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Residential Property
TRIBUNAL SERVICE

LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Case Reference: LON/00AK/LBC/2010/0011

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN APPLICATION UNDER S.168(4) COMMONHOLD AND LEASEHOLD REFORM ACT 2002

Applicants:	David John Powley and Janet Humphreys
Represented by:	Sanders Solicitors
Respondent:	Desmond Joseph Cole and Adam John Armsby
Represented by:	Layzells Solicitors
Premises:	199 Bowes Road, London N11 2HN
Tribunal:	Ms F Dickie, Barrister (Chairman) Mr C P Gowman Mr E Goss
Date of Hearing:	22nd March 2010
Appearances for Applicants:	Mrs A Creer, Counsel
Appearances for Respondents:	Mr M Walsh, Counsel
Date of Decision:	30th April 2010

Summary of Determination

1. The Tribunal finds that Clauses 2(7) and 2(11) of the lease have been breached.

Preliminary

1. The premises are a first floor flat known at 199 Bowes Road, London N11 2HN which by a lease dated 26th August 1983 were demised for a period of 99 years from 24th June 1983. The Tribunal did not carry out an inspection. The Applicants are the current registered freeholder and the Respondents the current registered owners of the leasehold interest in the premises. By an application dated 25th January 2010 the Applicants sought a determination under s.168 of the Commonhold and Leasehold Reform Act 2002 that the Respondents had breached the covenants of their lease. Directions were issued by the Tribunal on 29th January 2010. The relevant clauses of that lease relied upon by the Applicants are:

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(7) Not to cut maim or injure any of the walls or timbers of nor (without the previous consent in writing of the Lessor and any necessary consent of the Planning and other competent Authorities) make any alterations or additions to the demised premises or erect any new or additional buildings upon the demised land or any part thereof

(11) That the demised premises shall be used for private residential purposes in a single occupation and for no other purpose whatsoever

(13) That the Lessor or any person authorised by the Lessor may at all times during the said term at all reasonable hours in the daytime (except in case of emergency) enter into and upon the premises to view and examine the state and condition thereof and of all defects decays or wants of reparation or amendment (which upon such view shall be found) give or leave notice in writing at or upon the premises from the Lessee to repay and amend the same (damage excepted as aforesaid)

Section 168(1) - (4) of the Act provides:

(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 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 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.

2. At the hearing Mrs Creer, counsel for the Applicants, conceded that they did not rely on the breach of Clause 2(16) (not to do anything which may invalidate insurance), which had formed part of their application. At the hearing by Mr Walsh on behalf of the Respondents made the following admissions:
    a. The property known as 199 Bowes Road, London N11 2HN has been divided into two flats.
    b. The premises are now used as two dwellings
    c. Those dwellings are let out by the Respondents.

Case for Applicants

3. Mr Matthew Reach, formerly of the Applicant's solicitors, gave evidence on behalf of the Applicants. In view of the admissions made on behalf of the Respondents, the Applicants did not tender in evidence a recorded telephone conversation of 30th April 2008 between Mr Reach and the Respondent Mr Armsby, the admissibility of which was in dispute.

4. Mr Reach said his firm had been instructed on 12th March 2008 and he had never seen correspondence with the Applicants' previous solicitors now produced by the Respondents relating to the service in November 2006 and subsequent withdrawal of a notice under s.146 of the Law of Property Act 1925. The Applicants relied on Mr Reach's evidence that numerous requests for access to the premises had been made to the Respondents but never complied with. To his knowledge there had never been an inspection because a series of firm arrangements for appointments made with the Respondents to meet with Mr Tankard, the Applicants' builder, were never kept. Mr Reach said Mr Tankard would attend but nobody would be there to meet him, though he could not refer to dates and times or state on how many occasions this had happened. No evidence was produced from Mr Tankard.

5. Acknowledging that they would have a right under Clause 2(13) to seek an injunction to obtain access, Mrs Creek argued for the Applicants that there was an implied obligation in that Clause that the Landlords' right to access would be facilitated: a reciprocal obligation on the Lessee to accommodate the Landlords' entitlement to inspections under 2(13).

6. In considering the Tribunal's jurisdiction to consider a waiver of the performance of the specific covenants of the lease by a form of promissory estoppels, Mrs Creer drew the Tribunal's attention to the distinction between that and the waiver of right to forfeit, being an election whether to pursue specific remedy. Mrs Creer observed that the s.146 notice served in 2006 was withdrawn because it was invalid (as indicated in correspondence). She disputed that demanding rent could raise a promissory estoppel or that detrimental reliance had been proven – since taking no action cannot be detrimental reliance.

