SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

Case number: CHI/21UD/LBC/2007/0012

In the matter of section 168(4) of the Commonhold & Leasehold Reform Act 2002
and
In the matter of 7a Meads Street, Eastbourne, East Sussex ("the property")

BETWEEN

Mr L Pavey and Mrs C Pavey

Applicant

And

Mr N Carter Respondent

HEARING	**Thursday 1st November 2007**
TRIBUNAL MEMBERS	**Mr HD Lederman** **Mr N Cleverton FRICS** **Ms J Morris**
Appearances by	Ms Georgia Bedworth, Counsel instructed Stephen Rimmer & Co Solicitors on behalf of the Applicants Simon Sinnatt, Counsel instructed by Dean, Wilson Laing solicitors on behalf of the Respondent

DECISION OF THE TRIBUNAL

1. The Tribunal determines that the Respondent has been in breach of the covenant in paragraph 11 of the First Schedule and clause 2 of the Lease of 7A Meads Street Eastbourne dated 18th October 1989 ("the Lease") by using or permitting the use of the demised premises for residential accommodation by groups of students in the periods between April 2005 and May 2007 (the date of the application). This determination is made under section 168(4) of the 2002 Act.

2. The Tribunal has jurisdiction under section 168(4) of the 2002 Act to consider whether any breach or breaches of covenant have been waived by the Applicant in

the sense that the Respondent may allege the Applicants are not permitted to assert or rely upon the breaches complained of.

3. An adjourned hearing to determine whether the breaches referred to have been waived will be listed if the parties wish to have this issue determined by the Tribunal. Any further witness statements and documents addressing the issue of waiver to be filed and exchanged with the other party by 4 pm on 18th January 2008. Copies of skeleton arguments and authorities addressing the issue of waiver to be exchanged and filed with the Tribunal not less than one week before the hearing date.

Preliminaries

4. The Applicants issued a Notice of Application dated 8th May 2007 alleging among other things the Respondent was in breach of a restriction in paragraph 11 of the First Schedule to the Lease in that he "has permitted the Flat to be used other than as a single private dwelling in the occupation of one family". That Notice complained of occupation by a group of students or individuals in May 2007 and earlier. The Tribunal returns to the meaning and effect of the Notice of Application later.

The Flat

5. The Tribunal inspected the property demised by the Lease before the hearing on 1st November 2007. The property demised is described in the Lease as "The Flat". On inspection it was found the Flat included 7 rooms which were configured and used as separate bedrooms. One bedroom had a double bed. There was also a living room with armchair, sofas and television set with communal notices addressed to the occupants on the wall. There was one kitchen which also appeared to be capable of use as a dining room with a large table which could have been used for communal eating. There were 2 bathrooms, one with toilets and one with shower. These rooms were located on what appeared to be the first second and third floors of the building known as 7 Mead Street. Some bedrooms appeared to be on mezzanine floors. The communal entrance was on the ground floor on Meads Street by the side of the ground floor shop. The ground floor shop was owned by the Applicants and is known as 7 Meads Street. The Tribunal was told the Second Applicant and her business partner operates a business from that shop. 7 Meads Street is an end of terrace property with an adjacent hard standing capable of providing parking for at least 3 cars. It was common ground the parking space was not demised by the Lease or used in conjunction with the Flat.

6. It was common ground that the Applicants had purchased the freehold of property known as 7 and 7A Meads Street Eastbourne in about April 2005 from the Respondent who was formerly the freeholder. Since that time, it was his case that the Respondent as assignee of the term of the Lease had used the Flat by subletting the same as residential accommodation for students. For some, if not all of the time

since April 2005 these students had been attached to the University of Brighton. At the time we inspected the Flat it was being occupied by students as a single unit for shared occupation. The Tribunal was not informed of any changes to the layout or configuration of the Flat which had taken place since 2005 when the Applicants took an assignment of the Lease.

7. It was also common ground that at some unspecified time in the past the Flat had been in two parts or two flats and there was more than one lease. Both Counsel agreed that works of conversion had been carried out at some point in the past before the dates which are material to this application, so that the Flat was being used as one unit for shared occupation. The result of these works was the Flat we inspected could no longer be described as solely being on the first and second floor as the Lease suggested. Some of the rooms were in the eaves of the roof space. This change of the layout of the upper parts of 7A Meads Street may explain a number of clauses in the Lease which appeared to be anomalous or difficult to understand. On inspection there was no evidence of different flats in 7A Mead Street such as the "top flat" referred to in clause 6(5) of the Lease. The Tribunal was not shown and did not inspect any "lower ground floor flat" referred to in that clause.

The Demise and relevant terms of the Lease

8. The term was 125 years from 29th September 1989. In the Lease the premises demised were "the Upper Part of the Premises consisting of the First and Second floor of the Property with Ground floor entrance all of which is known as 7A Meads Street". The phrase "The Premises" was not separately defined in the Lease. The black and white copy of the plan annexed to the Lease gave very little clarification of the extent of the demise. The plan was expressed to be for the purpose of identification only in any event.

9. By Clause 2 of the Lease the Tenant covenanted that he "and the person deriving title under him will at all times observe the restrictions set forth in the First Schedule".

10. Paragraph 11 of the First Schedule contained the following restriction relied upon by the Applicants. The Respondent was alleged to have been in breach of the parts of this restriction emphasised below:

> "*NOT to use or permit the Flat for any purpose other than a single private dwelling or dwellings in the occupation of one family* each Flat nor for any purpose from which a nuisance can arise to the landlord nor for any illegal or immoral purpose" (emphasis added)

11. It was agreed between Counsel for the Applicant and the Respondents that the words "each Flat" were a reference to when 7A Meads Street had been 2 flats. It was agreed that the insertion of the words "each Flat" in this restriction was a drafting error and of no relevance to the issues before the Tribunal. In a letter dated

15th July 2005 from the Respondent's then solicitor Lawson Lewis & Co. annexed to the Respondent's witness statement, it was claimed the property was "effectively split into two leases and therefore there are two dwellings under (*sic*) this property". However, only the Lease is before us. Neither party sought to persuade the Tribunal it should construe the Lease so as to correct any errors, nor did they adduce admissible evidence about the factual matrix which might have enabled the Tribunal to embark upon that task.

12. The Tribunal noted the reference to "the other flats comprised in the Property" in the restriction in paragraph 4 of the First Schedule and to "the tenants of the flats" in clause 5(8) of the Lease. These references appear to have been the result of a similar error. The draftsman of the Lease appears to have envisaged "the Flat" consisted of more than one flat, or when adapting the lease of two separate flats appears to have forgotten to modify words and phrases which were no longer appropriate for one Flat. The rooms we inspected at 7A Meads Street were configured and used as one flat or one unit.

13. The Tribunal noted the Tenant's covenants in paragraph 3 of the Lease contained only one significant restriction upon underletting of the part or whole of the Flat in clause 3(f) which read as follows:

> "During the last seven years or the said term not to assign or underlet or part with possession of the Flat or any part thereof without the previous consent in writing to the Landlord such consent not to be unreasonably withheld."

14. There is no restriction on underletting in the Lease before the last seven years of the term. Clause 3(e) contains a restriction but only requires a copy of any underlease of seven years or more which has been granted by the Tenant to be provided to the landlord.

REASONS

Approach to construing the restriction in paragraph 11 of the First Schedule

15. Each Counsel submitted a written skeleton argument before the hearing and we heard oral submissions on these issues. Further written representations on some of the authorities referred to below were submitted after the hearing in response to an invitation by the Tribunal.

16. Counsel for the Applicants and the Respondents were agreed that the words *"other than a single private dwelling or dwellings in the occupation of one family"* in paragraph 11 of the First Schedule to the Lease were to be read so that the disjunctive "or" only applied to the words "dwelling" or "dwellings". After reflection we agreed with this approach. In other words the use as a single private

dwelling or dwellings has to be the occupation of one family. An alternative interpretation that the Flat could either be used as a single private dwelling, *or* as dwellings in the occupation of one family (emphasis added), was expressly rejected by both Counsel.

17. Much of Counsels' submissions centred upon the used of the word "family". Counsel for the Applicants argued that each of the words in the clause had to be given effect to. She also argued that the word "family" should be given its ordinary meaning as at the date of the Lease. The word "family" was a well known term it was said. Her suggested definition was persons related to on another by blood or marriage. The concept of family was different from concepts such as friendship.

18. At the hearing Counsel for the Respondent argued that the word "family" was ambiguous and because the Applicants were seeking to rely upon such term in the context of a restriction in the Lease should be construed restrictively.

19. When prompted, the Respondent's Counsel acknowledged he was seeking to refer to the principle which has been described as "contra proferentum". In other words it should be given the meaning which is least advantageous to the landlord whom it is assumed drafted and prepared the Lease.

