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LON/00AQ/LBC/2007/0001

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON APPLICATION UNDER COMMONHOLD & LEASEHOLD REFORM ACT 2002- SECTION 168(4)

Applicant: Butterfield Buildings Limited

Respondent: The Avon Estate (London) Limited

Re: Flat 1 Maison Alfort, 251 High Road, Harrow, HA2 3EL

Application received: 11 January 2007

Hearing date: 22 March 2007

Appearances:		
	Mr R Moules (Counsel)	(for Applicant
	Mr A Tarling (Surveyor)	"
	Mr K Kamlesh (Director)	"
	Mr P Sissons (Counsel)	(for Respondent)
	Mr I Moskowitz (Director)	"

Members of the Leasehold Valuation Tribunal:

Mr S Carrott LLB
Mr P Roberts DipArch RIBA
Mr C Piarroux JP CQSW

1. This is an application under section 168(4) of the Commonhold and Leasehold Reform Act 2002 for a determination that a breach of covenant or condition in the lease has occurred.

2. The Applicant landlord is Buttercup Building Limited and the Respondent tenant is Avon Estate (London) Limited. The subject property is Flat 1 Maison Alfort, 251 High Road, Harrow Weald, HA2 3EL.

3. At the hearing of this application both the Applicant and the Respondent were represented by Counsel. Mr R Moules represented the Applicant and Mr P Sissons represented the Respondent.

4. **Background**

It was common ground between the parties that the lease in question was originally for a term of 99 years from 25 December 1971 between Bromor Properties Limited and Olive Josephine Waterworth. The Applicant acquired the reversion of the subject property in or about 2000 and the Respondent acquired the leasehold interest in Flat 1 on 12 December 2005 pursuant to a deed of transfer executed by the previous tenants, a Mr and Mrs Wright. However, before Mr and Mrs Wright transferred their interest to the Respondent, they served notice on the Applicant pursuant to section 42 of the Leasehold Reform, Housing and Urban Development Act 1993 for a lease extension. The benefit of that notice was then assigned to the Respondent.

5. On 9 June 2006 the Respondent applied to the Tribunal under section 48 of the 1993 Act for a determination of premium payable for the lease extension. In respect of that application the Applicant's Solicitors made written representations to the Tribunal alleging that Respondent had carried out unauthorised alterations to the premises which were in breach of the terms of the lease.

6. One further matter should be mentioned by way of background and that is that because the Applicant refused to enter into a new lease, the Respondent applied to the Willesden County Court for an order pursuant to section 48(3) of the 1993 Act. The application is pending.

7. **The Issues**

Both parties have agreed that the works in question amount to alterations for which the consent of the landlord in writing ought to have been sought. The parties have also agreed that the landlord's counter notice served pursuant to the 1993 Act admitting the Respondent's entitlement to a lease extension and the extant application before the Willesden County Court have no bearing on this determination.

8. The issues identified by the parties and the Tribunal were as follows -

(1) whether the Applicant had impliedly given its consent to the works of alteration; and (subject to the question of the Tribunal's jurisdiction to determine the issue)

(2) whether or not the Applicant has now waived the right to forfeiture by demanding rent.

9. **Evidence**

On behalf of the Applicant, the Tribunal heard evidence from a surveyor, Mr Arnold Tarling, BSc FRICS MCIArb and also from Mr Kamlesh Anand a director of the Applicant company.

10. Mr Tarling told the Tribunal that he had been asked to prepare a report on the Respondent's breach of covenant. His report was prepared following an inspection of the subject property on 9 March 2007 and arising from the Respondent's conversion works he detailed a number of breaches of covenant. In giving his oral evidence he summarised his report and told the Tribunal about the matters which he considered constituted a breach of covenant in this case.

11. He told the Tribunal that contrary to clause 2(13) of the lease, the Respondent had without written consent altered the layout of the flat to form a 2 bedroom flat including cutting and forming new openings in main walls for a door opening and through main external walls for a boiler flue and kitchen extract fan. In the present case not only had the boiler flue been passed through a main external wall but it had passed through a structural concrete downstand beam. Mr Tarling said that the Respondent under clause 2(13) should have submitted plans, elevations, sections and specifications when requesting consent. He stated that had a section been prepared then the Respondent would have located the concrete beam and would have avoided passing the flue through a structural beam. As it was the work had now affected the integrity of the reinforced concrete beam. Moreover had the Respondent in submitting its drawings provided an elevation it would also have been clear that flue was located next to two air vents in the external wall which served flats 1 and 5 above and also close to an opening window. This could possibly involve the flue gases being blown back into premises. He said that he was not sure whether the location of the flue complied with manufacturers instructions or indeed with current building regulations and gas safety regulations. In addition the new cupboard enclosure erected around the new boiler was unventilated contrary to Gas Regulations.

