FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/00FY/LBC/2023/0001**
Property	**:**	**3 Royal Standard House, Standard Hill, Nottingham NG1 6FX**
Applicant	**:**	**RSH & CP Limited**
Applicant's Representative	**:**	**LMP Law Solicitors**
Respondents	**:**	**Janet Ann Burgass & Amanda Claire Kent**
Type of Application	**:**	**Application under S168(4) Commonhold And Leasehold Reform Act 2002 for a Determination that a breach of covenant in a lease has occurred**
Tribunal	**:**	**Tribunal Judge P. J. Ellis.** **Tribunal Member Mr RP Cammidge FRICS**
Date of Hearing	**:**	**12 December 2023**
Date of Decision	**:**	**17 January 2024**

DECISION

The Respondents are in breach of certain clauses in the lease made 2 December 1998 between Crosby Homes (Midlands) Limited and Janet Ann Burgass in that they have continually to the date hereof:

a) ***carried out work at the property without the consent of the Landlord contrary to Clause 3.5 of the lease.***
b) ***caused or permitted a fire risk by incomplete or inadequate work on electrical installations and wiring which may render void or voidable any policy of insurance maintained contrary to regulation 4 of schedule 4 to the lease.***
c) ***failed to repair maintain renew uphold and keep the property in good and substantial repair and condition contrary to clause 4.1 of the lease.***
d) ***failed to keep the property in a good state of decoration contrary two clause 3.4 of the lease.***
e) ***Carried out unauthorised work to walkways within Royal Standard House contrary to clause 3.5(a) of the lease***

1. This is an application for a Determination by this Tribunal under s168(4) Commonhold and Leasehold Reform Act 2002 (the Act) that a breach of covenant or condition of a long lease of a dwelling has occurred.

2. The parties are the same as those involved in a previous decision by this Tribunal case reference *BIR/00FY/LBC/2021/0004P (the First Case)*. That case also raised an allegation of a breach of covenant or condition of the same long lease of a dwelling.

3. In the First Case the Tribunal found that:

The Respondents had breached certain clauses in the lease made 2 December 1998 between Crosby Homes (Midlands) Limited and Janet Ann Burgass in that they have:

f) carried out work at the property without the consent of the Landlord contrary to Clause 3.5 of the lease.

g) Caused or permitted an accumulation of flammable material and the other damage to the internal structure of the property which poses a fire risk which may render void or voidable any policy of insurance maintained in respect to this state contrary to regulation 4 of schedule 4 to the lease.

h) failed to repair maintain renew uphold and keep the property in good and substantial repair and condition contrary to clause 4.1 of the lease.

i) failed to keep the property in a good state of decoration contrary to clause 3.4 of the lease.

4. On 22 December 2022 the Applicant issued a new application for a determination of a breach of covenant or condition because of the failure to of the Respondent to remedy the breaches.

5. Directions were issued on 21 February 2023 when the issues were identified as whether or not the acceptance of rent following the First Case amounted to a waiver of the breaches and whether a further determination is required for the failure to remedy the same breaches.

6. The Tribunal gave directions for the filing of evidence and submissions reserving to itself the further issue of whether or not the application should be struck out as an abuse of process after consideration of the parties' submissions.

7. By 4 May the Respondents had failed to comply with the directions for service of their statement of case. They were notified of the likelihood of being barred from taking part in the proceedings by reason of their default. On 15 June 2023 the Tribunal barred the Respondent from taking part in the proceedings

for their failure to comply with earlier directions. The order of 15 June was followed by an application to lift the bar on the grounds that the Respondents had not received notice of the potential barring order. They were given a further opportunity to serve a statement of case on 17 July 2023 but they made no response. However, the bar was eventually lifted on 4 October 2023 after a further explanation was offered for their failure to comply with directions and the Applicant raised no objection.