20. The Respondent's Counsel referred us to a number of possible meanings of the terms family in the Oxford English dictionary for 1933. The Tribunal accepts the word "family" may have spectrum of different meanings in different contexts. However given the age of that dictionary edition and the changes in usage which have occurred over time, it found those references to be of very limited assistance in construing the word "family" in this context. In particular there were some definitions in that entry which were clearly inapplicable such as the interesting reference to a family of gladiators!

21. Alternatively the Respondent's Counsel argued the word "family" had such a wide meaning it could not be construed in this context as anything more than or different from "single private dwelling" which he defined as a household being a body of persons who live in one house. He argued that the intent of this restriction was to prohibit business user rather than to require a 7 bedroom property to be used by a family. In his written submissions following the hearing the Respondent's Counsel appeared to be suggesting that the term "family" should not be given its ordinary and natural meaning in the context of a restriction in a lease. He also appeared to be arguing that the Tribunal should not adopt the approach to interpretation of this restriction suggested in *Investors Compensation Scheme v West Bromwich* [1998] 1 WLR 896 at 912- 913. The Tribunal finds the guidelines provided in that decision to be of assistance and note they have been adopted in the context of leases on many occasions since.

22. Neither Counsel referred us to an authoritative decision on the particular wording of this covenant at the hearing. In *Segal Securities v Thoseby* [1963] 1 QB 887 the

covenant was to use premises "for the purpose of a private residence in the occupation of one household only". There it was held the tenant taking in one paying guest who shared family life would not be regarded as a breach of such a covenant. Where however there was no real sharing of meals or of social life to a degree that the guest lived as a member of a family, that was found to be a breach of that covenant. As the Applicants' Counsel observed in her written submissions, the covenant in that case did not require the lessee to use the premises as a family, so strictly the decision is not binding on this Tribunal. *Segal* is however of some assistance if one accepts for the purposes of argument only, the Respondent's contention that household is synonymous with the word "family". Even on that footing, living as a member of a family was thought to require a sharing of meals and social life to a considerable degree in the context of the covenant in that lease.

23. Some assistance in interpreting the term "family" in the context of a restrictive user covenant in a lease can be derived from *Wrotham Park Settled Estates v Naylor* [1991] 1 EGLR 274, a decision of Hoffman J., as he then was. The facts were significantly different there, but the covenant made in 1968 required the tenant to occupy and use the premises "only as a private dwelling house with garage and gardens for the sole occupation of the tenant and the family of the tenant". The question arose as to the meaning of the term "family". Hoffman J. found the dictionary definition of family in the shorter Oxford English Dictionary to be of assistance. That entry showed the word family came from the Latin word *familia* meaning a household. That entry gave as one its primary meanings "the body of persons who live in one house or under one head including parents, children servants etc." This was one of the definitions cited to the Tribunal by the Respondent's Counsel.

24. The Tribunal reminds itself that the words in the Lease have to be construed objectively at the date when the Lease was granted. The meaning which the Lease would convey to a reasonable man is not the same thing as the meaning of its words. The background may not merely enable the objective observer to choose between the possible meanings of words which are ambiguous but even to conclude that, for whatever reason, the parties must have used the wrong words or syntax: see *Investors Compensation Scheme v West Bromwich*. The Tribunal was not referred to any evidence of a factual matrix or background to the granting of the Lease in 1989 which would have required it to conclude that the words "in the occupation of one family" were intended to have a meaning different from their ordinary or natural meaning, or that they had been the result of a drafting or clerical error of some kind.

25. The Tribunal was due to hear evidence from Mrs. Lynn Goodman the wife of the original freehold owner of 7 Meads Street. The Tribunal had a statement from her dated 15th October 2007 available to us in the bundle. However when she came to be called, the Respondent's Counsel expressed the view that her evidence dealt with the question of waiver and he did not wish to call her to give evidence at the hearing on 1st November 2007. Consequently, the Tribunal is unable to take into account

her evidence on the issue of breach of covenant, as it was not relied upon or tested. Even if the Tribunal had felt able to take into account the fact that the Flat had been used by student sharing accommodation for some years before, there was no evidence this was part of the factual matrix or background at the time of the grant of the lease.

26. The Tribunal raised the issue of the meaning of the phrase "each Flat" in paragraph 11 of the First Schedule with both Counsel. It was not suggested by either Counsel that *at the time of the grant of the Lease* the Flat was comprised of two or more flats. The Respondent's Counsel did at one stage argue that the existence of the 7 bedrooms in the Flat indicated that it could not have been intended that the Lease was to restrict occupation to that of one family. However no evidence was adduced to show that at the date of the grant in 1989, the Flat was being used as more than one dwelling or that there were 7 bedrooms. Neither Counsel sought to make submissions about the configuration of the Flat in 1989. The Tribunal finds one or more of the rooms currently used as a bedroom could easily have been used as store rooms, a study or other purposes consistently with use by one family. The Notice of Application referred to a letter of 6th April 2005 from Lawson Lewis & Co., the Respondent's former solicitors, suggests there was planning permission in 1989 to convert the property (which we take to mean the Flat) into 2 flats. None of the parties suggested that permission had been implemented. The Tribunal does not regard that letter as evidence from which it can infer anything of significance about the factual matrix *in 1989*. Neither Counsel sought to rely upon that letter for that or any other purpose.

27. The Respondent's Counsel orally and in his skeleton argument sought to derive support for his contentions from *Roberts v Howlett* [2002] 1 P & CR 234 a decision of His Honour Judge Langan QC sitting as a High Court Judge in the context of freehold restrictive covenants. There the covenant prohibited the use of a property "for any purposes other than as a single private dwelling house or as the professional residence of a doctor dentist solicitor or accountant or similar professional person". The approach of the Court in that case is of particular assistance on the meaning of the phrase "*single private dwelling or dwellings*" in paragraph 11 of the First Schedule to the Lease. The *Roberts* decision is not binding upon this Tribunal, as the wording of the covenant is different. It is of some assistance however.

28. The Tribunal considers that a leasehold covenant requiring user as "*a single private dwelling or dwellings in the occupation of one family*" in a long lease is very different from the context of freehold covenants imposed upon an adjoining house.

29. The Tribunal does not derive assistance from references to the word "family" in the *Roberts* decision. The issue of what amounted to a dwelling or dwellings in the occupation of one family was not considered in *Roberts*.

Conclusions on construction of covenant

30. The Tribunal accepts the submission of the Applicants' Counsel that in the context of this covenant The Tribunal should attempt to give meaning to all of the words in the relevant part of paragraph 11 of the First Schedule to the Lease. The Tribunal rejects the Respondent's submission that doubt about the meaning of the term "family" or the possibility of different meanings in other contexts should lead to the conclusion that the term "one family" is ignored or given no meaning different from "single private dwelling". The Tribunal agrees that the words "each Flat" appear to be surplusage, probably the result of a clerical or drafting error in the Lease and can be ignored. The same may apply to the words "or dwellings".

31. The Tribunal does not accept that the word "family" in the phrase *"other than a single private dwelling or dwellings in the occupation of one family"* gives rise to doubt or ambiguity in meaning in this context of this lease. There is no need to resort to the principle of contra proferentum by which we understood the Respondent to argue the Lease should be construed against the grantor. In any event the Tribunal does not know whether the landlord was solely responsible for the drafting of the Lease or whether it was the result of negotiation or joint drafting with the original lessee or its legal advisers. If so the principle of contra proferentum would not arise.

32. If The Tribunal is wrong in that conclusion, it would still seek to give effect to the meaning of the words "one family" in this covenant. The Tribunal does not accept the Respondent's Counsel's submissions those words add nothing to the words "single private residence" and should be construed solely as a "household". The Tribunal considers the draftsman of this clause, which is a variation on a well known clause in leases, would have had in mind the decisions such as *Segal Securities v Thoseby* and *Tendler v Sproule* and was intending to prohibit, among other things, the taking in of individual paying guests or tenants who in reality were not part of a family group. Had this clause been directed solely or mainly to prohibiting a business user, quite different words would have been used.

33. The Tribunal agrees with the Applicant's argument that the words in paragraph 11 of the First Schedule requiring user as a single private dwelling in the occupation of *"one family"* have a different meaning from restricting user "as a family" which suggests occupation in the style or manner of a family.

Breach of the covenant in clause 2 and paragraph 11 of the First Schedule to the Lease

Which matters are alleged to amount to breaches?

34. The Respondent's Counsel raised the preliminary point that some parts of the Notice of Application dated May 2007 alleged that the Respondent *is* in breach of covenant. He urged this meant that only the state of affairs at May 2007 could be considered and nothing before that date. The Tribunal considers that is a selective reading of the Notice of Application. In particular the opening words of paragraph 5 could be read as referring to events before May 2007 and paragraphs 5(7), 5(8) and 5(9) of that Notice refer or could refer to events before May 2007.

35. The written Response dated 26th July 2007 prepared on behalf of the Respondent also proceeded on the footing that the tenancy agreement for 2006 was being considered and that the period before May 2007 was relevant: see paragraphs 12(3), 12(4), 12(5), 12(7), 12(8) and 12(9) of that Response.