Case for Respondents

7. Mr Walsh argued that there had been no breach of covenant as alleged by the Applicants by virtue of the fact that they had waived their right to complain of the breaches and the covenants in question are suspended as against the Respondents. He accepted the Tribunal's jurisdiction to determine whether the Landlord has waived the right to assert, or is stopped from asserting, that a breach has occurred, but not to

decide whether waiver of the right to forfeit had occurred (referring to the principle in Swanston Grange Management Ltd v Langley-Essex [2008] L&TR 20). He submitted that a waiver of the right to forfeit and waiver of the right to complain of the breach operate in the same way, and that waiver of the right to complain of the breach and promissory estoppel in Swanston Grange were alternative tests.

8. Mr Walsh proposed that upon withdrawal of the s.146 notice served in 2006 the Applicants had treated the lease as continuing and waived their rights to rely on that breach. He further argued that the Respondents had relied on this conduct to their detriment by letting the premises out as 2 dwellings, doing so under the misapprehension that this was an agreed state of affairs. He argued that a covenant is suspended if there is a breach of any once and for all covenant if at the time of demand or rent there is knowledge of the breach, and that this principal applied to the facts of the case.

9. Mr Walsh argued that on its proper construction clause 2(13) imposes no positive obligation on the lessee to do something. It is merely permissive in allowing the lessor to view the property, but provides no positive obligation and no time period by which time the Respondents must permit access. Mr Walsh submitted that the Respondents had not denied the covenant's enforceability against them and the remedy if the lessor refuses to give access is an injunction.

Determination

10. The Tribunal dismisses the claim in respect of a breach of Clause 2(16) (not to do anything which may invalidate insurance), which was not pursued by the Applicants. The Respondents have admitted that the property has been divided into 2 flats without the landlord's permission. The associated building works constitute the making of an alteration prohibited by the terms of Clause 2(7) without the consent in writing of the Landlord. Furthermore, the admission that the premises have been divided into two dwellings each separately let and occupied is a breach of the covenant on single occupation in Clause 2(11).

11. It is convenient for the Tribunal to set out part of the decision of HHJ Hustkinson in Swanston Grange (Luton) Management Limited v Langley-Essen (LRX/12/2007).

"16. I am conscious of the fact that the question of the jurisdiction of the LVT to consider whether a landlord has waived a covenant (in the sense of being estopped from relying upon its rights against the tenant under the covenant) is a matter of some potential importance.....Nothing I say is intended to indicate any jurisdiction in the LVT to consider the separate question of waiver which arises when it is necessary to decide whether a landlord has waived the right to forfeit a lease on the basis of a breach of covenant. The latter question is dealing with the remedies available to a landlord on the basis of a breach of covenant which has been determined to have occurred or has been admitted by the tenant. The question with which this case concerned is the question of whether the landlord is estopped from asserting against the tenant that there has been a breach of covenant at all. This in my judgment is a wholly different question and I do not accept Mr Clargo's argument that, if the LVT does not have jurisdiction to consider questions of waiver of the right to forfeit, it necessarily cannot have jurisdiction to consider questions of waiver in the sense of being estopped from relying upon a covenant at all.

17. The purpose of a determination under section 168(2)(a) is in my judgment to bring the parties to the same position as would be reached if section 168(2)(b) was engaged by reason that "the tenant has admitted the breach". This contemplates an admission by a tenant that it has committed an actionable breach of covenant. Paragraph (b) does not contemplate an admission by a tenant that it has done an act which, judged strictly, would be a breach of covenant but which the tenant asserts the landlord is not entitled to complain about for reasons of waiver/estoppel.

