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FIRST TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AG/LSC/2017/0102**
Property	:	**Flat 4, 23 Buckland Crescent, London NW3 5DH**
Applicant	:	**Marksglade Limited**
Representative	:	**Mr Kapoor In-house solicitor**
Respondent	:	**Mr Badtunge Edun**
Representative	:	**Fladgate LLP**
Type of application	:	**For the determination of an alleged breach of contract**
Tribunal members	:	**Judge Carr** **Mr Roberts Dip Arch RIBA**
Date and venue of hearing	:	**10th January 2018** **10 Alfred Place, London WC1E 7LR**
Date of decision	:	**20th February 2018**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the Respondent is in breach of the covenant set out in paragraph 8 of the Third Schedule to the lease.

(2) The tribunal makes the determinations as set out under the various headings in this Decision

The application

1. The Applicant seeks a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 (The Act) as to whether the Respondent is in breach of paragraph 8 of the Third Schedule to the lease.

2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. The Applicant was represented by Mr Kapoor, an in-house lawyer with the Applicant. Mr G Gay ARICS also attended and gave evidence on behalf of the Applicant. The Respondent was in attendance and was represented by Mr J Dillon of Counsel. Mr N Loucas, the Director of RoofDesign and Build Limited, was present and gave evidence for the Respondent.

The background

4. The property which is the subject of this application is a two bedroom flat on the top floor of a converted period building comprising 4 flats, which was probably converted in the 1960s. The Respondent bought the property on 6th July 2015.

5. The alleged breach relates to the failure to obtain a licence to permit the construction of a roof terrace to the flat. The relevant works commenced on 6th October 2016 and were completed by the end of November 2016. The works comprised installing a roof terrace and required planning permission.

The issues

6. The issues before the tribunal are as follows:

   (i) Does the lease include the covenant relied on by the Applicant and

(ii) That, if proved, the alleged facts constitute a breach of that covenant.

7. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

The relevant clause of the lease

8. As far as is relevant, paragraph 8 of the Third Schedule provides as follows:

Not without the license of the Lessor in writing first obtained, which license shall not be unreasonably withheld or delayed to alter the elevations or cut maim or alter the main walls timbers or principal partitions of the Demised Premises... or erect any new buildings or carry out any operation... for which permission is for the time being required under the Town and Country Planning Acts 1947 and 1971, or any Act or Acts for the time being amending or replacing the same.

9. The parties were both agreed that the works carried out by the Respondent required a licence as planning permission was required for the works. Although various allegations were made that the works exceeded the authority of the planning permission, and indeed the demise, the parties agreed that these issues were not relevant to the Applicant's allegation of breach of paragraph 8.

10. The tribunal therefore determined, and the parties agreed that the lease contained the obligation relied upon by the Applicant.

Do the alleged facts constitute a breach of the obligation

11. The argument of the Applicant is that no licence in writing was obtained and that therefore there was a breach of the obligation. The argument of the Respondent is either that the communications between the parties in effect constituted a licence, or, in the alternative, that the Applicant through those communications has waived the requirement of a licence.

The evidence before the tribunal

12. The Respondent provided a witness statement as did Mr Loucas. It was Mr Loucas who, on behalf of the Respondent, carried out the works in respect of which a licence was required. No information was provided by the Applicant which contradicted either of these statements.

13. Mr Loucas stated that he liaised with the landlord with the aim of establishing the landlord's requirements in connection with the proposed works to the roof. In summary his contacts with the landlord were as follows:

(i) He first wrote to the landlord on 21st August 2015 making it clear that the Respondent was seeking to renew the planning permission and carry out the works.

(ii) He then spoke to the landlord on 26th August 2016 speaking to one of two employees of the landlord, either Hannah English, who no longer works for the landlord, or Fiona Hills. He was not sure to which of them he spoke. He states that that they simply needed to know that any works had a valid planning permission, as that was what the landlord required. He therefore offered to provide a copy of the planning permission once granted and said that he would also provide the completion certificate once the works were completed. He also agreed to provide a copy of the application in the meantime.

14. He subsequently provided a copy of the planning application and drawings. The landlord's response was to request that he let them know when the planning application was approved. Eventually, on 25th November 2015 he forwarded a copy of the planning approval by email.

15. Mr Loucas states that he recalls calling the landlord shortly after the planning permission was received informing the landlord that the Respondent would be proceeding with the works and that he would send a copy of the building control completion certificate following completion of the works.

16. He was unclear who he had spoken to and the Applicant was doubtful whether such a call had taken place. The Applicant also doubted wheter Mr Loucas's account of the phone call on 26th August 2015 was accurate.

17. Mr Loucas, when asked directly by the tribunal whether he had read the lease, told the tribunal that he had not. He was aware that leases frequently contained requirements for licences but that in his experience no-one held lessees to those requirements.

18. Mr Edun's statement points out that he was in regular contact with the landlord's agent regarding the management of the premises and about work that Mr Loucas's company were offering to do for the freeholder at the same time as carrying out the works to create a roof terrace.