12. Mr Tarling said that were other instances where the Respondent had formed openings in a main wall. He pointed to photographs 47 and 48 which showed that the Respondent had installed an extract duct in a main external wall to the new kitchen. This was adjacent to the communal entrance of the property and discharged below a canopy which meant that smells and odours from cooking would cause a nuisance to persons visiting the premises and that the smells would enter Flat 2 which was directly opposite and had a spinner vent in the window. The other risk was of smoke. In the event of fire, the smoke would spread to the main entrance and exit of the building through the duct which had been formed for the kitchen extractor fan.

13. Mr Tarling stated that a specification would detail the materials that are proposed to be installed and would include matters required for building regulations, such as the extract rate of the fan for a room of that type and size.

14. Mr Tarling stated that the main structural wall which supported the concrete floor to the flats above had been cut to form a doorway for the new living room. Moreover the original bathroom door which had been removed and relocated would have had a glazed fanlight which would have allowed natural lighting into the hallway. The new door had a solid panel over and so the natural lighting in the hallway was lost.

15. He said that the Respondent had also penetrated the wall plaster and had connected a waste pipe from the new kitchen into a rain water down pipe which was not demised to the property. He said that this interfered with the landlord's installation and that under building regulations you do not mix foul and surface water drainage. He said that under a scheme works which the landlord was proposing new rainwater down pipes were to be installed which were external to the building. The old down pipes were to be cut off when roof coverings are replaced and be blocked off below ground level. This would render the new waste system inoperable.

16. Other breaches included cutting pipe holes through the main structural walls for both the hot and cold water supplies to the kitchen which now took a very long route from the original position in the kitchen. The pipes ran all the way down the left hand side flank, across the front of the building at low level, all the way up the right hand side flank and about half way across the rear wall to the new kitchen. This was ordinary copper half-inch pipe. Mr Tarling stated that generally plumbing takes the shortest possible route. The old pipe work originally ran under the floor within the screed.

17. Based on the above, Mr Tarling told the Tribunal that had the Applicant been notified of the proposed works and provided with drawings and specification he could reasonably have objected to the works as carried out by the Respondent. He told the Tribunal that the Applicant could have objected to the position of the new kitchen and the extract in the canopy area by the main front entrance door and could have objected to the position of the gas flue where it damaged the concrete beam. The new kitchen could and indeed should have been reconfigured to a smaller size with the entrance door to the living room through a stud wall as opposed to a main wall. Similarly the landlord could have objected to the waste pipe being connected to the rainwater down pipe.

18. Mr Sissons did not challenge Mr Tarling's evidence by way of cross-examination.

19. Mr Anand told the Tribunal that he was a director of the Applicant company and that he was a consultant with the managing agents KLPA. He confirmed his written evidence but clarified one matter, namely the date that he became aware of the breaches of covenant. In his written evidence he stated that he had not become aware of the alterations until February 2007. He said that this was a typing error and that it should have read February 2006.

20. He explained to the Tribunal how the works came to his attention. He stated that as well as being a director of the Applicant company he also held the leasehold interest in several of the flats and garages including Flat 5. He said that he had noticed that the lobby door which gave access not only to the subject property but also the garages was locked on his visit. He knocked on the glazing and it was opened by a builder. He asked the builder what he was doing and the builder was very hesitant and he simply looked at the alterations that were taking place. Mr Anand was not sure of the precise date of his visit but said that he caused the managing agents to write a letter to the

Respondent's Solicitors who were dealing with the lease extension which although undated was faxed on 13 February 2006.That letter referred to the fact that the Respondent had converted a one bedroom flat into a two bedroom flat without permission from the managing agents. He said that he had dictated this letter himself a couple of days after the visit to the premises. He said he thought that Mr and Mrs Wright were still the owner of the property at the time even though the letter acknowledged that the current tenant was Avon Estate.