18. The nature of a promissory estoppel, if established, is helpfully summarised in Halsbury's Laws of England 4th Edition Re-issue Volume 9(1) at paragraph 1030:

"1030 ***The High Trees doctrine.*** *Similar to waiver is the doctrine of promissory or equitable estoppel, whereby a party who has represented that he will not insist upon his strict rights under the contract will not be allowed to resile from that position, or will be allowed to do so only upon giving reasonable notice."*

Also at paragraph 1035 there is this

1035 ***Promissory estoppel generally has effect of suspending obligation.*** *Like waiver, a concession giving rise to the High Trees doctrine of promissory estoppel will generally only suspend the strict legal rights of the party granting it (B); and he may revert to these rights for the future upon giving reasonable notice of his intention to the other party (A).*

19. These passages show that if a landlord has waived or become estopped in the foregoing sense from relying as against a tenant upon a covenant, then for so long as this waiver or estoppel operates the obligation is suspended. It is wrong to conclude that a tenant who performs acts which strictly would be a breach of the suspended covenant has breached this covenant. Accordingly in answering the question posed by section 168(2)(a) as to whether the breach has occurred the LVT needs to decide (and must consequently have jurisdiction to decide) whether at the relevant date the covenant was suspended by reason of a waiver or estoppel (in which case a breach will not have occurred) or whether at the relevant date the covenant was not suspended (in which case a breach will have occurred if the facts show non-compliance with the terms of the covenant). ...

21. ... what is contemplated in section 168(2)(a) is a determination that an actionable breach of covenant has occurred, not a determination that facts have occurred which, on the strict interpretation of the lease, amount to a breach of covenant but with it being left over for future consideration as to whether the landlord is or is not estopped from asserting that these facts constitute a breach of covenant."

12. The test for this Tribunal is, accordingly, that set out in paragraph 23;

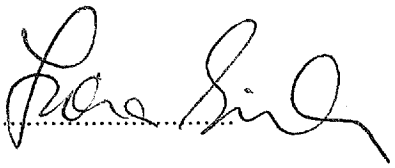
"For the Appellant to be prevented by waiver or promissory estoppel from relying on the relevant covenants the Respondent would need to be able to show an unambiguous promise or representation whereby she was led to suppose that the Appellant would not insist on its legal rights under the relevant covenants regarding underlettings either at all or for the time being. The Respondent would need to establish that she had altered her position to her detriment on the strength of such a promise or representation and that the assertion by the Appellant of the Appellant's strict legal rights under the relevant covenants would be unconscionable."

13. The Tribunal does not agree with the submissions of Mr Walsh that the decision in Swanston Grange provides alternative tests of waiver and promissory estoppel, or that waiver of the right to forfeit and waiver of the right to complain of the breach operate in the same way. They are wholly different questions, as identified by HHJ.Huskinson. The Tribunal does not accept that mere withdrawal of the s.146 notice for its invalidity, and acceptance of rent, can raise a promissory estoppel. The promise or representation must be referable to the particular covenants in question. There was no promise or representations in relation to these covenants, and no alteration of position to the detriment of the Tenants (who merely continued, as they had done before, to let out the two dwellings). The demand of rent amounting to waiver of the right to forfeiture is within the jurisdiction of the County Court and not this Tribunal, which could not entertain a parallel jurisdiction in respect of it.

14. The Tribunal finds that the Respondents have not shown that there was "an unambiguous promise or representation" leading them to suppose the Applicant would not rely on the relevant covenants. Accordingly, the Tribunal finds that there has been no waiver of the breaches of covenants 2(7) and 2(11) of the lease (within the meaning of "waiver" which it is within the jurisdiction of the Tribunal to determine). It is satisfied that such breaches have taken place. The operation of those covenants against the Respondents has not been suspended such that it would be unconscionable to rely on them.

15. Finally, the Tribunal turns its attention to the covenant in Clause 2(13). In its determination it accepts the arguments of Mr Walsh. The particular covenant in question is drafted so as to confer on the Landlord a right to enter for the purposes of inspection, but does not confer on the Tenant the duty to allow such entry. The Landlord has a remedy in the courts by way of an injunction where the Tenant fails to permit access. There is no specific and positive obligation on these Respondents in respect of which they can be in breach. The Tribunal is not persuaded that the implication of such a positive obligation (precise terms for which were not advanced) is necessary to give the clause business efficacy. The Tribunal notes that once such inspection has taken place, Clause 2(14) does indeed place a positive obligation on the Tenant to allow access by the Landlord / Landlord's agents to carry out works of repair identified.

16. The Tribunal furthermore considers that the Applicants' evidence fell short of proving that the Respondents had failed to provide access. The evidence of Mr Reach regarding dates and times of unsuccessful appointments was insufficient. There was no direct evidence from Mr Tankard - the only person according to the Applicants who was to have been present at appointments said to have been arranged.

Signed .....  ..... Dated 30th April 2010