36. Article 3(7A) and paragraph 7 of Schedule 2 to the Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003 (as amended) ("the Regulations") requires an Applicant for a determination under section 168(4) of the 2002 Act to file a statement giving particulars of the breach of covenant or condition which is alleged. The Notice of Application could have been drafted so as to make this issue clearer. Nevertheless we find that the requirements of paragraph 7 of Schedule 2 to the Regulations have been sufficiently complied with. No complaint about lack of clarity appears to have been made by the Respondents' legal team until the Respondent's skeleton argument of 30th October 2007 and they do not appear to have been misled by the way in which the Notice of Application was drafted. Indeed the Response prepared on behalf of the Respondent of 26th July 2007 specifically addressed the events and matters complained of in paragraphs 5(7), 5(8) and 5(9) of the Notice of Application which referred to events before May 2007. Further some paragraphs of the Response prepared on behalf of the Respondent of 26th July 2007 went on to assert waiver and acquiescence in the alleged breaches of covenant by reference to events which occurred in 2005 and 2006. It seems to us the Respondent could only have been alleging waiver and acquiescence on the basis that he understood the allegations of breach to have occurred in 2005- 2006.

37. If the Tribunal is wrong in this conclusion it finds the particulars and documents have been sufficient to enable the application to be determined and that the Respondent has not suffered prejudice by reason of any lack of clarity or failure to give particulars. The Respondent adduced witness evidence as to the state of affairs in 2005 and 2006- 2007 from Nigel Carter and Rhiannon Davies. No application was made to us for an adjournment by the Respondent on the basis that he was taken by surprise by these allegations. The Respondent's Counsel was able to make submissions without any difficulty about events which occurred in 2005 – May 2007. Alternatively, we would not treat the requirements of paragraph 7 of Schedule 2 to the Regulations as mandatory so as to require us to dismiss the application insofar as it relied upon events occurring before May 2007.

38. No allegation of breach by user of the Flat as two flats was made in the Notice of Application. Accordingly the Tribunal did not consider this issue.

Was use of the Flat for occupation by students a breach without more?

39. The Applicants' primary submission was that occupation by students in April 2005, 2006 and 2007 was in breach of paragraph 11 of the First Schedule whatever their pattern of living or relationship between the students. Breach of the restriction in paragraph 11 is a breach of the covenant in clause 2 of the Lease. We accept that submission.

40. In the context of this Lease it was urged on us the words *"one family"* mean something different to the words *"a single private dwelling or dwellings"*. The word "family" in 1989 could have had a number of different meanings. We do not need to provide an exhaustive definition. The Tribunal finds that students residing together temporarily for the academic year, some of whom may or may not be friends or may or may not have any close connection, would not be considered a "family" or "one family" according to natural and ordinary meaning of that term in the Lease. For this purpose it is irrelevant that some of those students may have been joint tenants for some of that period.

41. Even if one takes the definition of "one family" to be "the body of persons who live in one house" as the Respondent's Counsel appeared to suggest at one stage, the Tribunal finds this must add something to the phrase *"a single private dwelling or dwellings"*. An example of this is to be found in the dicta of Lord Donaldson MR in *C &G Homes Ltd v Secretary of State for Health* [1991] Ch 265 at 389F-G (discussed in the *Roberts* decision at paragraph 19 [2002] P & CR 238) who envisaged that the term "private dwelling house" connoted "use of the premises for the accommodation of the owner *or* a tenant *and* his family" (emphasis added). That of course was an entirely different context.

42. The Tribunal is supported in this view of paragraph 11 of the First Schedule by the absence of any other control by the landlord upon the user or occupation of the Flat in the Lease. The landlord would be expected to seek control over user if he was unable to reject or veto applicants by the grant or refusal of consent or to parting or sharing with possession over the term of 125 years.

Did the use by students of the Flat in the period May 2005 -2007 amount to a breach of covenant?

43. The Applicants' alternative submission was that the user of the Flat by students in the period April 2005 to May 2007 amounted to a breach of the covenant prohibiting use of the Flat *"other than a single private dwelling or dwellings in the occupation of one family"*. The Tribunal does not find it necessary to consider this issue as it finds that use by students of itself amounted to a breach of that covenant. In case it is wrong on that issue, the Tribunal also finds the actual use by students in

the period from about April 2005 to May 2007 amounted to a breach of that covenant.

44. The Tribunal finds that in May 2007 at about the time of the issue of the Notice of Application the Flat was occupied by a group of students including Rhiannon Davies under the terms of a written tenancy agreement dated 3rd September 2006. Although that group of students may have vacated by the date of the Respondent's Response dated 26th July 2006, they remained in occupation in May 2007.

45. The Tribunal heard evidence from Mr. Liam Joyce of Castle Estates, an estate agent engaged by the Applicants who inspected the Flat in October 2005 and wrote a letter shortly thereafter. In the Tribunal's view he was clearly an honest and careful witness doing his best to tell the truth. The Tribunal found it telling that the male student he spoke to was unable to give the surname of one of the female students who he was sharing with. The Tribunal noted this was shortly after the academic term had commenced. It is possible that male student and others had only recently met to form a group for sharing and letting the Flat as the Respondent's Counsel speculated. We had no direct evidence on this issue. The inference The Tribunal draws from this evidence is that at least one member of the group to whom the Flat had been let in 2005 had not met another member of the group before, or was not familiar with her. This is not the occupation one would ordinarily expect to find if the Flat had been occupied by one family. The Tribunal accepts it is matter of fact and degree and does not rely upon this point by itself.

46. The Tribunal heard evidence from the Respondent who accepted separate payments from individual tenants of the Flat for much of the time in the tenancy agreement running from September 2005 to September 2006. Some of the Respondent's accounting records for the Flat were adduced in evidence which provided information about payments received from occupants in the period November 2003 to March 2006. These and other records were only produced following an order made on 30th October 2006 against the Respondent in the Eastbourne County Court requiring him to give pre-action disclosure (Case No 6EA01576). The Tribunal did not see the order itself although it was informed it required such records to be produced for a 3 year period before the date of the order. The records the Tribunal saw appeared to be an incomplete account of receipts in respect of occupation of the Flat. In particular the Tribunal would have expected some form of profit and loss account or calculation to have been prepared by the Respondent, his accountant or book keeper for the purpose of accounting to Her Majesty's Revenue and Customs in relation to his income. The Respondent told us he is a landlord of other properties as well. The Tribunal would have expected him or his legal advisers to have had access such records. The Tribunal is not considering the issue of the Respondent's compliance or otherwise with that order. The Tribunal finds that it does not appear to have been provided by the Respondent with all of the contemporaneous written documents which might have been available to address questions of use of the Flat in the period in issue.

47. The book keeping records appeared to confirm receipt of separate sums from different named individuals for some of the period with which the Tribunal is concerned from April 2005 onwards. From these records the Respondent accepted one of the named occupiers appears to have paid more than the others did. This is not necessarily consistent with a true joint tenancy or joint and several liability for which the tenancy agreement of September 2005 appeared to provide.

48. The Respondent did not lead any evidence as to the pattern of occupation, lifestyle or relationship between the student occupants of the flat who occupied under the tenancy agreement dated 3rd September 2005 which expired in September 2006.

49. From these records and from the copy of the tenancy agreement bearing the date 3rd September 2005 the Tribunal finds that one of the named occupiers JL Lilley appears to have left and been replaced by another, Clare Baker. That tenancy agreement had been altered by substitution of one name for another. The Respondent was unable to provide us with the original of that agreement or the date on which it was altered. From the incomplete records available the Tribunal finds this probably occurred in late 2005 or early 2006. It was common ground the copy tenancy agreement for the year from September 2005 had been altered to insert Clare Baker's name and delete the name JL Lilley. The Tribunal makes no finding whether this alteration affected the validity of the tenancy or the precise circumstances in which it came to be made. It suffices to say it indicated a change of occupant. If was relevant, which we doubt, this substitution would also have amounted to a severance of any joint tenancy which may have existed.

50. There was no direct or persuasive evidence that the new occupant Clare Baker knew the other students in the Flat when she came to occupy, let alone that she was friendly with them or lived or intended to live with them as a single household, single unit or even in one unit within the Flat. There was no evidence about how she or the others in fact occupied the Flat. Taken with all the other circumstances the Tribunal finds that the substitution of this tenant and the evidence of Mr. Joyce indicate that the Flat was not being used either as single private dwelling or as a single private dwelling or dwellings in the occupation of one family in the period between September 2005 and September 2006. It is more consistent with a group of individuals with some common features sharing some but not all expenses.

51. The Tribunal turns to consider the letting of the Flat in the period from September 2006 to 8th May 2007. The Tribunal saw a copy of the tenancy agreement commencing 3rd September 2006 for 12 months although it appeared to have been signed later in September 2006. The original agreement was not made available to the Tribunal despite its relatively recent origin and the serious allegation that the agreement was a sham made in correspondence from the Applicants' solicitors. Although some documents and agreements from the 2005 might have gone missing due to moves, the Tribunal was surprised not to have had sight of the original agreement which terminated as recently as 2007.