21. Mr Anand was cross-examined by Mr Sissons and a letter dated 1 February 2006 from Avon Estate (London) Ltd was put to him. The letter requested permission to carry out 'certain minor alterations relating to the repositioning of the kitchen' and enclosed a sketch plan showing not only the repositioning of the kitchen but also the creation of an additional bedroom. The letter was addressed to the Applicant company care of the managing agents. Mr Anand denied having received that letter. He did not comment on whether or not he had received a further letter from Avon Estate dated 17 March 2006 stating that in view of the failure of the Applicant to reply that the Respondent would be proceeding with the work as previously advised. He said that the works had definitely started when he visited in February 2006 and that the Respondent's assertion that the works did not begin until March 2006 was not correct. He denied that his visit in February 2006 was as a result of receipt of the letter dated 1 February 2006.

22. When pressed by the Tribunal on this issued Mr Anand said that he was a founding member of the managing agents and as well as being a consultant there that he also shared the office for his other business. He stated that he opened all of the mail that was addressed to the managing agents and that had the letter of 1 February 2006 been received it would have come to his attention. He said that his visit in February 2006 was coincidental because he was attending the building in connection with the Flats that he owned there.

23. Mr Moskowitz, giving evidence on behalf of the Respondent confirmed his written evidence. He told the Tribunal that he was a director of the Respondent company and that the Respondent had acquired the subject property in December 2005. He stated that the Respondent company had acquired the property quite cheaply because the building as a whole was in dilapidated condition and the previous tenants were sick and tired of the condition of the property and wanted to sell. He said that he agreed to purchase the property and the tenants agreed that they would apply for a lease extension. He further told the Tribunal that once the Respondent had acquired the extended leasehold interest they could not achieve a selling price at auction. He said that they could not sell it for £80,0000 let alone the £160,000 that they wanted to achieve simply because of the dilapidated condition of the block. He said that the condition of the block could be seen in the photographs of the external areas taken by Mr Tarling. As a result of this the Respondent decided to convert the flat into a two bedroom property and then rent it out. He said that his secretary Mr Babbat drew up a sketch plan and that he personally signed the letter dated 1 February 2006. He said that when no reply was received he wrote again on 17 March 2006 to inform the Applicant that the Respondent would be proceeding with the work. He said however that he knew that he would not receive consent from the Applicant because Mr Anand was a difficult man to deal with but that he also knew that the Applicant could not withhold consent if the works did not affect the Applicant's reversionary interest. He also said that if the Applicant had requested further information about the works he would have replied to any request. He was adamant that the conversion works started in March and not February as Mr Anand had stated. He said however that the builders were in the property during February and that they were cleaning out and doing other works to the flat.

24. He said that there were no planning breaches and referred to a letter from the London Borough of Harrow dated 23 May 2006. He said that he had made an application in respect of building control on 17 March

2006 and that the works had not been signed off because of the Applicant's breach of covenant to repair the structure of the building and water getting in.

25. When questioned by Mr Moules, Mr Moskowitz was insistent that he had not started the conversions works in February 2006 and stated that the only reason that Mr Anand visited the premises was because he had received the letter dated 1 February 2006. He stated that the property was still vacant as at March 2007 because of the poor condition of the block as a whole. He said that he had not denied access to the Respondent and that if building control had not refused consent for the works then the Applicant could not refuse consent. He said that he did not see the Applicant's letter which was faxed to the Solicitors on 13 February 2006. He said that it was quite clear that the Applicant did not want the works to proceed and he said that the Applicant's object was to bring proceedings for forfeiture so that he could get the subject property back for free.

26. **Submissions**

Mr Sissons accepted that alterations had been carried out which fell within clause 2(13) of the lease but that there was no breach because the Applicant's consent had been unreasonably withheld, that the Applicant had sought the Applicant's consent and that the unreasonable withholding of consent entitled the Respondent to carry out the works.

