FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AM/LBC/2019/0031**
Property	**:**	**11A King Edwards Road, London E9 7SF**
Applicant	**:**	**King Edward's Road Freeholders Limited**
Representative	**:**	**Mr Philip Charles Adams - Director**
Respondent	**:**	**Ms Pauline Claire Mason**
Representative	**:**	**None – Ms Mason In person**
Type of Application	**:**	**S168(4) Commonhold and Leasehold Reform Act 2002 – determination that a breach of covenant has occurred**
Tribunal Members	**:**	**Judge John Hewitt** **Mr Stephen Mason BSc, FRICS, FCIArb** **Mr Alan Ring**
Date and venue of Hearing	**:**	**16 & 17 October 2019** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**1 November 2019**

DECISION

The issue before the tribunal and its decisions

1. The issue before the tribunal was whether four alleged breaches of covenant had occurred. During the course of the hearing the applicant withdrew and abandoned two of the alleged breaches.

2. The decision of the tribunal is that:
   2.1 A breach of the covenant set out in clause 2(x) of the lease has occurred; and
   2.2 A breach of the covenant set out in clause 2(xx) of the lease has occurred.

3. The reasons for this decision are set out below.

Note: This decision is to be read in conjunction with the decision of the tribunal in Case Ref: LON/00AM/LAM/2019/0007 (the Manager Application). The two applications were heard simultaneously and in large measure the evidence was of relevance to both of them.
The decision in the Manager Application sets out a summary of the background and context and we need not repeat it in this decision because it may be assumed it is incorporated into this decision.
In this decision the applicant is referred to as 'the Company'. The respondent is referred to as 'Ms Mason' and this accords with the designations adopted in the decision in the Manager Application.

Procedural background

4. The application is dated 24 April 2019. Directions were given on 9 May 2019.

   The Company's statement of case is page numbered (xiv) – (xvi). Ms Mason's statement of case in answer is page numbered (xvii) –(xx). The Company's reply is page numbered (xxi) – (xxxv). There then follows a series of documents page numbered 1-139 followed by some photographs and HM Land Registry extracts from the registers of the freehold and leasehold titles which were not page numbered.

5. For the purposes of this decision 'the Lease' means the lease dated 22 June 1984 granted by Marian Stern and Marilyn Susan Kaye to Andrew Stuart Talmage Read as varied by a deed of variation (the DoV) dated 24 September 2007 entered into by the Company and Ms Mason. The DoV gave rise to a surrender and re-grant hence reference in the land registers to a lease dated 24 September 2007.

The alleged breaches

6. The breaches of covenant alleged to have occurred were those set out in clause:

   2 (x) not to do or omit to be done or omitted any act or thing in on or respecting the demised premises which shall be a contravention of the Town and Country Planning Acts for the time being in force (**Planning**);

2 (xvii) to pay all costs charges and expenses incurred by the landlord of or incidental to the preparation of a notice under s146 Law of Property Act 1925 requiring the tenant to remedy a breach (**S146 costs**);

2 (xix) not to do or permit or suffer to be done any act or thing whatsoever whereby the risk or hazard of the demised premises or the Building by any insured risk shall be increased so as to require an additional premium for insuring the building (**Insurance premium**); and

2 (xx) to make good all damage caused through the act or default of the tenant:

(a) to any part of the Building or to the appointments of fixtures and fittings thereof; and

(b) to any other occupier or tenant of the Building and to keep the landlord indemnified from all claims in respect thereof. (**Making good damage**).

It is convenient to take each in turn.

Planning

7. During the course of the hearing Ms Mason accepted that she procured the removal of the pitched roof above Flat C, replaced it with a (reasonably) flat roof, laid wooden decking onto that roof, placed planters and other goods and chattels on the decking and used that space as amenity space as if it were a terrace; and that such use required planning consent and that such consent had not been granted.

8. In those circumstances we find that a breach of the covenant occurred over the period November 2007 to November 2018 by which time the decking and Ms Mason's possessions upon it had been removed Ms Mason had ceased to use the area as an amenity space.