52. The Tribunal was informed by the Respondent that utility bills were paid by the student occupants in addition to the rent under the September 2006 agreement. There was a slightly different arrangement about water bills. In the previous year those items had been included in the rent. The Respondent's accounting working papers showing his receipts under this tenancy agreement were not made available to us. Most of these records would probably not have been required to be disclosed by the order of 30th October 2006. The Tribunal does not address the issue of compliance or non-compliance with that order. The Tribunal finds it has not been provided with all the relevant records which the Respondent might have had available relating to occupation by students under this tenancy agreement. This means the Tribunal has to view the evidence of the Respondent and of the witness Rhiannon Davies who gave evidence about this period with some caution, as it has not been tested by reference to contemporaneous or relevant records.

53. The Tribunal was provided with a witness statement of Rhiannon Davies a student of podiatry at Brighton University dated 16th October 2007. The Tribunal also heard evidence from Rhiannon Davies that she occupied from September 2006 until the end of the academic year 2006/2007 approximately. She was clearly an honest and intelligent witness doing her best to give us her recollection. She had previously shared accommodation with 5 of the other students named on the 2006 tenancy agreement. Some of them she saw socially in vacation time. They each had separate addresses other than the Flat. They would share some food but generally purchased food separately. Some of them would eat together in pairs from time to time. Some of them would take turns to cook for one another. Often individual occupants would eat and cook separately, as they had different courses and different academic and social commitments. Sometimes all six would eat together. Some of them would stay in the Flat for periods during vacation. Most would go to their homes. One individual rarely went back home out of term time.

54. Rhiannon Davies told the Tribunal she and another gave separate deposit cheques to the Respondent when they first agreed to take the Flat, before the tenancy agreement was signed. She did not sign a deposit cheque for all of her fellow occupiers. The other paid their deposit cheques separately to the Respondent. She told the Tribunal the Respondent repaid the deposits in separate cheques to the individual students.

55. Rhiannon Davies informed the Tribunal payment of rent was by individual direct debits from each of the student occupiers. She informed the Tribunal she understood was liable for the whole of the rent, if any of the others did not pay, from the start of the agreement.

56. The gas and electricity were in Rhiannon Davies' name and she asked for contributions from the others. The telephone was in the name of the name of one of the male students and would be contributed to by one of the others. All the students signed the tenancy agreement on the same day in September 2006 after they had gone into occupation of the Flat some time earlier. At the hearing the Applicants'

Counsel did not pursue the allegation made in correspondence on their behalf that the September 2006 tenancy agreement was a "sham". That issue is not before the Tribunal.

57. Rhiannon Davies acknowledged there was a spare 7th bed room at the Flat when she occupied. She gave evidence the Respondent told her he was happy to leave it at 6 but the seventh room could be used.

58. The Respondent gave evidence that he was content to leave the property occupied by 6 students. He denied placing the advertisement for a seventh person upon the website of the Brighton University student accommodation service which had been downloaded on 12th December 2006. His evidence was that the level of rent had been fixed in accordance with guidance given verbally by Brighton University student accommodation service.

59. The Tribunal heard evidence about an application form completed partly by the Respondent for letting the Flat with the auspices of Brighton University student accommodation service ("studentpad.co.uk"). This was undated but appeared to relate to a letting from September 2007 onwards. For that reason the Tribunal makes no findings about that document.

60. These patterns of occupation and use of the Flat seem to the Tribunal to be quite different from occupation as a single private dwelling or dwellings as those terms would have been understood in 1989. Furthermore whatever definition of "family" one takes, these students were not using the Flat as *one* family, or even as a family, or as a tenant sharing some expenses with a guest or guests or with his family, but as a collection of individuals akin to paying guests, or paying tenants of the Respondent or of each other who happened to share certain facilities and liabilities relating to the Flat. The fact that the students may have been joint tenants for at least some of the period does not seem to us to affect this conclusion.

61. Should it be necessary, from this evidence the Tribunal concludes that in respect of the periods covered by the tenancy agreements dated September 2005 and September 2006 the Flat was not being occupied or used as a single private dwelling or dwellings. The Tribunal also concludes that in this period the Flat was not being used as a single private dwelling or dwellings in the occupation of one family in these periods.

62. If, contrary to our finding above, the relevant restriction is to be construed so that the Flat could either be used a single private dwelling *or* as dwellings in the occupation of one family, the Tribunal finds that it was used as neither in the light of the evidence relating to the periods 2005 – May 2007.

63. At the hearing the Respondent's Counsel did not pursue the application to strike out parts of the application mentioned in his skeleton argument dated 30th October 2007. It was also agreed that any application for an order under section 20C of the

Landlord and Tenant Act 1985 in relation to the legal costs of these proceedings would be made separately by the Respondent and would not be addressed at the hearing.

Waiver of breach of covenant

64. Skeleton arguments prepared before the hearing from each of the Applicants and Respondent addressed the issue of waiver of breach of covenant. At the outset of the hearing on 1st November 2007, the Tribunal raised the question whether it had jurisdiction to consider this question under section 168 of the 2002 Act. The Tribunal expressed the provisional view that sections 168 and 169 of the 2002 Act read together, made no reference to the issue of waiver and appeared to provide no power for the Tribunal to consider this issue. The Tribunal's provisional view was that the words "finally determined" in subsection 168(2) of the 2002 Act provided no basis for such an issue to be considered in the light of the definition of that phrase in section 169(2) of the 2002 Act.

65. The Tribunal also referred to section 146 (forfeiture) and section 148 of the Law of Property Act 1925 ("the 1925 Act") as part of the background against which section 168 of the 2002 Act was enacted. Section 148 expressly mentions waiver. Following the expression of our provisional view, the Applicants' Counsel was content to accept the Tribunal had no jurisdiction to consider the issue of waiver. The Respondent's Counsel sought to persuade us at the hearing on 1st November 2007 that the Tribunal did have jurisdiction on two grounds. Firstly it was said the purpose of section 168 of the 2002 Act was to provide a brake upon landlord of a dwelling serving a notice under section 146(1) of the 1925 Act. It was argued that if the breach could not be relied upon for reasons of waiver it would be wrong to make a determination of breach under section 168(2) and 168(4) of the 2002 Act. Secondly, it was suggested there might be difficulty in raising the issue of breach once a notice under section 146(1) of the 2002 Act has been served following such a determination.

66. The Applicants and the Respondent were given a further opportunity to make written representations on the issue of waiver on the basis that if we accepted jurisdiction we would hear evidence about that issue at another hearing. The Respondent's written submissions under cover of letter of 8th November 2007 expressly conceded that the Tribunal did not have jurisdiction to make a finding whether a breach of covenant has nor has not been waived.

67. Initially the Tribunal believed that concession was properly made. There is no express or implicit reference to the issue of waiver in sections 168 and 169 of the 2002 Act. The Tribunal's view looking at the issue on first principles was there is no basis for the Tribunal to assume jurisdiction to deal with that waiver in the sense that the Applicants were not permitted to rely upon the breaches complained of and that if necessary, the County Court could consider that issue.

68. However since considering the initial written representations from the parties, the Lands Tribunal decision in *Swanston Grange (Luton) Management Limited v Eileen Langley Essen* LRX/12/2007 22nd October 2007 has come to the Tribunal's attention. There the Lands Tribunal held (at paragraphs 16- 21 of its decision) that the Leasehold Valuation Tribunal does have jurisdiction to consider issues of waiver in the sense set out above. The parties were given a further period of time until 7th December 2007 upon which to provide further representations on this decision. No further representations have been received.

69. This Tribunal is not bound as a matter of law to follow a decision of the Lands Tribunal on an issue of law as distinct from and issue of valuation or practice: see the Court of Appeal in *Sportelli* [2007] EWCA Civ 1042 at paragraph 99. However, in the Tribunal's view it should in general follow decisions of the Lands Tribunal on matters of law and practice, unless satisfied that the Lands Tribunal is wrong. It is only right as a matter of judicial comity to respect decisions of a higher Tribunal. Moreover it is only sensible, since if this Tribunal refuses to follow decisions of the Lands Tribunal, there will inevitably be successful appeals to the Lands Tribunal, with consequential costs to the parties.

70. This is what the Court of Appeal has held previously. In *Shephard v Turner* [2006] EWCA Civ 8, Lord Justice Carnwath said at para 57 that:

> "In reviewing... decisions [of the Lands Tribunal], it is important to keep in mind that [Lands] Tribunal decisions are not normally to be regarded as setting any precedent in relation to what must be essentially a question of fact and degree. However, one of the functions of a specialist tribunal such as the Lands Tribunal (made explicit by s 4(1)(b) of the Lands Tribunal Act 1949) is to promote consistent practice in the application of the law to its specialist field. Unexplained inconsistency of approach may in certain circumstances amount to an error of law."

