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LON/00BG/LBC/2008/0012

Residential Property
TRIBUNAL SERVICE

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE ON AN APPLICATION UNDER SECTION 168(4) OF THE COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Applicant: Peveral Freeholds Limited
416 Manchester Road RTM Co Ltd

Respondent: Mr Jonathan Louis Mark Simmons

Address of Property: Flat 83 Pierhead Lock
416 Manchester Road
London
E14

Application date: 19 March 2008

Hearing date: 29 May 2008

Appearances: Ms Alice Marshment, counsel — For the Applicants

For the Respondents

Members of the Residential Property Tribunal Service:

Mr Adrian Jack — Chairman
Mrs E Flint FRICS
Mr E Goss

London Leasehold Valuation Tribunal File Ref No.	LON/00BG/LBC/2008/0012

Leasehold Valuation Tribunal: decision

Commonhold and Leasehold Reform Act 2002 section 168

Address of Premises	The Committee members were
Flat 83 Pierhead Lock, 416 Manchester Road, London E14 3FD	Mr Adrian Jack Ms E Flint FRICS Mr E Goss

Landlord: **Peveral Freeholds Ltd**

Management Co: **416 Manchester Road RTM Co Ltd**

Tenant: **Mr Jonathan Louis Mark Simmons**

The application, the law, the lease and the allegations

1. By an application dated 17th March 2008 the landlord and management company applied for a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 that the tenant is in breach of two covenants of the lease.

2. Section 168 provides, so far as relevant, that:

> "(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 a breach has occurred...
>
> (3) But a notice may not be served by virtue of subsection (2)(a)... 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."

3. The tenant holds his flat under the terms of a lease dated 4th December 1998 for a term of 999 years from 1st August 1996. By clause 13 of Part I of the Eighth Schedule to the lease the tenant covenanted:

> "Not to bring into the Demised Premises or any part thereof any article which will impose undue stress or strain to any part of the floor surface or structure or any article which is or may became dangerous to the Development or the occupants thereof."

By clause 7 of Part II of the Eighth Schedule to the lease the tenant further covenanted (so far as relevant):

> "not to do permit or suffer on the Demised Premises any act or thing which shall or may be or become a nuisance damage annoyance or inconvenience to the Lessor or to the lessees or occupiers of any other Properties or to the owners or occupiers of any neighbouring property and to pay all costs charges and expenses of abating a nuisance and executing all such work as may be necessary for abating a nuisance."

4. It was common ground that the tenant had installed a Jacuzzi (or hot tub) on the terrace outside his flat. The applicants' case was that the Jacuzzi was too heavy and represented a potential danger to the structural integrity of the building. The tenant disputed this.

Inspection

5. The Tribunal inspected the property in the presence of the tenant on the morning of 29th May 2008. The flat is in a substantial development overlooking the Thames directly opposite the O_2 Dome. The flat is in a curving block which rakes back, so that flats at the front have terraces which rest on the accommodation beneath. Flat 83 is a duplex and the bedrooms are underneath the terrace on the higher floor.

6. The terrace attached to Flat 83 was about 15 feet deep (although because of the curve, this figure was not constant) and 28 feet wide. The adjacent flat had a continuation of the same terrace and was separated by a bamboo partition. The Tribunal were not able to measure the terrace of the adjacent flat, but estimated it to be about 20 to 24 feet wide.

7. The Jacuzzi was on the right hand side of the terrace as one looked out. Its external dimensions were 72 inches by 78 inches. The internal dimensions of the basin were 58 inches by 66 inches. The Jacuzzi was filled with water when the Tribunal inspected it. The depth of the water was not even, because different forms of seat were molded into the frame. The shallowest seat had a depth of 16 inches and there were two V-shaped seats which were deeper. The deepest point in the Jacuzzi was in the middle with a depth of 28 inches.

8. The Tribunal considered that the average depth of the Jacuzzi was likely to be about 24 inches. The tenant said that the empty weight of the Jacuzzi was 144 kilogrammes and this seemed reasonable from the Tribunal's own inspection of it.

9. The Jacuzzi rested on a rubber base which did not extend beyond the Jacuzzi. The tenant had laid timber deckingover the terrace, but this did not extend underneath the Jacuzzi itself. Next to the Jacuzzi was a lightweight plastic shed used for storage. It was six feet high and four feet across.

10. The floor of the terrace, which also constituted the roof over the bedrooms, was 18 inch thick and consisted of a concrete base with 35 mm screed and asphalt covering. Neither from the top nor from the bedrooms was there any sign of warping or distress in the structure.

The hearing

11. After the inspection the Tribunal held a hearing at Alfred Place. The applicants were represented by Ms Marshment of counsel. Ms Emily Measor, the managing agent, was in attendance, as was Mr Duncan Anderson, the applicants' structural engineer. The tenant represented himself.