27. Mr Sissons relied upon section 19(2) of the Landlord and Tenant Act 1927. He said that by this provision, where as in the present case there was a qualified prohibition against alterations and not an absolute prohibition, the Act operated so as to imply a proviso that the landlord's consent to alterations would not be unreasonably withheld and he said that since the alterations amounted to improvements within section 19(2) of the 1927 Act it followed that the Applicant was under an obligation not to unreasonably withhold consent. He referred also to the

correspondence from the Respondent dated 1 February 2006 and 17 March 2006 and submitted that the Applicant's unreasonable withholding of consent entitled the Respondent to carry out the alterations in question thus there was no breach. He referred to Tribunal to the cases of Treloar v Bigge (1874) L.R. 9 Ex. 151 and F.W. Woolworth and Co v Lambeth [1937] Ch 37.

28. He also relied on section 196 of the Law of Property Act 1925 in order to establish that the Applicant was deemed to have received the letter dated 1 February 2007.

29. Mr Sissons argued that if, contrary to submissions, that the Tribunal held that there was a breach then the Applicant had waived its right to forfeit the lease. He submitted that not withstanding the terms of section 168(4) of the 2002 Act the Tribunal did have jurisdiction to consider the question of waiver of the right to forfeiture on the basis that this was integral to the Tribunal's remit under section 168 of the Commonhold and Leasehold Reform Act 2002. The purpose of section 168 was to prevent the abuse of forfeiture notices being served in circumstances where forfeiture was clearly not justified and so therefore where in a clear case as this where there had been an unequivocal demand for rent following the alleged breach, it would be wrong to allow the landlord to serve a section 146 notice when the inevitable conclusion would be that the landlord had waived the right to forfeiture.

30. Mr Moules on behalf of the Applicant submitted that there was clearly no consent in this case and that the mere silence of the landlord could not amount to consent. He referred the Tribunal to certain passages in Chitty on Contracts at paragraph 2-063 to show that as a general rule that an offeree who does nothing in response to an offer is not bound by its terms. Likewise he submitted that mere silence could not amount to the unreasonable withholding of consent. His primary contention however was that the Applicant in this case did not receive the letter

dated 1 February 2006 and that in any event the Applicant had made its position clear in the letter faxed to the Respondent's on 13 February 2006.

31. On the question of waiver of the right to forfeiture, Mr Moules submitted that this was not within the jurisdiction of the Tribunal. The Tribunal had a limited function in such cases and that was simply to determine whether or not there was a breach of covenant. It could deal with issues of consent because where there was in truth consent then there could be no breach but so far as issues of waiver of the right to forfeiture was concerned, that only arose once a breach had been determined. He said that if Parliament had intended the Tribunal to determine the issue of waiver of the right to forfeiture then section 168 would have said so in very clear terms.

32. **Determination**

The Tribunal determined that it did not have jurisdiction to consider the question of whether or not the Applicant had waived the right to forfeit the lease. Subsection (4) of section 168 was clear. The jurisdiction of the Tribunal was to determine whether or not a breach of covenant or condition in the lease had occurred. This was a preliminary step towards the service of a section 146 notice and questions of whether or not the right to forfeit had been waived, and for that matter, whether relief from forfeiture should be granted were questions for the County Court.

33. The Tribunal further considered that there was a distinction between waiver of a breach of covenant and waiver of the right to forfeiture. It was clear that waiver of a breach of covenant rested on the notion of consent. If there was consent then there could be no breach. However waiver of the right to forfeiture did not in law rest on consent but on the landlord's election to treat the lease as either continuing or being at an end. If established the effect was to bar the landlord's remedy: see Woodfall paragraph 17.092. The issue surrounding the landlord's

election was an issue which only arose once a breach had been established.

34. Although the Respondent's argument was attractive in as much as it could be said that where there was a clear cut case that landlord had waived the right to forfeiture why should the Tribunal allow the landlord to serve a section 146 notice which would lead to further expense for the tenant, this could not override the clear words of the subsection which limited the remit of the Tribunal to determining whether or not a breach of covenant or condition in the lease had occurred.

35. Given the above determination as to jurisdiction it would be wrong for the Tribunal to make any findings or express any opinion on the facts in so far as they related to waiver of the right to forfeiture. Therefore, the only issue for the Tribunal to consider was that of consent.

36. Clause 2(13) of the lease provided as follows -
Not at any time during the said term without the previous consent in writing of the Landlord and except in accordance with plans elevations sections and specifications previously submitted to and approved by the Landlord to make or suffer to be made any alteration or addition whatsoever in or to the demised premises or cut or injure or suffer to be cut or injured any of the main walls or timbers girders ceilings roofs or floors thereof PROVIDED ALWAYS that the Landlord may as a condition of giving any consent under this clause require the Tenant to enter into such covenants with the Landlord as the Landlord shall require in regard to the execution of any alteration or addition to the demised premises and the reinstatement thereof at the determination of the tenancy or otherwise.

