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

Case Reference : **LON/OOAG/LBC/2015/0120**

Property : **Flat 1, 53 Rosslyn Hill Hampstead
London NW3 5UH**

Applicant : **53 Rosslyn Hill Residents
Association Limited**

Representatives : **Natalie Brown of Counsel**

Respondents : **Carl Philip Johnson and Cressida
Marianne Dimmock**

Representative : **Annette Cafferkey of Counsel**

Type of Application : **Application for an order that a
breach of covenant or a condition
in the lease has occurred pursuant
to S. 168(4) of the Commonhold
and Leasehold Reform Act 2002**

Tribunal Members : **Professor Robert M Abbey
(Solicitor)
Mr Alan Manson FRICS**

**Date and venue of
Hearing** : **12th April 2016 at 10 Alfred Place,
London WC1E 7LR**

Date of Decision : **29 April 2016**

DECISION

acted in such a way that they are in breach of a covenant or covenants in the lease and listed above.

The hearing

9. The Tribunal had before it a bundle of papers prepared by the applicant in the form of a lever arch file containing copies of documentation and registered title copies and a copy of the lease as well as copy correspondence. A similar bundle was also submitted by the respondent containing copies of documentation and authorities regarding legal submissions.
10. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.
11. The first and only person to give oral evidence was Mr Carl Johnson one of the respondents. The tribunal was able to see two witness statements of Joanne Louise Kenrick a former director of the applicant who was unable to give oral evidence before the tribunal on the day of the hearing. The tribunal was also supplied with a witness statement of Gillian Paschkes-Bell a director of the applicant since 22 December 2015. Her statement was accepted by the parties. The tribunal also had before it several statements that were prepared for the purposes of the previous application.
12. In regard to witness statements of witnesses that did not give oral evidence it is the case that the Tribunal can only give such weight to this evidence as they think appropriate bearing in mind the evidence was not tested in cross-examination.
13. In cross examination Mr Johnson stated that no further works had been carried out by him in the property since late 2011/first quarter of 2012. He did explain that some works had been effected to the property since then by contractors for the applicant/landlord such as some works to the external (stud partition) wall of the property. He also explained his view of the circumstances in which the property windows had been removed, returned and then stolen. He also indicated what he had done in relation to an insurance claim that had arisen after the theft of the windows. He also suggested that the mediation agreement had been accepted by him simply because it was a pragmatic solution that would remedy all the outstanding issues that had arisen out of the previous application. He also confirmed that the property had been purchased by the respondents on 16 May 2011 and while he had access to the property before that date, he could not be responsible for breaches that occurred prior to his purchase.

The issues

14. The only issue for the Tribunal to decide is whether or not a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002. Having heard evidence and submissions from the Applicant and from the Respondent and having considered all of the documents provided, the Tribunal determines the issue as follows.
15. The Tribunal heard Ms Cafferkey for the respondent assert in her final submissions on the law that the effect of the mediation agreement was to release the respondent from any liability for breaches. The Tribunal therefore considered the mediation agreement in detail and noted the following relevant points contained within it that we set out in summary:-
 - (i) The respondent admitted that they were at that time in breach of covenants
 - (ii) The applicant agreed to take no further action in regard to the matters raised in paragraph 19 of the previous application. (As to the contents of this paragraph see paragraph 6 above).
 - (iii) The applicant agreed to grant consent for any works or alteration sought to the property
 - (iv) The applicant was to appoint a surveyor to prepare a specification of works including those necessary to remedy all matters raised in the previous application. The clear intention was that the works would be completed by the applicant and the respondent would pay by way of service charges.
 - (v) Payments were agreed by both parties and a timescale listed for the payment to be made by
 - (vi) The agreement at clause 9 stated that "This agreement is in full and final settlement of all matters, disputes and causes of action mentioned in this application or which were known or reasonably discernible as at today, for the avoidance of doubt this includes any claim for damages"
16. The position of the respondents is that they say they have not done any further works to the subject property since before the previous application and where the mediation agreement was completed by the parties to compromise the claim. Indeed Ms Brown on behalf of the

applicant and in her final submissions did concede that the removal of the walls was discernible at the date of the mediation agreement. The respondent says that the mediation agreement fully compromised the matter and covers the alleged breaches that represent the subject matter of this claim.

17. After hearing the evidence the tribunal accepted that the works set out in paragraph 5 above all took place some time ago and preceded the mediation agreement. Certainly this is the case for the windows. It is accepted that the windows were in fact returned to the front yard of the property at the end of March 2012 or thereabouts when they were not stored in the subject property but in the common parts outside. This position of the windows was seen and approved by the applicant's agent. It must therefore be the case that the windows were subsequently stolen when in the possession of the applicant. An insurance claim was made. A payment was issued, returned and re-issued. It seems to the tribunal that if a payment has been issued by the insurance company it must be good evidence of their acceptance of the claim.
18. The effect of the mediation agreement seems to the tribunal to lead to a position whereby the respondents were in effect released from their leasehold obligations and that consequently they cannot be in breach. There is said to be "accord and satisfaction". The mediation agreement was a contract that provided accord and satisfaction in the manner required by law, see *British Russian Gazette v Associated Newspapers Limited [1933] 2 KB 616*. This being so the law will not permit further litigation in relation to matters that have been compromised such as is the case in this dispute.
19. At paragraph 16 of the applicant's statement of case the applicant confirms that it would pursuant to the terms of the mediation agreement reinstate the windows. Subsequently the applicant asserted that there has been frustration or waiver of the mediation agreement such that the applicant can therefore pursue the current application. They say this is so because the respondent has failed or refused to obtain replacement windows, see paragraph 19 of the applicant's statement of case.
20. The tribunal is of the view that neither waiver nor frustration will apply. The windows were not in the custody of the respondent they had been returned to the common parts at the specific request of the applicant's agents. The respondents cannot be responsible for the windows if they are then stolen. Moreover an insurance payment has been made to address this point of the dispute. In these circumstances the tribunal cannot see why the respondents should either supply or fit the replacement windows. Consequently the tribunal can see no merit in the position of the applicant in this regard. We cannot find a breach of

covenant in relation to the missing windows. The mediation agreement remains effective.

21. As for the removal of the stud partition walls the tribunal accepts the evidence of Mr Johnson who said he had not carried out any works for some years, see paragraph 13 above. This being so the tribunal take the view that the mediation agreement must also apply to these works and are thus fully compromised. We cannot find a breach of covenant in relation to the stud partition walls. The mediation agreement remains effective.

22. Other breaches were also asserted by the applicant in its statement of case. These additional breaches include breaches of clause 2 of the fifth schedule, (nuisance), clause 8.1 of the fourth schedule, not to block up windows), clause 8 of the fifth schedule, (alteration of external walls), clause 1.1 of the sixth schedule, (keep in good repair) and finally clause 3 of the sixth schedule, (to clean windows). However the tribunal takes the view that if the mediation agreement applies (as set out above for the walls and windows) then it must follow that there can be no breaches in regard to the provisions. Accordingly, we cannot find a breach of covenant or covenants in relation to the items listed above. The mediation agreement remains effective.

Name: Prof. Robert M. Abbey **Date:** 29.04.16