12. There was a large amount of correspondence and e-mails between the parties. In particular it was disputed whether or not the tenant had at an early stage of the proceedings refused to allow access to Mr Anderson. There were also disputes as to what had been said between Ms Measor and the tenant. The Tribunal considered that it was not necessary to resolve these issues for the purpose of the matters in dispute between the parties.

13. There is, however, no doubt that Mr Anderson did not in fact gain access to the tenant's flat and did not measure the Jacuzzi himself. Mr Anderson's report dated 9th June 2007 was therefore based on observations from an adjacent balcony and some of the assumptions made by him in that report proved to be incorrect. No blame attaches to Mr Anderson personally for this, but the Tribunal is surprised that the applicants did not seek any directions from the Tribunal so that Mr Anderson might be allowed access.

14. At any rate the circumstances in which Mr Anderson came to make his initial report were such that it caused (unjustifiably in the Tribunal's view) the tenant to distrust his objectivity. There is no doubt that this prevented any meaningful dialogue between the parties before the hearing.

The evidence and the Tribunal's findings

15. The only witness for the applicants was Mr Anderson. He is (among other qualifications) a Fellow of the Institute of Structural Engineers and a Chartered Structural Engineer. He has been in general practice for some 30 years. The Tribunal considered that Mr Anderson was an experienced expert who was doing his best to assist the Tribunal. In particular, he was happy to rethink the views expressed in his report, once the figures as found by the Tribunal were put to him. With the exception of certain matters where Mr Anderson had made assumptions, the Tribunal had no hesitation in accepting his evidence.

16. The Tribunal's figures showed that the total water in the Jacuzzi was 91,872 cubic inches (58" x 66" x 24"). With 277.419 cubic inches to the gallon, the total number of gallons was 331.67. A gallon weighs precisely 10 pounds, so the total weight of water in the Jacuzzi was about 3,317 lb, or 1.48 long tons.

17. Mr Anderson said (on these facts) that the mass of 1.5 metric tons exerted a force of about 15 kiloNewtons (kN). If the dry weight of the Jacuzzi was 144 kilogrammes, that would exert a force of about 1.5 kN. If three 80 kilo persons were sat in the Jacuzzi they would exert a force of about 2.4 kN. The total force exerted by the Jacuzzi filled with water and people was therefore about 18.9 kN.

18. The footprint of the Jacuzzi on the Tribunal's measurements was 72 inches by 78 inches, or 1.8 metres by 1.99 metres, or approximately 3.6 square metres. The point force exerted by the Jacuzzi was therefore about 5.28 kN/m^2.

19. Mr Anderson explained that when a structural engineer designs a floor, there are two elements which he needs to take into account. Firstly there is the need for the floor to support its own deadweight (this will be a static figure). Secondly the floor must support whatever is placed on the floor. This superimposed loading will be a variable figure depending on the use of the floor from time to time.

20. He said that the relevant British Standard provided that a balcony of a residential property should be able to support a downward force of 1.5 kN/m^2. Since, he said, this had been a speculative development, it is likely that the builders, Barretts, would have kept to the minimum.

21. The tenant attacked this part of Mr Anderson's evidence. Firstly, he said that the Jacuzzi was on a terrace not a balcony, so that it was wrong to rely on the British Standard applied by Mr Anderson. Secondly, he said that the superimposed loading specified by Barretts was in fact 4.57 kN/ m^2.

22. The Tribunal did not accept the tenant's first point. The difference between a balcony and a terrace is purely semantic. The Tribunal accepted Mr Anderson's evidence that the balcony figure was the only one which could sensibly apply to the current case in the British Standard.

23. The tenant's second point is more complicated. The tenant explained that he had spoken to a Mr Menichella, who was a surveyor employed by Barretts, who had had involvement in the original construction of the development. It was Mr Menichella who had told him that the superimposed loading was 4.57 kN/ m^2.

24. In the Tribunal's judgment there were difficulties accepting in full this evidence of what Mr Menichella was alleged to have said. Firstly, on the tenant's own account, Mr Menichella was unwilling to give any professional opinion or assume any duty of care to the tenant, nor was he willing to put anything in writing. If Mr Menichella was not prepared to do that for the tenant, he was still less likely assume any expert duties to the Tribunal.

Secondly, it was not clear what Mr Menichella's professional qualifications were. Thirdly, Mr Anderson's firm view was that 4.57 kN/ m^2 was a much higher figure than would ever normally be specified for a residential development and probably represented the combined deadweight and superimposed load. Only in a warehouse would such a high figure be expected. Mr Anderson did, however, concede that a specification of 2.5 kN/ m^2 might be specified in a residential development.