19. He states that he was shocked to receive correspondence from a solicitor for the landlord in January 2017 which informed him that he had undertaken unlawful alterations and which sought to exercise a right of access under paragraph 8 of the third schedule to the lease.

20. He also argues that if he had had any idea that the landlord did not consider that it had authorised the works then he would not have commenced the works. He spent a considerable amount of money carrying out the works and would not have spent that money if there was any question that they would not be authorised.

21. Mr Edun was asked whether he read the lease prior to commencing the works. He said that he had not done so since the purchase and was relying on Mr Loucas.

22. During the course of the hearing an additional email was produced to the tribunal by the Respondent. It was part of the email chain in relation to the provision of information about planning permission. This stated as follows:

> It has come to our attention that a scaffold tower has been erected at the rear of 23 Buckland Crescent and have been advised by the operatives on site that the roof works have been instructed by you, the owner of the Second Floor Flat. The works were advised to be relevant to the planning application with Camden Council filed last year. As far as we are aware you have not applied for Licence to Alter or what may be required Party Wall proceedings as per the Lease. In this case you will be in breach of the lease and you may be liable for the roof reinstatement works until the required documentation is in place, subject to the freeholder's instructions. I will advise you in writing further to the freeholder's instructions.

23. The email presented to the tribunal was undated but was copied into an email to Mr Loucas dated 14th October 2016.

24. The email was forwarded by Mr Edun to Mr Loucas. The tribunal asked Mr Loucas what he did in response. His answer was not clear. At first he said he did not receive this until after the works were completed, then he said he had no memory of receiving it and then he said that he assumed that the matter was dealt with by reminding the landlord that it had been given copies of the planning permission.

25. The tribunal also asked Mr Gay whether permission would have been given for the works if it had been formally requested. Mr Gay told the tribunal that if the landlord had been asked it would have given permission upon terms, for instance a schedule of works would have been required, permission would have been conditional upon inspection to ensure that the works had been carried out correctly and

that the integrity of the structure of the building had not been compromised and it would have stipulated conditions about insurance and service charge provisions.

The decision of the tribunal

The tribunal determines that the Respondent is in breach of the covenant set out in paragraph 8 of the Third Schedule to the lease.

Reasons for the tribunal's decision

26. Both parties agreed that paragraph 8 of the Third Schedule required the Respondent to obtain a licence to carry out the installation of the roof terrace. Any decision by the tribunal that there was no breach of that clause requires the tribunal to accept one of the two arguments made by the Respondent, either that the email correspondence together with verbal communications between the parties constituted a licence or that the email correspondence and the verbal communications constituted a waiver of the requirement.

27. The Respondent spent little time arguing that the email correspondence together with accounts of telephone conversations constituted a licence. The relevant email correspondence appears to comprise (i) an email dated 26th August 2015 from Mr Loucas stating, ' as discussed earlier today, please find attached planning application form and drawings etc that I have copied of the Government's planning portal Web site. Please contact me if you require any further information, (ii) the reply from Ms English dated 7th October 2015 stating 'thank you for your letter of 21st August 2015 in regard to the above property, Please could be kind enough to revert when the application has been reapproved' (iii) emails dated 26th November and 1st December 2015 from Mr Loucas to the management company notifying it that planning permission had been approved. In addition the Respondent argues that there should also be taken into account Mr Loucas's evidence that in a telephone conversation the landlord had indicated that all they needed to know was that any works had a valid planning permission.

28. The tribunal considers that the email correspondence together with the telephone conversations do not constitute a licence to carry out the works. The email correspondence is concerned with updating planning permission and cannot be construed as granting the licence required under the lease. Nor does the tribunal consider that Mr Loucas's evidence about a subsequent telephone conversation is sufficient to persuade it that a licence had been given. The tribunal is reluctant to accept Mr Loucas's evidence on this point as it is unsubstantiated. The

tribunal has doubts about the reliability of the evidence. First of all Mr Loucas had not read the lease, so he was unaware of the specific requirement for a licence. Secondly Mr Loucas's evidence about his response to the specific request for a licence to be obtained was very vague and might even be considered evasive. In the light of this the tribunal is reluctant to accept the unsubstantiated hearsay evidence of Mr Loucas on such an important conversation. Two further points can be made, first the tribunal would have expected that if Mr Loucas had been told that the landlord was happy for the works to proceed without any further permissions, he would have asked them to confirm this by email, as this would be a very important concession by the landlord. Secondly even Mr Loucas's accounts of the conversations with the managing agents do not appear to provide conclusive evidence of the granting of a licence.