9. In discussion Ms Mason sought to rely upon a letter from the planning authority dated 26 January 2009 [85]. We have commented on that letter in paragraph 29 of our decision in the Manager Application. We infer the letter concerned an alleged breach by planning by way of change of use and sub-letting and was not directed at use of the flat roof as amenity space. Even if we were wrong about that, the fact that a planning authority might not see fit to take enforcement action is not determinative of whether a breach of planning control has or has not occurred.

10. On the facts admitted by Ms Mason we are satisfied that a breach of planning control and hence a breach of the covenant concerning planning has occurred.

S146 costs

11. Having explained our understanding of the law, Mr Adams withdrew and abandoned this alleged breach. We comment on it briefly in case it is of some relevance in the future.

12. Mr Adams told us that he had taken legal advice on a number of issues concerning Ms Mason. One of them was the removal by Ms Mason of the pitched roof above Flat C and its replacement with a flat roof. Advice was set out in a letter signed off by a firm of solicitors known as Duncan Lewis. The material part of that letter is at [131]. The advice makes no reference to s168 Commonhold and Leasehold Reform Act 2002. It simply says: *"We confirmed that following further enquires, it may be beneficial to write to Pauline to request the decking be removed; failing removal you will have no choice but to issue a s146 notice stating that the lease can be forfeit."*

13. We do not know the date of the letter because Mr Adams did put a complete copy of the letter in his bundle. We infer it was around August 2018 because Mr Adams told us that the costs he was claiming was £486 being the cost of the advice and at [124] there is a copy of an invoice issued by Duncan Lewis in the sum of £486 on which is stated the invoice was paid on 31 August 2018.

14. Mr Adams did not seek further advice on the s146 notice but drafted it himself. A copy is at [97] and the supporting letter referred to in it is at [97a]. Both are dated 3 December 2018. There are comments on these documents in paragraph 34 of our decision in the Manager Application.

15. S168(1) Commonhold and Leasehold Reform Act 2002 is quite clear to the effect that a landlord of a long lease of a dwelling may not serve a s146 notice unless subsection (2) is satisfied. Subsection (2) is satisfied if:-

    (a) it has finally been determined on an application under subsection (4) that the breach has occurred; or
    (b) the tenant has admitted the breach.

    It was not in dispute that at the time when the notice was served a tribunal had not determined that a breach had occurred and Ms Mason had not admitted the breach.

16. There may also issues as to whether the s146 notice served was a valid notice. Arguably it contains some technical errors. We need not go into the detail. But whilst the notice may not be a valid s146 notice it might be a valid notice for other purposes – see paragraph 24 below.

Insurance premium

17. The gist of the Company's case was that as a consequence of Ms Mason procuring a flat roof over Flat C, the insurers imposed a 'flat roof clause' in the building policy. The clause is set out on [xvi]. It imposes an excess for each storm claim made and imposes a requirement on the

insured to have the 'felt on timber' portion inspected at least every two years by a competent roofing contractor. Mr Adams argued the clause imposed an additional cost burden on the insured.

18. The critical provisions of the covenant are: *"Not to do or permit … any act deed or thing whatever whereby … any insured risk shall be increased so as to require an additional premium for insuring the same …"*

19. The first point that arises is that no evidence of an increase in the premium for buildings insurance was put before us. The need for an inspection by a roofing contractor might increase the cost associated with insurance but any fees paid to a roofing contractor are not part of a premium for insurance paid to the insurer. Further, no evidence that roofing contractors had in fact been engaged to carry out any such inspections was put before us. No invoices relating to any such inspections were put before us.

20. A second point is that there was no evidence before us that the Company, as the landlord, had effected buildings insurance or incurred the cost of it. Mr Adams was uncertain as to whether the Company or the Association was the insured. In the bundle there is a letter from a loss adjuster to the Association explaining why a claim was rejected; from which it might be inferred that the insured was the Association.

21. Following discussion of the above matters with the parties, Mr Adams withdrew and abandoned this alleged breach.

Making good damage

22. This allegation again concerns the unlawful removal of the pitched roof above Flat C and its replacement with a flat roof.