25. The Tribunal considers (and Mr Anderson agreed) that the 4.57 kN/ m^2 figure (assuming that is what Mr Menichella said) was probably the combined deadweight and superimposed loading. The Tribunal was, however, concerned that the applicants were unable to say what the actual specification for the superimposed loading was. Ordinarily in a fairly recent development, such as the present one, it is easy to gain access to the original plans and specifications. No explanation was given as to why the applicants had not made these documents available to Mr Anderson. It is wrong in our judgment that Mr Anderson was forced to speculate that the specification for the superimposed load was 1.5 kN/ m^2, when the true figure could have been known.

26. The Tribunal considers that it is appropriate to draw inferences adverse to the applicants. On the basis of Mr Anderson's evidence the Tribunal rejects the tenant's submission that 4.57 kN/ m^2 was the appropriate figure, but it considers that it was quite likely that 2.5 kN/ m^2 might have been specified as the superimposed load. The Tribunal had particularly in mind that this was a reasonably prestigious development and that a high specification might well have been stipulated.

27. Under cross-examination, Mr Anderson conceded that a mass of one metric ton does not produce precisely 10 kN/ m^2. He accepted that a closer figure is in fact 9.8 kN/ m^2. The tenant also suggested that the true footprint of the Jacuzzi was 2.0 metres by 1.85 metres, so as to give a footprint of 3.7 m^2. Putting these figures together meant that the point force produced by the Jacuzzi was 14.6 kN from the water, 1.4 kN from the dry weight and 2.35 kN from the people using the Jacuzzi, so as to give a total figure of 18.35 kN. With a footprint of 3.7 m^2, the force exerted was therefore 4.95 kN/ m^2. Mr Anderson agreed that on these hypotheticals that was the arithmetical result, but he said that this was still nearly double the specified figure of 2.5 kN/ m^2.

28. In the Tribunal's judgment this figure of 4.95 kN/ m^2 was the smallest force which could reasonably have been generated by the Jacuzzi. The burden is on the applicants to show that the tenant was in breach of covenant. In the Tribunal's judgment the landlord has succeeded in showing that the Jacuzzi generates 4.95 kN/ m^2 of force, but has not shown that it generates any more force than that. It is on this figure of 4.95 kN/ m^2 that the Tribunal will decide whether there has been a breach of covenant.

29. The tenant also cross-examined Mr Anderson to the effect that there was always a safety margin built into these figures, so that, even if 2.5 kN/ m^2 was specified, in practice the safe working limit could be 60 per cent higher, so as to give 4.0 kN/ m^2. Mr Anderson accepted that there was a safety margin, but he said that it would be quite wrong to rely on the safety margin. The whole point of having a figure like 2.5 kN/ m^2 was ensure safely. Where, he asked rhetorically, could one otherwise draw the line? You should not, he said, go above the safe working limit.

30. The Tribunal fully accepts this evidence, which accords with its own knowledge. It would be contrary to any good practice deliberately to breach a safe working limit by relying on a margin of safety. Moreover the Tribunal notes that, even if (which is not the case) it was legitimate to rely on a margin of safety so that the "true" safe working limit on this balcony was 4.0 kN/ m^2 the minimum figure for the point force produced by the Jacuzzi was still in excess of this at 4.95 kN/ m^2.

31. Mr Anderson gave evidence in chief about the effect of overloading floors, such as occurred on the terrace in this case. It was, he said, unlikely that there would be a catastrophic failure resulting in the sudden collapse. Rather the weight of the Jacuzzi would be likely to cause some bending or deflection in the structure of the building. This would not necessary effect the area immediately beneath the Jacuzzi; it might well be felt at some distance on a neighbour's land. One consequence might be, for example, that water was able to ingress.

32. The Tribunal accepted this evidence. There was admittedly no evidence on visual inspection that the Jacuzzi had caused structural damage, but for the reasons advanced by Mr Anderson it is likely that overloading will produce medium and long-term detrimental results.

33. Mr Anderson in his original report had given his view that with the Jacuzzi in place the balcony as a whole (rather than just the point loading where the Jacuzzi was installed) could be overloaded. This was based on an assumption that there might be some form of entertainment with some 50 people on the balcony. He calculated the total superimposed loading on the balcony on this scenario would be 62 kN (including the Jacuzzi). Under cross-examination from the tenant, he accepted that the area of the balcony was likely to be 4.6 metres by 8.6 metres. With a 1.5 kN/ m^2 specified loading, the maximum safe loading which the balcony could support would be 59.34 kN (4.6m x 8.,6m x 1.5 kN/ m^2). With a 2.5 kN/ m^2 specified loading, the total loading would be 98.9 kN (4.6m x 8.6m x 2.5 kN/ m^2). Since the Tribunal accepted the 2.5 kN/ m^2 figure, it follows that the 98.9 kN figure is more than 62 kN which resulted from the Jacuzzi plus 50 visitors. Accordingly the applicants have failed in

our judgment to show that the balcony as a whole (as opposed to the point loading) is unsafe.