37. The Tribunal accepted the evidence of Mr Moskowitz that the letters dated 1 February 2006 and 17 March 2006 were posted to the Applicant and its managing agents. The Tribunal also accepts that these letters did not come to the attention of Mr Anand but that even if

they were received by the Applicant or the managing agents, they did not comply with clause 2(13) since it was a pre-requisite of clause 2(13) that where alterations were proposed that the tenant should provide copies of plans including elevations, sections and specifications, none of which was provided by the Respondent.

38. The letter dated 1 February 2006 stated -

" We recently purchased the above mentioned flat.

We wish to carry out certain minor alterations relating to the repositioning of the kitchen. We enclose a sketch plan herewith.

As you are aware, the lease provides for consent, which cannot be unreasonably withheld.

We would advise that if we do not hear from you within six weeks from the date hereof with your approval the we shall proceed with the works a per our plan.

We await hearing."

39. Attached to the letter were two very rough sketches of the premises as existing and as proposed (which were inaccurate). No sections, elevations or specifications were provided and far from being minor alterations, the proposal was to convert a one bedroom flat into a two bedroom flat.

40. The Tribunal accepts that Mr Anand visited the block in early February 2006 and discovered that workmen were carrying out works to Flat 1 and that as a result of what he was told and what he observed that he instructed the managing agents to send a letter by fax to the Respondent's Solicitors. At that time the Respondent's Solicitors were still instructed in connection with the lease extension. The letter alleged that the Respondent was in breach of covenant and requested that the Respondent provide copies of any permissions received from the local authority's planning and building control departments. Neither party is aware of any reply by the Solicitors to this letter.

41. On 19 September 2006 the Applicant's Solicitors wrote to the Tribunal in connection with the lease extension pointing out that the Respondent was in breach of the terms of the lease for having carried out unauthorised alterations to the property.

42. Mr Sissons arguments concerning the effect of section 196(4) of the Law of Property Act 1925 were of no assistance to the Respondent on the facts because although sent by post, the documents were not sent by registered letter which was a requirement of the subsection if service was to be presumed effective. Moreover it can be seen from the Tribunals findings above, this was not a case where the landlord remained silent.

43. The Tribunal accepted that in the present case section 19(2) of the Landlord and Tenant Act 1927 applied because the prohibition against alterations was qualified rather than absolute. However this was not a case where it could be said that the Applicant had unreasonably withheld consent for two reasons - first, the Respondent had not complied with clause 2(13) of the lease, which required detailed proposals for the works as opposed to a simple assertion that 'minor alterations' were to be carried out and; secondly, the Tribunal accepted the evidence of Mr Tarling that the landlord could have objected the position of the new kitchen, the position of the extract fan in the canopy area by the front entrance door, the position of the gas flue, the cutting and forming of a new doorway in a main wall and the connection of the new kitchen waste pipe to the rainwater down pipe.

44. The Tribunal determines that the Respondent is in breach of clause 2(13) of the lease and although as a result of this finding the Applicant is entitled to serve a notice pursuant to section 146 of the Law Property Act 1925, the matter will not necessarily rest there. By paragraph 6 of Schedule 12 to the Leasehold Reform, Housing and Urban Development Act 1993, where as in the present case, a tenant has served notice under section 42 making a claim to a new lease, no

proceedings can be brought to enforce any right of re-entry or forfeiture without the permission of the Court and in such cases permission will only be granted if the court is satisfied that the notice was given solely or mainly for the purpose of avoiding the consequences of the breach of the terms of the lease. Where permission is granted, the notice will cease to have effect. So the position now is that although the Applicant can now serve a notice under section 146 of the 1925 Act, it will still have to pursuade the County Court to grant permission if it is to bring forfeiture proceedings.

45. **Decision**

The Respondent is in breach of clause 2(13) of the lease by making unauthorised alterations to Flat 1 Maison Alfort, 251 High Road, Harrow Weald, HA2 3EL.

Chairman S E Connott

Date 23/4/07