71. Accordingly this Tribunal considers itself bound to reject its provisional view that the Tribunal does not have jurisdiction to consider waiver. It will consider the issue of waiver at an adjourned hearing if the parties wish to have this issue determined by this Tribunal.

Howard Lederman

Howard Lederman
Chairman
19th December 2007

SOUTHERN RENT ASSESSMENT PANEL

LEASEHOLD VALUATION TRIBUNAL

Case number: CHI/21UD/LBC/2007/0012

In the matter of section 168(4) of the Commonhold & Leasehold Reform Act 2002
and
In the matter of 7a Meads Street, Eastbourne, East Sussex ("the property")

BETWEEN

Mr L Pavey and Mrs C Pavey

Applicant

And

Mr N Carter Respondent

HEARING	**Thursday 6th May 2008**
TRIBUNAL MEMBERS	**Mr HD Lederman** **Mr N Cleverton FRICS** **Ms J Morris**
Appearances	Ms Georgia Bedworth, Counsel instructed by Stephen Rimmer & Co Solicitors on behalf of the Applicants Simon Sinnatt, Counsel instructed by Dean, Wilson Laing solicitors on behalf of the Respondent

DECISION OF THE TRIBUNAL

1. The Tribunal determines the Respondent has been in breach of the covenant in paragraph 11 of the First Schedule and clause 2 ("the covenant") of the Lease of 7 and 7A Meads Street Eastbourne dated 18th October 1989 ("the Lease") by using or permitting the use of the upper parts of the demised premises for residential accommodation by groups of students in the periods between April 2005 and 9th May 2007 (the date of the application). This determination is made under section 168 of the Commonhold & Leasehold Reform Act 2002 ("the 2002 Act") and is supplemental to the Tribunal's written decision dated 19th December 2007.

2. The Applicants are not estopped from relying upon the covenant against the Respondent in respect matters which are the subject of complaint in the period between April 2005 and 9th May 2007. The Respondent has not established a promissory estoppel or a waiver in equity which would prevent reliance on the covenant. Alternatively, if there was such an estoppel or waiver in respect of a breach which occurred in 2005, reasonable notice was given in correspondence at the latest on 20th June 2006 (if not earlier), that the Applicants would seek to rely upon that covenant.

3. The Tribunal has jurisdiction to consider the question whether the Applicants have waived the right to rely upon the covenant, or have waived the breach of the covenant at common law. The Tribunal finds there was no such waiver or forbearance at common law. Alternatively, if there was forbearance by the Applicants at common law, that forbearance was lawfully brought to an end at the latest by correspondence from the Applicants' solicitors from 29th November 2005.

4. The Tribunal does not have jurisdiction to consider the question whether the Applicants have waived the right to forfeit on the ground of electing to treat the Lease as in force. If the Tribunal did have jurisdiction it would have found there was nothing in the correspondence or conduct of the Applicants in the period April 2005 – May 2007 which constituted a waiver of the right to forfeit on the basis of a breach of the covenant, the Respondents having abandoned the allegation there was waiver of forfeiture by demand or acceptance of rent.

Procedure adopted at the hearing on 6th May 2008

5. Both Counsel prepared written skeleton arguments for use at this hearing. It was agreed at the outset the issues before the Tribunal at this hearing were as follows:

   a. whether the Applicants waived the covenant in the sense that they had waived the right to assert against the Respondent that the facts determined by the Tribunal constituted a breach of covenant (promissory estoppel) in respect of the period between April 2005 and May 2007; and

   b. whether the Tribunal has jurisdiction to consider the issue of waiver as forbearance at common law (paragraph 36 of the Respondent's skeleton argument); if so whether the Applicants were prevented by this doctrine from asserting breach of the covenant

   c. whether the Tribunal has jurisdiction to consider the issue of waiver of forfeiture (election) (paragraph 34 of the Respondent's skeleton argument); if so, whether the Applicants have waived the breach of the covenant in this sense so as to prevent them from claiming forfeiture.

6. Although laches and acquiescence were mentioned in the Response dated 26th July 2007, the Respondent's Counsel did not pursue these as independent arguments at

the hearing on 6th May 2008 or in his skeleton argument. Accordingly, the Tribunal does not treat them as additional to those issues raised in the Respondent's two skeleton arguments.

7. The following sequence of dates was agreed with both Counsel at the outset of the hearing on 6th May 2008:

18 01 1989	Execution of Lease Frederick John Goodman (Lynn Goodman's husband) to Michael Terence Ring and Stephen Terence Ring
16 05 2003	Respondent took assignment of term of the Lease
15 01 2004	Respondent took assignment of reversion from Lynn Goodman
30 09 2004	Respondent assigned reversion to Neville Meads Limited (a company in which the Respondent was a sole director and shareholder)
22 04 2005	Applicants took assignment of reversion from Neville Meads Limited

8. It was agreed the Tribunal could have regard to all of the correspondence and evidence adduced at the hearing on 1st November 2007. In addition the Tribunal had available witness statements and heard evidence from Mrs Claudia Anne Pavey (dated 15th January 2008) Elizabeth Sarah Salek (dated 18th January 2008), Nigel Carter (dated 18th October 2007) and from Mrs. Lynn Goodman (dated 15th October 2007). The dates of the statements are in brackets.

9. Upon enquiry from the Tribunal, both Counsel agreed that the supplemental lease dated 20th January 1998 and the Deed of Variation dated 22nd April 2005 (referred to in the Response at page 35) were not relevant to the issues which the Tribunal had to decide. Neither document was contained in the bundles put before the Tribunal. None of the parties suggested the effect of the transactions by which the Respondent took an assignment of the reversion whilst the Lease was vested in him in January 2004 was to merge the leasehold title with the freehold. Accordingly the Tribunal proceeded on the footing (accepted by both Counsel) that the Lease remains in existence.

10. It was also agreed following the Tribunal's determination of 19th December 2007, the burden lay with the Respondent to establish the various types of estoppel, forbearance and waiver alleged. At the end of the hearing on 6th May 2008 the Tribunal drew attention to *Greenwood Reversions v Mehra* [2008] EWCA Civ 47

(on the issue of what amounted to waiver of forfeiture by correspondence) and invited the parties to provide written submissions on that decision, if so advised by 4 pm on 20th May 2008. This decision takes into account supplemental written submissions received from both Counsel about the effect of the *Greenwood* decision on waiver of forfeiture.

The Law

11. **Promissory estoppel:** The Lands Tribunal in *Swanston Grange (Luton) Management Limited v Eileen Langley Essen* LRX/12/2007 22nd October 2007 (paragraph 16) held that the Tribunal has jurisdiction to consider waiver of the covenant by the Applicants in the sense of being estopped from relying upon their rights against the Respondent. *Swanston* was considering promissory or equitable estoppel whereby a party who has represented that he will not insist upon his strict legal rights under a contract will not be allowed to resile from that position, or will be allowed to do so only upon reasonable notice: see *Swanston* paragraph 16 referring to Halsbury's Laws of England 4th edition Volume 9(1) paragraphs 1030, 1035, *Central London Property Trust Ltd v High Trees House Ltd* (1946) [1956] 1 All ER 256n and Lord Goff in *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corp of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep. 391 at 399. *Swanston* has recently been applied by the Lands Tribunal in the *Glass* decision LRX/153/2007 11th June 2008).

12. A *representation* is required to establish this kind of waiver. Ordinarily such a representation is found in words or a statement. The Respondent asserts the Applicants' "conduct and knowledge" outlined in paragraphs 36-46 of his skeleton argument amounted to a representation *by conduct* that they were not going to sue the Respondent upon the covenant: paragraph 49 of the Respondent's skeleton argument.

13. To establish such an estoppel, a representation must be clear or unequivocal: see for example Chitty on Contracts 3-090, Treitel, The Law of Contracts 12th edition paragraph 3-081. In this context it is said mere inactivity will not normally suffice for a promise or representation since "it is difficult to imagine how silence and inaction can be anything but equivocal": Chitty on Contracts 3-092, Treitel, The Law of Contracts 12th edition paragraph 3-082 (both edited by the same author). In addition, there must be reliance upon the promise or representation by a person in the position of the Respondent, for such an estoppel to be made out. The test is objective and what was in the mind of the Applicants is not determinative; rather the focus is on the likely effect (objectively speaking) of the words or conduct in question: see *MSAS Global Logistics Ltd v Power Packaging Inc* [2003] EWHC 1393 (Davis J).

14. "Detriment" in the strict sense of the word is not required for promissory estoppel to exist. It is enough if the promisee (here the Respondent Nigel Carter) has altered

his position in reliance upon the promise, so that it would be inequitable to allow the promisor (the Applicants) to act inconsistently with it: Chitty on Contracts 3-094, Treitel, The Law of Contracts 12th edition paragraph 3-084.