23. Mr Adams relied upon a letter dated 8 August 2008 sent by William Sturges & Co to Ms Mason [73] which included the demand: *"Our client will also require you to reinstate the flat roof to its previous condition."* Ms Mason did not comply with that demand and did not respond to the letter.

24. Mr Adams also relied upon the s146 notice mentioned above. The notice required the demolition of the pitched roof. The addendum to the notice sets a number of demands including:

- *"You are required to reinstate the pitched roof;*
- *You are also required to repair and redecorate damage to the ceilings, walls , window frames, carpets ad wallpaper in Flat C in both rear and front bedrooms"*

25. Ms Mason accepted that she did not reinstate the pitched roof and she did not carry out repairs and redecoration to the bedrooms of Flat C.

26. In the event Mr Adams procured via the Association the removal of the flat roof and its replacement with a pitched roof. The work was carried out in through thought the service charge. The roof works cost £5,300. The invoice dated 30 June 2019 is at [129]. Works of repair and redecoration to Flat C cost £2,000. The invoice dated 30 June 2019 is at [130].

27. As we understand it Ms Mason has paid to the Association a 16% contribution to the roof works but declines to make a payment of or contribution to the cost of repairs/redecoration to Flat C.

28. On the evidence we are satisfied that the Company made valid demands on Ms Mason to make good the damage caused by the removal of the original pitched roof and to remove the flat roof and reinstate with a pitched roof. To that extent a breach of this covenant has been made out.

29. At the hearing Ms Mason acknowledged that such a breach had occurred, but submitted that the Company had waived the breach such that it was not entitled to serve the notice dated 3 December 2018. Ms Mason did not rely upon any specific act done or documents issued by the Company but relied upon acquiescence by delay. Ms Mason said that the Company was aware of the breach in November 2007 [4] and not taken any effective steps or followed up on the solicitors letters in 2008. Ms Mason submitted that by failing to pursue a remedy the Company is deemed to have waived the breach.

    Ms Mason said she did not have any authorities to support her submission that a waiver of a breach by acquiescence can arise.

30. The relevant limitation period is 12 years. This suggests to us that once a landlord has knowledge of a breach it has 12 years to bring an action in connection with it. That then suggests that doing nothing in those 12 years does not amount to a waiver by acquiescence by delay.

31. The subject is discussed in paragraph 11.044 of *Woodfall: Landlord and Tenant*.

    The authors clarify the distinction between waiver of the right to forfeit based on the landlord's election and waiver of the breach which is not based on election but on an inference of consent to the breach.

    They also assert that at common law the right to recover damages for a breach of covenant is only waived where there is an agreement to waive it, either under seal or for good consideration. Where rent is received for a long period of years with full knowledge of the breach, a licence under seal may be presumed. That is not the case here. There has been no agreement and there has not been a long period of payment of rent.

    There is also a discussion about the distinction between a landlord seeking legal relief and equitable relief. In the case of equitable relief

delay in seeking relief or a remedy may preclude a landlord from a discretionary remedy, such as an injunction, but it will not at law waive the breach. It simply affects the range of remedies available.

32. S168 of the Act requires the tribunal to determine whether a breach has occurred. We find that a breach has occurred and that breach has not been waived.

33. It is clear on the authorities that the tribunal is not concerned with the question whether the right to forfeit the lease for the breach has been waived.

34. If this matter is taken further by the Company it will be for the court to consider whether the Company is entitled to a remedy and, if so, what the remedy shall be.

Judge John Hewitt 1 November 2019

ANNEX - RIGHTS OF APPEAL

1. By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify parties about any rights of appeal they may have.

2. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to this tribunal - the First-tier Tribunal at the regional office which has been dealing with the case.

3. The application for permission to appeal must arrive at the regional office within 28 days after the date on which the tribunal sends out to the person making the application the written reasons for the decision.

4. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

5. The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

6. If the tribunal refuses permission to appeal, a further application for permission may be made directly to the Upper Tribunal (Lands Chamber)