8. The matter was determined by the Tribunal on 12 December 2023 on the papers.

The Property and the Lease

9. The principal terms of the lease and a description of the property were described in the First Case

The alleged breaches of the lease

10. The Applicant alleges the Respondents are in breach of the same clauses as described in the First case being

    a. A breach of Regulation 4 of the Fourth Schedule which provides that the Respondents will not *" do or permit to be done any act or thing which may render void or voidable any policy of insurance maintained in respect of the estate or may cause an increased premium to be payable in respect thereof or to keep or permit to be kept any petrol or other inflammable substances in or about the Premises and to repay to the Landlord all sums paid by way of increased premium and all expenses incurred in or about the renewal of any such policy or policies rendered necessary by a breach of this regulation all such payments to be recoverable as rent in arrear*"
    b. A breach of clause 4.1 which requires the Respondents to "*repair maintain renew uphold and keep the Premises and all parts thereof including so far as the same form part of or are within the Premises all window glass and doors (including the entrance door to the Premises) locks fastenings and hinges sanitary water gas and electrical apparatus and walls ceilings drains pipes wires and cables*

and all fixtures and additions and the surface of the balcony or terrace (if any) adjoining the Premises and the railings enclosing the balconies (if any) thereon (but excluding the external wall of the Premises adjoining) in good and substantial repair and condition save as to damage in respect of which the Landlord is entitled to claim under any policy of insurance maintained by the Landlord in accordance with the covenant in that behalf hereinafter contained except insofar as such policy may have been vitiated by the act or default of the tenant or any person claiming through the tenant or his or their servants agents licensees or invitees"

c. A breach of clause 3.5(b) of the lease which requires the Respondents" *not to make any internal non-structural alterations or additions without first having received the Landlords written consent which shall not be unreasonably withheld",* and

d. A breach of clause 3.4 which requires the Respondents "*in accordance with the tenant's covenants in that behalf here enough to contained to repair decorate and make good all defects in the repair decoration and condition of the Premises of which notice in writing shall be given by the Landlord to the tenant within two calendar months next after the giving of such notice.*

This time the Applicant has added an alleged breach of clause 3.5(a):

e. Not to make any structural alterations or additions to the Premises or any part thereof or any alterations to the exterior of the Premises and not to alter the colour texture or appearance of any glass in the windows.

11. The Applicant's case is that there is a continuing breach of the covenants. They do not rely on an allegation of failure to remedy breaches previously determined. In support of their contention the Applicant exhibited the Tribunal's decision on the First case together with a report by Blue Property Management Limited who attended the property on 28 November 2022.

12. The Blue report stated that no action has been taken following correspondence between the solicitors for the Applicant and the leaseholders.

The apartment is not currently being used for residential dwellings. It appears to be used for storage, possibly commercial storage.

13. The report exhibited photographs with a brief description of the apparent breach of conditions illustrated.

14. Defects noted and illustrated are consistent with the use described in the report. Hazards of risk of fire, unsafe electrical installations are noted. Structural changes to the bathroom and throughout the apartment are identified.

15. The Respondents made two submissions by correspondence. Mrs Sarah Sutton who was described in the First Case as the sister of the second named Respondent had made the request for unbarring the Respondents. In July 2023 Mrs Sutton sent pictures of the interior of the apartment. It was admitted that work in the apartment was in progress allegedly because electrical and heating problems had occurred rendering it necessary to carry out updating.

16. Mrs Sutton denied the apartment was used for commercial storage, but it had been used to store her own household contents. In the First Case Mrs Sutton had agreed the apartment was full of stuff but asserted it was not hers but belonged to someone else. She also denied there was a risk of fire. However, she admitted there was a breach of covenant.

17. By a letter to the Tribunal dated 7 August 2023 Mrs Sutton repeated her general denials but repeated her acknowledgement that there was a breach of covenant. This time she added that the Applicant required a license under the lease before any works of the sort underway could commence. An architect had been instructed but no information regarding the purpose of or the instructions to the architect were produced.

The Statutory Framework

18. S168 of the Act provides

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 the appropriate 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

Decision

19. Clause 3.5(b) recited above clearly requires a leaseholder to obtain permission to make any changes to the apartment. Since the First Case it appears some work has started in walkways. The report exhibited by the Applicant included a picture of raw steel beams in the walkways.

20. The Respondents acting by Mrs Sutton and on their own behalf have shown a persistent disregard for the terms of the lease either through naivety or wilful

disregards of the obligations associated with ownership of a leasehold property. The outcome is the same. There is a clear breach of the terms of the lease. The Respondents through Mrs Sutton acknowledge there is an unremedied breach of covenant. The breaches of covenant determined by the Tribunal in the First Case have continued after the acceptance of rent.