15. There is a further requirement that it must be inequitable for the promisor (here the Applicants) to go back on the promise. The underlying idea is that a person in the position of the Respondent must have acted in reliance on the promise so that he can no longer be restored to the position in which he was before he took such action: Chitty on Contracts 3-095, Treitel, The Law of Contracts 12th edition paragraph 3-085. The effect of this doctrine is generally suspensory, so that it only suspends but does not extinguish rights, save in exceptional cases. The rights can be enforced upon the giving of reasonable notice when the effect of the doctrine is to suspend rights: Chitty on Contracts 3-095 and 3-097, Treitel, The Law of Contracts 12th edition paragraph 3-086 – 3-087.

16. The Respondent alleges the Applicants had "knowledge, actual or Nelsonian that the Property was being let in breach of the covenant". "Notwithstanding this, the Applicants' conduct in pursuing the sale and in demanding and accepting rent after purchase inferred their consent to the breach" (paragraph 37 Respondent's skeleton argument). When asked, the Respondent's Counsel clarified "Nelsonian knowledge" in his submission meant "deliberately ignoring what is obvious to anyone". He referred the Tribunal to *Metropolitan Properties Co Ltd v Cordery* (1979) 251 E.G. 567 as an example of this. That was a case concerning waiver of a breach of covenant which did not address the requirements of promissory or equitable estoppel.

Waiver or forbearance at common law

17. Waiver in this sense may have occurred if without any request the Applicants represented to the Respondent they would forbear to enforce or rely on a term of the contract and the Respondent acted in reliance upon that representation: Chitty on Contracts ¶ 22-040. Even if such a forbearance was established the Applicants as the party forbearing may be entitled, upon reasonable notice to require the Respondent to comply with the original mode of performance unless in the meantime circumstances have so changed as to render it "impossible" or inequitable to do so: Chitty on Contracts ¶ 22-042. A forbearance does not need to be evidenced in writing even where the underlying contract requires Chitty on Contracts ¶ 22-042. In the circumstances of this case neither Counsel drew attention to any important differences between waiver or forbearance at common law at equitable estoppel. The authors of Chitty regard the two as closely analogous: see Chitty on Contracts ¶ 22-044.

Waiver of forfeiture – the law

18. A legal right of re-entry on breach of covenant is waived by any unequivocal act on the part of the landlord (here the Applicants, if such waiver is proved) such as

receipt of rent after the date of the event giving rise to the forfeiture. To amount to such a waiver the act by the Applicants must show an intention to treat the lease as subsisting.

19. In the course of submissions on 6th May 2008, the Respondent's Counsel abandoned reliance upon the demand and acceptance of rent from the Respondent by the Applicants as the unequivocal act said to evidence an intention to keep the lease subsisting which he had initially relied upon in paragraph 58 of his skeleton argument. This abandonment took place after the Respondent gave his evidence to the effect that he had only paid one amount of ground rent since the Applicants had acquired the freehold.

20. The Respondent's Counsel instead placed reliance upon certain letters from the Applicants' solicitors said to evidence such an intention. The test is whether any letter was "so unequivocal that when considered objectively it could only be regarded as being consistent with the lease continuing": see Neuberger J (as he then was) in *Yorkshire Metropolitan Properties Ltd v Co-operative Retail Services Ltd* [2001] L&T R 26 applied in *Greenwood Reversions v Mehra* at paragraph 30.

Evidence and findings

21. **Nigel Carter** – the Respondent. He attended at the hearing and was tendered for cross-examination upon his first witness statement. He did not add anything of substance to that statement before he was cross examined. The Tribunal considered the entirety of his statement. At paragraphs 5 and 7 – 8 of that statement he said:

> "5. .....throughout the time I owned the lease and Mrs. Goodman owned the Freehold of the Property, Mrs. Goodman was made aware that I was letting the Property to groups of students on an Assured Shorthold Tenancy Basis. She never objected to this at any time.....In addition at all times I owned the Freehold interest in the Property I considered that paragraph 11 of the First Schedule to my lease was waived."
>
> .....
>
> "7. On 22nd April 2005 the Freehold interest in the Property was sold by Neville Meads Limited to the Applicants. The Applicants were aware at the time they purchased the property that the property was being let to students. I recall a specific conversation with Mrs. Pavey where the issue of letting to students was discussed. I believe the Applicants own and run a business 2 doors away from the Property. I have further noted that it has taken the Applicants some 2 years to issues these proceedings against me During those two years the Applicants were aware that I was letting the Property to groups of students from the local university. In addition I would like to point out that the majority of the flats above shops in Meads Street are let to students in similar terms to the way in which I let"

"8. It was only when the provisions of the Housing Act 2004 came into force that any issue of potential breach was raised on the basis that the Applicants didn't want the Property to be classified as an HMO [house in multiple occupation]".

22. The Respondent exhibits correspondence passing between his solicitors and the Applicants solicitors. The Response filed on his behalf also alleges the Applicants purchased the property in the knowledge of sublettings. That Response refers to paragraph 16 of preliminary enquiries dated 10th February 2005 from the Applicants' (then) solicitors which raised the following question:

"With regard to the Lease of the flat above these premises:

(a) Please supply the names and address(es) of the present lessees and give an address where they can be contacted/have rent/service charge demands sent to them
(b) Please confirm that there have not been any disputes with the Tenant of any kind and all payments due under the Lease have been made on time"

Neither the Applicant not or the Respondent adduced evidence as to the answer to that enquiry or to what extent any such answer influenced either party in the sale transaction.

23. Nigel Carter was cross examined on behalf of the Applicant. In preparation for the sale of the Lease to the Applicants, Nigel Carter signed a "Sellers Property Information form (4th edition Transaction)" relating to the Lease dated 24th January 2005, a copy of which is to be found at pages 1-10 of the annex to the witness statement of Leeland Pavey. In section 8 entitled "Occupiers" at 8.1 the question was posed "Does anyone other than you live at the property? If the answer is "Yes" the form asks the seller to give their full names and addresses. The question was answered by a tick in the "No" box. At the time that answer was given (or at least by the date of exchange of contracts) the Lease was subject of lettings to students: see paragraph 7 of Mr. Carter's witness statement of 18th October 2007. Mr. Carter's response to this in cross examination was that he thought he was selling the ground floor shop and the freehold and he thought this answer referred to the shop. Mr. Carter referred to his answer to question 10 which related to the use of the shop. Neither the Applicants nor the Respondent contended the intention with which the various statements in that form were made by Mr. Carter was a live issue before the Tribunal. Mr. Carter did say the Sellers Property Information form was completed in front of the solicitor then acting for Neville Meads Limited. No evidence was put before us about the advice which his solicitor gave about completion of this form.

24. Nigel Carter agreed that when he acquired the freehold from Mrs. Goodman he acted on the advice of his solicitor. He agreed could have changed the covenants in

the Lease at that stage. No documents or other communications evidencing the advice received from his then solicitor have been put before us and no evidence about the advice received by him was given. When he transferred the freehold to Neville Meads Limited Mr. Carter's evidence in cross examination was he did not make any representations to Neville Meads Limited about whether any particulars terms of the Lease would not be enforced but carried on as before. The issue of enforcement of the covenant with which the Tribunal was concerned does not appear to have been considered.

25. Nigel Carter confirmed that before the sale to the Applicants, Ms. Salek, the Respondent's partner had run the shop on the ground floor of 7 Meads Street as a greengrocer, but that business had stopped in about Christmas 2004. In cross examination Nigel Carter expanded on the conversation he had with Mrs Pavey some months before the sale. His evidence was that that he told Mrs. Pavey what the rental was at the maisonette on the upper floors of 7A Meads Street. His recollection about this was challenged on behalf of the Applicants. The Tribunal is not satisfied that such a conversation took place. If there was a conversation about the occupation and use of the maisonette on the upper floors of 7A Meads Street it was not in terms that Mrs. Pavey could have reasonably have been expected to have understood would have any significance or legal consequences.

26. Mr. Leeland Pavey's letter of 24th June 2005 addressed to Nigel Carter asking for confirmation that 7 Meads Street was being "used for the purpose of a single private dwelling in the occupation of one family" in accordance with the covenant was put to Nigel Carter in cross examination. It was suggested by the Applicants' Counsel that Mr. Pavey would not have raised this enquiry had he known the true position about letting to students at this stage. The letter of 15th July 2005 from Nigel Carter's solicitor (Lawson Lewis) addressed this issue in the following terms:

> "In relation to your last paragraph regarding the single dwelling occupation of one family then we would remind you that this property is effectively split into two Leases and therefore there are two dwellings under this property.
>
> Notwithstanding the fact that this property has been used for its current use for a number of years at (*sic*) the knowledge of the landlord and in fact you were fully aware of its use when you acquired the property we consider that such a clause has in fact been modified".

27. Those paragraphs in the Lawson Lewis letter of 15th July 2005 could have been worded more clearly. There is only one relevant lease the Tribunal is aware of. The Tribunal proceeded on the basis that any other lease or deed of variation was not relevant by agreement of both Counsel at the outset of the hearing. No express or written variation of the Lease has been argued to be relevant before us.

