint twice and varnish colour grain and whitewash all the inside parts of the Demised Premises respectively heretofore or usually painted papered varnished coloured grained and whitewashed
- 7(5) Observe and perform the Regulations in the Fourth Schedule hereto provided the Lessors reserve the right to modify or waive such Regulations I their absolute discretion

8. Mr Falkowski referred to a schedule prepared by the Applicant's surveyor, Brian Aldridge BSc MRICS FFB. This detailed extensive work that the Respondent had commenced to undertake to the Property. This included installing new windows, altering the surface of the roof terrace with a view to installing solar panels. Alterations were being made to the exterior of the balcony and extensive internal refurbishment was in the course of being undertaken. This work included removing floors to instal under floor heating, moving internal doors and walls. No consent had been

requested and, once the Applicant realised the extent of the work, injunction proceedings were threatened and the work ceased.

9. The Respondent's previous solicitors asked for licence to alter in relation to the new windows in April 2013 and gave an undertaking for costs. The Applicant made it clear in an e-mail dated 5<sup>th</sup> April 2013 that consent was subject to a formal licence. At the Applicant's solicitor's request the Respondent's solicitors submitted a standard form of licence. There was some discussion about the form of wording in the licence. The form was agreed and the parties were to sign the licence with a view to exchanging on 16<sup>th</sup> May 2013. This was subject to a final inspection of the windows by the Applicant's surveyor and on 19<sup>th</sup> June 2013 the Applicant's solicitors pointed out that the design of the windows was not consistent with the remaining windows in the building. There was further correspondence and on 27<sup>th</sup> June 2013, the Respondent's solicitors said they were no longer prepared to wait for the formal licence and would be undertaking work to the windows the following week. The licence was not completed as the Applicant was not satisfied with the window design.
10. The Applicant realised that there were major works being undertaken and wrote to the Respondent's solicitors on 8<sup>th</sup> and 9<sup>th</sup> August 2013 insisting that the work be terminated immediately, failing which there would be injunction proceedings. The work stopped and the Respondent's solicitors wrote to the Applicant's solicitors stating that the Applicant was unreasonable in withholding consent to the windows.
11. In the same letter the Respondent's solicitors acknowledged that the internal refurbishment works did require a licence as they involved a remodelling of parts of the Flat. They said they would make a formal application for a licence once they had received the plans showing the extent of the planned work. Some specifications were produced on 9<sup>th</sup> September 2013 but the Applicant considered that these gave insufficient detail.
12. The Respondent's current solicitors sent a letter to the Tribunal on 12<sup>th</sup> February 2014 that purported to withdraw the admission made by the previous solicitors that a licence was required.
13. Both parties' representatives submitted skeleton arguments, copies of which are in the file and which the Tribunal has considered carefully.

## **DECISION**

14. The Tribunal's powers in relation to Section 168 (4) of the 2001 Act are limited to deciding whether or not a breach of covenant has occurred. It has no jurisdiction to determine whether there has been a waiver of the breach or whether the breach is minor or major. If the Tribunal determines that a long leaseholder has been in breach of its obligations under a lease, it can lead to an action that could result in the forfeiture of the Respondent's property and it should not be invoked lightly. The Tribunal does not have jurisdiction to determine whether a landlord can

forfeit a lease but can decide whether an actionable breach of covenant exists.

15. The Tribunal has considered each of the alleged breaches.

**Alteration of the demised premises - Clause 6(5)(i)**

16. The Tribunal has considered the report by Mr Aldridge. It is clear that the extent of the work amounts to an alteration of the property and cutting into the walls and timbers. The alteration of the internal bathrooms and kitchens amounts to the alterations of the landlord's fixtures and fittings and there is a clear breach of this covenant.

17. The Respondent submitted that the works undertaken did not require a licence, as these would not be construed as repairs within the meaning of the lease. In fact the photographs and the surveyor's report indicate that there have been substantial works carried out. It is evident that the Respondent's intention was to make substantial alterations and, whilst on their own many of the alterations are minor, the cumulative effect coupled with the Respondent's clear intention to make changes means that the work does indeed need a licence for alterations. In the light of the Respondent's intention to remodel the Property, there can be no assumption that it is the Respondent's intention to restore the interior to its former condition as suggested by the Respondent's representative.

18. There is a clear acknowledgement in the Respondent's former solicitors' e-mail of 9<sup>th</sup> August 2013 which states that he acknowledges that the work being undertaken required a licence and requested the same.