29. The Respondent spent more time arguing that the landlord, by its actions, had waived the requirement for the licence. In the opinion of the Respondent the landlord had demonstrated that it was happy for the works to go ahead by standing by, allowing the tenant to proceed with the works, with the landlord's knowledge. The Respondent quotes Woodfall in support:

If the landlord permits the tenant to expend money in improvements, it would seem that it is prima facie evidence of his consent to the alteration of the premises and continuance of the term'

30. The Respondent argues that the landlord had been asked whether anything else was needed. In failing to request the licence at this point the Respondent argues that the landlord lost its right to insist on its rights. Mr Edun carried out the works and changed his position to his detriment following the assurance that nothing further was required . In the opinion of the Respondent the Applicant had made it perfectly plain that no further steps were required.

31. The Applicant rejects this argument. It argues that the tribunal cannot rely on unsubstantiated hearsay evidence relating to conversations with employees of the managing agents. In its opinion the Respondent failed to take the necessary precaution of either reading the lease or getting legal advice before going ahead with the works. There was nothing in what the Applicant said that entitled the Respondent to avoid obtaining a licence for the works.

32. The tribunal agrees with the Applicant. The email correspondence did not make it 'perfectly plain' that nothing else was required. It does not accept the evidence of the alleged conversations between Mr Loucas and employees of the managing agents for the reasons set out above. Whilst it notes the extract from Woodfall, this provides only a very general statement of the law. The tribunal prefers to rely on a decision of the Upper Tribunal SWANSTON GRANGE (LUTON)

MANAGEMENT LIMITED and EILEEN LANGLEY-ESSEN LRX/12/2007.

33. In this case Judge Huskinson made the following observation in relation to waiver (at paragraph 21 of the decision)

> 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, see Halsbury's Laws 4thEd Reissue Vol 16(2) paragraph 1082 and following.

34. In the opinion of the tribunal there is no evidence that there was an unambiguous promise or representation whereby Mr Edun was led to suppose that the Applicant would not insist on its legal rights. The e mail evidence relates only to discussions of planning permission. There is also evidence that as soon as scaffolding was erected at the premises the managing agents contacted the Respondent in connection with the need for a licence. This is not consistent with the argument of the Respondent. Moreover, if there was an unambiguous representation then Mr Loucas would have presented evidence of this to the Applicant as soon as the email was forwarded to him by Mr Edun. Instead Mr Loucas's recollection of his response to that email is hazy to say the least.

35. Therefore the tribunal determines that the Respondent has failed to demonstrate that the first requirement of a waiver has been achieved in this instance, and therefore it finds that there has been a breach of covenant by the Respondent.

Name: Judge Carr **Date:** 20 February 2018

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,
   (b) the person to whom it is payable,
   (c) the amount which is payable,

(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

S168 No forfeiture notice before determination of breach

(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.

(5) But a landlord may not make an application under subsection (4) in respect of a matter which-

(a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(b) has been the subject of determination by a court, or

(c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

S169 Section 168: supplementary

(1) An agreement by a tenant under a long lease of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—

(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject of an application under section 168(4).

(2) For the purposes of section 168 it is finally determined that a breach of a covenant or condition in a lease has occurred—

(a) if a decision that it has occurred is not appealed against or otherwise challenged, at the end of the period for bringing an appeal or other challenge, or

(b) if such a decision is appealed against or otherwise challenged and not set aside in consequence of the appeal or other challenge, at the time specified in subsection (3).

(3) The time referred to in subsection (2)(b) is the time when the appeal or other challenge is disposed of—

(a) by the determination of the appeal or other challenge and the expiry of the time for bringing a subsequent appeal (if any), or

(b) by its being abandoned or otherwise ceasing to have effect.

(4) In section 168 and this section "long lease of a dwelling" does not include—

(a) a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (c. 56) (business tenancies) applies,

(b) a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 (c. 5) in relation to which that Act applies, or

(c) a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (c. 8).

(5) In section 168 and this section--

"arbitration agreement" and "arbitral tribunal" have the same meaning as in Part 1 of the Arbitration Act 1996 (c. 23) and "post-dispute arbitration agreement", in relation to any breach (or alleged breach), means an arbitration agreement made after the breach has occurred (or is alleged to have occurred),

"dwelling" has the same meaning as in the 1985 Act,

"landlord" and "tenant" have the same meaning as in Chapter 1 of this Part, and

"long lease" has the meaning given by sections 76 and 77 of this Act, except that a shared ownership lease is a long lease whatever the tenant's total share.

(6) Section 146(7) of the Law of Property Act 1925 (c. 20) applies for the purposes of section 168 and this section.

(7) Nothing in section 168 affects the service of a notice under section 146(1) of the Law of Property Act 1925 in respect of a failure to pay—

(a) a service charge (within the meaning of section 18(1) of the 1985 Act), or

(b) an administration charge (within the meaning of Part 1 of Schedule 11 to this Act).

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
  (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
  (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
  (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
  (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
  (a) specified in his lease, nor
  (b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration charge is payable and, if it is, as to—
  (a) the person by whom it is payable,
  (b) the person to whom it is payable,
  (c) the amount which is payable,
  (d) the date at or by which it is payable, and
  (e) the manner in which it is payable.

(2) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) may be made in respect of a matter which—
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject matter of an application under sub-paragraph (1).