28. It is worthy of note that no explicit reference is made in that letter of 15th July 2005 to any conversations with Mrs. Pavey which the Respondent or his partner Ms. Salek now say took place before the sale of the freehold in April 2005. Had such conversations taken place and had they been understood to have the significance which the Respondent now attaches to those conversations (imparting knowledge to the Applicants that the upper part of 7A Meads Street was being used for the occupation of students in breach of the terms of the Lease), the Tribunal would have expected there to be mention of those conversations or one of them in that letter or other correspondence at about that time. There is no explanation in the Lawson Lewis letter or in subsequent letters how the Applicants are alleged to have had knowledge of the precise use of 7A Meads Street when they purchased, if that is what is being said. That part of the letter appears to contain some clerical errors, but no attempt is made to provide any details to explain how such knowledge was acquired.

29. The Applicants then solicitors Quinn Mannion responded to this and other points in their letter of 12th October 2005. On behalf of the Applicants they denied Mr. Pavey was aware of the use of the flat and referred to a letter from Lawson Lewis of 6th April 2005 which was said to have confirmed that the "the residential accommodation above the shop is one flat". Quinn Mannion also threatened to take "such steps as are necessary to protect his position including a section 146 notice requiring your client [Nigel Carter] to remedy his breach". The threat to take such action is expressed in terms which could be regarded as conditional upon the local authority taking the view that the Flat at 7A Meads Street is regarded as an HMO and take enforcement action. The letter of 6th April 2005 is not in our bundle, but it was not suggested it would affect our decision. Neither party applied for permission to put that letter before us.

30. Quinn Mannion's letter of 29th November 2005 said that Mr. Pavey's view was "the present use appears to be a breach of the terms of the lease and ... [the Applicants] are considering the remedies available to them". Mr. Pavey then wrote directly to Lawson Lewis by letter of 17th March 2006 referring to an earlier letter of 11th January 2006 (which The Tribunal has not seen) saying there was a breach of the Lease and threatening legal proceedings in respect of that breach.

31. Stephen Rimmer & Co. are the Applicants' current solicitors. Their first letter of 20th June 2006 on behalf of the Applicants made the point that Nigel Carter was in breach of "his Lease" and "made a material misrepresentation as to the occupation of the property... when selling the freehold to our client". That letter threatened proceedings for forfeiture of the Lease or an injunction for breach of covenant.

32. In cross examination it was put to Mr. Carter that there was no conversation with Mrs. Pavey before the sale by which she was alleged to have been informed of the use of the property by students.

33. It was put to Mr. Carter that the tenancy agreement dated September 2006 with Ms Rhiannon Davies and others was entered into in the knowledge that the Applicants regarded such a use as a breach of the covenant. Mr. Carter accepted that he re-let to students in September 2006 because of the advice he had received from his solicitors that re-letting to students was not a breach of covenant. He did not enter into that tenancy agreement in response to anything said or done by the Applicants.

34. Mr. Carter was re-examined by his Counsel. Mr. Carter was referred to the Lawson Lewis letter of 14th August 2006 and asked about payments of rent he had made. In response Mr. Carter confirmed he had made no payments of ground rent since 10th June 2005.

35. **Mrs. Goodman** gave evidence and produced her statement dated 15th October 2007 and the attached letter of 5th October 2006. She was tendered for cross examination. Her evidence was that she did not have knowledge of the specific clauses of the lease. She said her husband would have dealt with that. It was her husband who was the registered proprietor before her. She however owned the freehold between September 1994 (after her husband's death) and 15th January 2004. These dates modify what she said about the dates of her ownership of 7 Meads Street in her letter of October 2006. The Tribunal finds these dates are likely to be more reliable than the date in her statement which contained inaccuracies and did not appear to reflect the tenor of her oral evidence in some important respects. Mrs. Goodman's evidence was she had been helping to manage 7 Meads Street before she became the sole owner, while her husband was alive. She said she was not aware of the specific clause in the Lease restricting the user to a single family. The Tribunal unhesitatingly accepts her evidence about this.

36. **Elizabeth Salek** gave evidence and produced her witness statement. She was the partner of the Respondent. She confirmed she was trading as a greengrocer at the shop at 7 Meads Street and ceased trading on 1st January 2005. She said she knew Mrs. Pavey as another trader in the street. Ms. Salek's evidence was the traders in that street spoke to each other reasonably often. She gave evidence of discussions about students living at 7 Meads Street with Mrs. Pavey. She could not recall the precise dates of the discussions. She referred to a discussion about an Irish student called Tom whom she thought Mrs. Pavey would have known. Ms. Salek was clear in her view Mrs. Pavey knew of students occupying the upper part of 7 Meads Street before the Applicant's purchased that property. The Tribunal finds Ms. Salek was doing her best to give evidence about her recollection of an informal conversation which took place some 3 years earlier, but that her recollection at this stage is likely to have been affected by the passage of time and inevitably the purpose for which she has been asked to recall matters. The Tribunal finds there may have been an informal conversation with Mrs. Pavey at which the name of a student or students was mentioned living at 7 Meads Street. Understandably Ms. Salek was unable to be precise about the date of that conversation. The Tribunal is not satisfied that the terms of any conversation which may have taken place between these two ladies were sufficiently clear or close in time to the sale of

Meads Street to the Applicants as to leave Mrs. Pavey with the impression that students were occupying 7 Meads Street in breach of covenant. The Tribunal finds it is most unlikely that Ms. Salek herself would have been aware of the terms of the Lease let alone aware that the occupation by students was or even might have been in breach of covenant. Such discussion as may have taken place would not have been sufficiently clear or unequivocal as to leave either individual with the impression that the Applicants would not enforce their strict legal rights.

37. **Leeland Pavey** gave evidence and produced his witness statement of 19th October 2007. He said that after purchase of 7 Meads Street in 2005 works of renovation were carried out at his request. He then discovered people coming and going. In cross examination he said this would have been in about June 2005. He was cross examined on the footing that his primary concern was breach of the HMO regulations. He accepted this was an issue under discussion. He was cross examined on the correspondence from his solicitors on the footing that it was not unequivocally saying "stop the breach" until 17th March 2006.

38. Leeland Pavey was cross examined on the document entitled "additional preliminary enquiries". He said that he did not know if these documents were produced as result of the sellers additional property information form completed by Nigel Carter's solicitors. He said he did not recall having seen "additional preliminary enquiries until it was produced by Mr. Carter's solicitors. The form itself is undated and no documents were produced which enabled the Tribunal to date this document.

39. **Mrs. Claudia Pavey** gave evidence and produced her witness statement. She repeated that she only learned of students being in occupation when renovation works were being carried out. She said she did not recall discussions with Ms Salek about students at 7A Meads Street before the purchase in 2005. This was challenged in cross examination of her by the Respondent's Counsel. The Tribunal finds that she was doing her best to give truthful evidence. At this point in time it is hardly surprising that she had no clear recollection of conversations about the occupants of 7A Meads Street. If such conversations took place or conversations with the Respondent, they are likely to have been of extreme informality. The Tribunal finds that any such conversation was not sufficiently clear or expressed in sufficiently precise terms so as to leave Mrs. Pavey with the impression that the terms of the Lease were being breached or varied or modified by the occupation of 7A Meads Street by students.

Promissory estoppel

40. The upper floors of 7 Meads Street known as 7A Meads Street were occupied by students in the time when Mrs. Goodman managed or owned the property from 1989 to 2004. While she was the registered proprietor from about 1994, after her husband's death Mrs. Goodman permitted subletting and occupation to students. Contrary to what she says in paragraphs 6 – 7 of her statement, the Tribunal finds

that she was unaware of the precise terms of the Lease or the provision in the Lease which required the upper floors to be occupied as a single private dwelling. The Tribunal finds she was content for the upper floors to be let to students. She did not look at the Lease or have much concern with the terms of the Lease. This attitude continued until January 2004 when the freehold was assigned to Mr. Carter. It is not necessary for the Tribunal to decide whether Mrs. Goodman or her husband waived the user covenant or were estopped from enforcing the user covenant as against Nigel Carter or his company Neville Meads Limited. No specific discussions or representations are referred to between Mrs. Goodman and Neville Meads Limited or Nigel Carter. Mrs. Goodman may well have failed or omitted to enforce the covenant, without knowing its precise terms or that it could have been enforced. Mrs. Goodman was not a sophisticated landlord or property investor but appeared at one stage to have run the shop on the ground floor. She appeared to have limited knowledge of the terms of the Lease. Had it been relevant to consider the issue The Tribunal would have found Mrs. Goodman's omission to enforce the covenant would not by itself be taken as a waiver or forbearance which bound her. It was too imprecise and unequivocal for any one to act in reliance upon such a state of affairs.