19. The Respondent's current solicitors sent a letter to the Tribunal on 12<sup>th</sup> February 2014 stating that, following the Respondent's surveyor's report, they wished to withdraw all admissions made on behalf of the Respondent relating to the claimed breach of covenant. A copy of the report by the Respondent's surveyor, Mr J Rowling was enclosed. He was unable to attend the hearing.

20. At the hearing the Respondent's representative submitted that under CPR 14, and admission could be withdrawn even after proceedings had begun. The Tribunal is not bound by CPR 14 but there may be circumstances where the principal could be considered by the Tribunal in coming to a decision. The instant matter is not such a case as the Respondent was professionally advised and concluded that the terms of the Lease were such that a licence was required. The Tribunal therefore determines that there was a breach of the covenant not to make any alterations

**Cutting holes into the windows or alter the external appearance of the building - Clause 6(5)(ii)**

21. The windows have been removed and replaced with windows not approved by the Applicant. There have also been alterations to the external balcony

that does not form part of the demise and should not have been altered or repaired by the Respondent.

22. The Respondent maintained that there had been a licence granted for the replacement of the windows in reliance on correspondence between the Respondent's former solicitors and the Applicant's solicitors. The correspondence considered by the Tribunal clearly shows that the e-mail of 5<sup>th</sup> April 2013 agreeing to the grant of a licence stated that the e-mail was not to be regarded as consent to the work, which was to be subject to a formal licence being completed. The e-mail correspondence showed that the licence would not be granted until concerns raised by the Applicant's surveyor had been addressed and there was no evidence before the Tribunal that these concerns have been addressed.
23. The Tribunal's task was not helped by the Respondent's representative being selective when referring the Tribunal to correspondence in the file but it is clear that the grant of the licence was subject to completion of a formal licence which was never completed as the works have not been approved. There is a clear breach of covenant on the part of the Respondent.

**Breach of planning legislation and statutory requirements -  
Clauses 6(11) & (12)**

24. The Tribunal has not seen any evidence of breach of planning. Planning consent was obtained for the windows and no other issues were brought to the Tribunal's attention

**Failure to repair - Clause 7(1)**

25. The evidence before the Tribunal in photographs and in the Applicant's surveyor's report showed that the Property was not in a good state of repair. Walls and doors had been moved, floors stripped and radiators removed. Substantial work has been undertaken for which no consent had been obtained. The Respondent argued that the reason the Property was in that condition was because the Applicant had made the Respondent cease work. The Tribunal does not accept that it was ever the intention of the Respondent to restore the Property to its former condition but intended to make substantial alterations.
26. From the information before the Tribunal, it is clear that the Property is in a poor state of repair and there is a clear breach of this covenant

**Failure to decorate the interior every five years - Clause 7(2)**

27. Although the photographs and report showed that the Property was in poor decorative condition, there was no evidence that the redecoration requirements had not been strictly complied with.

## **Observe the regulations in Fourth Schedule – Clause 7(5)**

28. The Fourth Schedule sets out regulations to be observed. Regulation 15 requires the lessee to keep the floors of the Property covered with carpet and underlay with the exception of the kitchen and bathrooms, which must be suitably covered. All the carpets had been lifted and there was evidence that underfloor heating was to be installed. The removal of the carpets was a clear breach of Regulation 15.

## **Conclusion**

29. The Respondent appears to have lost sight of the Tribunal's jurisdiction and its limits. There has also been a lack of transparency about the Respondent's intentions with regard to the Property, despite numerous requests for details. It only came to the Applicant's attention that works had commenced when there was disruption to the building. Despite have been told clearly what was required on 30<sup>th</sup> October 2013, there was no response. The Applicant cannot serve a Section 146 Notice until the Tribunal has made a determination as to whether or not there has been a breach of covenant and it followed that these proceedings had to be commenced.

30. A lot of time was wasted on disputes as to what documents should be included in the trial bundle but the Tribunal was at a loss to understand what the dispute related to. It appeared that the Applicant objected to the inclusion of a report that should never have been sent to the Tribunal and a great deal of time was wasted. There was a disputed bundle of correspondence but on analysis by the two counsel, one letter marked "without prejudice " was removed and all the other documents were accepted. The issues were spurious and the request for a two-day hearing was inappropriate for an issue such as this.

31. The Tribunal acknowledges that the burden of proof that there has been a breach of the Lease lies with the Applicant but the surveyor's report and the photographs, coupled with the correspondence considered by the Tribunal, clearly set out that work has been undertaken for which a licence is required and that there is also a breach of Regulation 15 of the Fourth Schedule

**JUDGE TAMARA RABIN**

**DATED 30<sup>th</sup> March 2014**