21. The Tribunal was concerned that the second proceedings for substantially the same breach of covenant amounted to an abuse of process. The Applicant contends the Respondents have committed a continuing breach for so long as the breaches are either unremedied or waived. The Applicant admits the rent was accepted after the determination of the First Case and asserts that the failure to remedy the breaches in the period after payment of rent is a continuing breach.

22. This may not be an issue for this Tribunal whose role under s168(4) is to determine whether there is a breach of the covenant. However, if a waiver of a breach amounts to the extinction and exhaustion of the remedy it is necessary to consider whether there is a breach of the covenants or conditions as required by s168(4).

23. In Faiz v Burnley BC[2021] EWCA 55 Lord Justice Lewison said at paragraphs 15 and 16:
"The basic principle is not in doubt. Where a tenant commits a breach of covenant which gives rise to the right to forfeit the lease, the landlord is put to his election. Either he may forfeit the lease; or he may affirm its continuation. In order for the landlord to be put in that position he must have knowledge of at least the basic facts which constitute the relevant breach. Subject to statutory restrictions, he may forfeit the lease either by the issue and service of a claim form claiming possession; or by peaceable re-entry. He may affirm the continuation of the lease either expressly or by means of an act or statement (communicated to the tenant) which is consistent only with the continuation of the lease. The affirmation of the lease is normally referred to as a waiver of forfeiture. Once the landlord has made his election, he cannot retract it.

16. It is well-settled, for example, that distraining for rent with knowledge of a breach amounts to a waiver of forfeiture down to the date of the distress. That is because the right to distrain is a right which (until recent statutory changes) can be exercised only during a subsisting landlord/tenant relationship. It is also well-settled that the acceptance of rent which accrued due after the date on which the landlord had knowledge of the breach also amounts to a waiver. Where the alleged act of waiver is the acceptance of rent, and possibly where it is no more than a demand for rent, that is all that counts. "

24. The Applicant accepts and acknowledges the acceptance of rent amounts to a waiver, the only issue is the nature of the continuing failure of the Respondents to end their activities.

25. In Faiz v Burnley Lord Justice Lewinson considered further the circumstances giving rise to a waiver. At paragraph 37 he said: *"thus the principle is that waiver takes place where the landlord demands or accepts rent which accrued due after the date of a breach known to the landlord. Where the breach consists of an* unlawful *sub-letting (as in this case), I consider that the landlord must know not only that the sub-letting has taken place, but also that the rent demanded or accepted accrued due after the date of the breach."*

26. The effect of a waiver operates so as to continue a lease but it does not operate to extinguish future obligations to comply with the terms of the lease. " *where the waiver has been caused by an acceptance of rent, the landlord can forfeit the day after the rent has been accepted, provided that the breach continues: he does not have to wait until the end of the rental period in respect of which rent has been taken"* per Hill and Redman para 4845 quoting *Greenwich London Borough Council v Discreet Selling Estates (1991) 61 P&CR 405*, 412–3 per Staughton LJ, CA..

27. The Tribunal determines that the breaches of covenant complained of are continuing breaches pursuant to s168(4) of the Act. It finds the Respondents are in breach of certain clauses in the lease made 2 December 1998 between

Crosby Homes (Midlands) Limited and Janet Ann Burgass in that they have continually to the date hereof:

(a) carried out work at the property without the consent of the Landlord contrary to Clause 3.5 of the lease.

(b) caused or permitted a fire risk by incomplete or inadequate work on electrical installations and wiring and exposed structural steels which may render void or voidable any policy of insurance maintained contrary to regulation 4 of schedule 4 to the lease.

(c) failed to repair maintain renew uphold and keep the property in good and substantial repair and condition contrary to clause 4.1 of the lease.

(d) failed to keep the property in a good state of decoration contrary two clause 3.4 of the lease.

(e) carried out unauthorised work to walkways within Royal Standard House contrary to clause 3.5(a) of the lease.

Appeal

28. If either of the parties is dissatisfied with this decision, they may apply to this Tribunal for permission to appeal to the Upper Tribunal (Lands Chamber) on a point of law. Any such application must be received within 28 days after these written reasons have been sent to them rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

Tribunal Judge Peter Ellis