34. The tenant gave evidence on his own behalf. He explained that he had had some architectural training, although he had never qualified as an architect. He accepted that he had no qualifications as a structural engineer. The Tribunal was not willing to accept his comments on the structural matters as evidence, because he lacked any expert qualifications. Instead the Tribunal considered his comments as submissions. We have dealt with the substance of these submissions as we have considered the evidence of Mr Anderson.

Conclusions

35. The landlord relied on breaches of two covenants: The first was not "to bring into the Demised Premises or any part thereof any article which will impose undue stress or strain to any part of the floor surface or structure or any article which is or may became dangerous to the Development or the occupants thereof." On our findings of fact, the Jacuzzi does impose undue stress and strain to the floor and structure. However, at present on the evidence of Mr Anderson it is unlikely to become dangerous. The longer term consequences of overloading are admittedly bad, but there is unlikely to be actual danger. There is thus a breach of the first part of the covenant only.

36. The second covenant allegedly broken is "not to do permit or suffer on the Demised Premises any act or thing which shall or may be or become a nuisance damage annoyance or inconvenience to the Lessor or to the lessees or occupiers of any other Properties or to the owners or occupiers of any neighbouring property and to pay all costs charges and expenses of abating a nuisance and executing all such work as may be necessary for abating a nuisance." Again the installation of the Jacuzzi has not yet caused a nuisance, but there is a very real risk that it will cause damage to the building and therefore damage to other lessees and the landlord. The covenant in respect of "damage" does not read well, since a prohibition on doing anything which "may be or become a.. damage... to the Lessor" is not good English. However, the intention is clearly to prohibit anything which may cause damage. Accordingly there is a breach of this covenant to that extent. Since there is no nuisance, the second part of the covenant has no application.

The way forward

37. It follows from our findings that the tenant, if he is to avoid being in continued breach of covenant, should empty the Jacuzzi of water. It may be that some platform can be built under the Jacuzzi to allow the weight to be safely spread over a wider footprint. This, however, is a matter where the tenant will need to take advice from his own structural engineer. It would obviously be sensible if any structural engineer instructed by him could reach agreement with Mr Anderson.

38. It should be possible as well to check the original plans and specifications to see what the actual figure for superimposed loading was. The Tribunal has determined this application on the basis of the limited evidence it heard. Our determination that 2.5 kN/ m^2 was the likely specification of the superimposed loading will not bind a future Tribunal hearing any renewed application under section 168, if such is brought in the event that the tenant installs a platform underneath the Jacuzzi which the applicants still consider inadequate.

Costs

39. The applicants applied for an order that the tenant pay it £500 under para 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 based on the tenant having acting unreasonably in the course of the proceedings. There are criticisms which can justifiably be made of the tenant's conduct, just as there may be of some of the applicants' conduct of the proceedings. However, in order to make an order under para 10, it is necessary that the unreasonable conduct reaches a high threshold of unreasonableness. In our judgment, the criticisms of the tenant's conduct are comparatively minor and in our discretion we make not order under para 10.

40. The applicants indicated that they intended to recover the costs of these proceedings against the tenant under the standard term in the lease allowing costs incidental to the service of a section 146 notice to be recovered. The Tribunal expresses no view one way or the other as to whether that is permissible under the terms of the lease. That matter will have to await another day.

DECISION

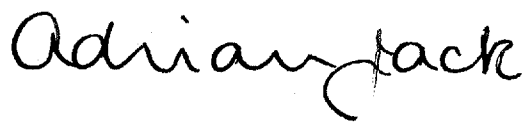
41. **Accordingly the Tribunal determines:**

a. that the tenant has, by the combined effect of placing of the Jacuzzi now on the terrace of his flat and filling of the same with water:

i. thereby imposed undue stress and strain on the floor surface and structure of the block and is thereby in breach of is in breach of the terms of clause 13 of Part I of the Eighth Schedule to the lease; and

ii. thereby done, permitted and suffered an act or thing which may be or become a cause of damage to the landlord or to the lessees or occupiers of other properties in the block or to the owners or occupiers of any neighbouring property and is thereby in breach of the terms of clause 7 of Part II of the Eighth Schedule to the lease;

b. that the applicants' application for an order under para 10 of Schedule 12 to the Commonhold and Leasehold Reform Act 2002 be refused.



Adrian Jack, Chairman 4th June 2008