41. If there had been such a waiver or estoppel by Mrs. Goodman relating to Mr. Carter's use of 7 Meads Street (or use by Neville Meads Limited), it is difficult to envisage how such a waiver or agreement could have bound the Applicants. Even if the Applicants knew of the occupation of 7A Meads Street by students before the purchase in April 2005, the Tribunal has not seen or heard evidence the Applicants knew of any waiver or agreement not to enforce the covenant *by Mrs. Goodman.* Sales of freeholds are evidenced by detailed contracts usually incorporating standard form terms and conditions. The sale in April 2005 was handled by conveyancing solicitors on each side. Such sales are invariably on standard terms which are designed to record all of the terms of the contract and comply with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. The Tribunal has not seen the contract. The Tribunal infers that had such a waiver been included in the contract it would have been produced or referred to. Such a waiver need not be found in the contract but the Tribunal would have expected to have considered the detailed factual matrix surrounding such a waiver before reaching the view that objectively speaking Mrs. Goodman's conduct was such as to represent she would not rely upon her strict legal rights. The Tribunal was not provided with the details of the transactions between Mrs. Goodman and Nigel Carter. The Tribunal is not satisfied Mrs. Goodman made such a representation she would not rely upon the terms of the Lease.

42. Following the assignment of the freehold to Nigel Carter in September 2004 the freehold was transferred to Neville Meads Limited. The Tribunal has not seen or heard evidence (from Mr. Carter or in the documents) that Neville Meads Limited had considered the question of waiver of the terms of the covenant before April 2005, let alone made the necessary unequivocal promise or representation that it would not rely upon its rights against the lessee Nigel Carter. If there had been such

a waiver, the Tribunal would have expected to find some evidence of the same in the contract or in the surrounding negotiations or circumstances, if it was intended to bind the Applicants. The Tribunal has not been given any explanation why the documentary background to the transactions between Neville Meads Limited and Nigel Carter is not available to us or why there is no reference to such a state of affairs in the documents. In the circumstances the Tribunal is not satisfied there was a clear promise or representation between Neville Meads Limited and Nigel Carter or between Mrs. Goodman and Nigel Carter that the strict legal rights under the Lease would not be relied upon either by words or conduct.

43. The Respondent does not argue there was an express representation or agreement the Applicants would not enforce the covenant that but says there was a representation by conduct and knowledge: see paragraph 49 of his skeleton argument. In summary what is said is that the Applicants knew or must have known 7A Meads Street was being let to students in breach of covenant, their conduct "in pursuing sale and demanding and accepting rent after purchase inferred their consent to the breach": see paragraphs 37 and 49 of his skeleton argument. The Tribunal finds the Applicants did not have sufficiently clear or unequivocal information about the occupation of 7A Meads Street to know whether the occupation of the upper floors at the time of completion of the sale in April 2005 was in breach of covenant. The Respondent had the opportunity to provide them with such information in the Sellers Property Information form. For reasons which are not material to this decision, the Respondent did not provide the Applicants with an accurate or complete picture of the occupation of 7A Meads Street in that form or in any other form before the Applicants acquired the freehold of 7A Meads Street in April 2005.

44. The completion of sale and the demand and acceptance of one period of ground rent after such completion are not in the circumstances of this case evidence from which the Tribunal infers a clear or unequivocal representation or agreement by the Applicants that their strict legal rights in relation to the covenant would not be relied upon or enforced. Knowledge of a breach of covenant, or even a decision not to take enforcement action, if proved, is not without more, unequivocal evidence of consent, let alone an agreement to suspend legal rights: see Chitty on Contracts ¶ 3-92. In the context of a sale of the freehold to the Applicants in April 2005 where both parties were represented by conveyancing solicitors if there had been such an agreement the Tribunal would have expected this to have been made explicit or referred to in the contract or in the surrounding negotiations or documents. The Tribunal has only seen selections from the conveyancing file and had no evidence from either conveyancing solicitor. The Tribunal is quite unprepared to infer such consent from the fact of the sale taking place from the incomplete material available. The completion of the sale itself even if the Applicants had knowledge of breach of the covenant, is very far from a clear or unequivocal representation by the Applicants that their strict legal rights would not be relied upon.

45. The Tribunal is not satisfied the Applicants allowed, acquiesced in or turned a blind eye to the fact that the Respondent let the property to students in breach of covenant before April 2005. Whilst the Applicants may have come to know of the existence of students before completion of the sale in April 2005, that fact by itself would not in the circumstances of this property necessarily meant the letting to students was in breach of the covenant.

46. If there had been some agreement or waiver between Neville Meads Limited as freeholder and Nigel Carter as lessee at the time of the completion of the sale to the Applicants in April 2005, such an agreement would not bind the Applicants if it was unprotected by registration: see section 29 of the Land Registration Act 2002 ("the 2002 Act"). The Tribunal finds any agreement that the covenant would not be enforced between Nigel Carter and Neville Meads Limited would not have amounted to an overriding interest within Schedule 3 to the 2002 Act. From the excerpts of the conveyancing file which have been produced in evidence before us, it is clear that enquiry was made about lessees occupying the flat above the shop at 7A Meads Street. Neville Meads Limited through Nigel Carter could reasonably have been expected to disclose such a waiver or consent, but failed to do so. The Tribunal concludes that such a waiver therefore does not fall within paragraph 2 of Schedule 3 to the 2002 Act as an interest which binds the Applicants.

47. There was only one demand and one acceptance of rent in June 2005 according to the evidence of Nigel Carter. Mr. Leeland Pavey's letter of 24th June 2005 was not consistent with an acknowledgement that 7A Meads Street was being used in breach of covenant. Even if the Applicants' conveyancing solicitors had enquired about the terms of the tenancy agreements of the occupiers at the upper floors in 7A Meads Street, such an enquiry would not constitute knowledge that that property was being used in breach of the covenant. Thereafter the letter of 12th October 2005 from Quinn Mannion on behalf of the Applicants asserted that the use of 7A Meads Street was in breach of covenant (second page final paragraph). This is the opposite of consent and is not material from which the Tribunal infers consent or agreement to a breach of covenant. If that letter is regarded as equivocal in relation to the breach the Tribunal finds the letter of 29th November 2005 from Quinn Mannion amounted to a clear notice that any indulgence which may have been given earlier was withdrawn.

48. The Tribunal emphasises the issue is not whether the Applicants knew there were occupants or students in occupation as tenants before completion of the sale took place. The question is whether there is evidence from which their unequivocal consent to the breach or an agreement not to rely upon the covenant can be inferred objectively.

49. The Applicants sought to argue that Mr. Pavey's letter of 24th June 2005 was an assertion of breach of covenant, so that any consent or waiver which may have been given was being withdrawn. Taken by itself the Tribunal does not find that letter to be a clear assertion of breach. That letter poses the question whether 7A Meads

Street was being used in accordance with the covenant. However, the Tribunal's view of whether that letter was an assertion of breach of covenant does not determine this issue. That letter appears to have been understood by Lawson Lewis (the Respondents' solicitors) as an assertion that the Respondent was using 7A Meads Street in breach of the covenant. The author of the Lawson Lewis letter of 15th July 2005 is at considerable pains to deny breach of covenant by the Respondent and asserts the covenant "has... been modified by implication". For that reason the Tribunal accepts the Applicants' Counsel's submission that by 15th July 2005 the Respondent was no longer acting in reliance upon that consent or waiver because he understood it to have been withdrawn.

50. The Tribunal finds that at the very latest by the date of receipt of the Quinn Mannion letter of 29th November 2005 the Respondent had notice that any waiver or consent to user for the purpose of student letting in breach of covenant which may have existed was being removed. By that stage the tenancy agreement with the students in September 2005 had been entered into. Had the issue come before the Court as to the relief which the Applicants were entitled to in relation to that agreement, there might have been a difficult question whether the Respondent had been given reasonable notice of intention to withdraw consent. But certainly by September 2006, the Respondent had 10 months to seek to find tenants who would have occupied 7A Meads Street as single family in compliance with the covenant. The Tribunal finds this was reasonable notice of withdrawal of any consent to breach, should such consent be held to have occurred.

51. The Tribunal turns to consider whether it is inequitable for the Applicants to insist upon their strict legal rights in enforcing the covenant or relying on a breach of covenant for the purposes of serving a notice under section 146 of the law of Property Act 1925. As the Tribunal observed earlier, at the date of the sale to the Applicants the Respondent was in receipt of professional legal advice. The Tribunal infers in the absence to evidence to the contrary that he was given appropriate advice about the terms of the Lease, including the covenant and any question about whether that covenant had been modified or waived. He has not adduced any evidence that he relied upon such a waiver or organised his affairs in such a way as to make it inequitable for the covenant to be enforced. In paragraph 50 of his skeleton argument it is said that "the Respondent continued to let the Property to groups of student after having sold the freehold interest in the Property to the Applicants". Our understanding from the evidence the Tribunal heard on 1st November 2007 was that the letting to students were on assured shorthold tenancy agreements the duration of which broadly coincided with the academic year. At the date of the sale in April 2005 Nigel Carter was bound by the tenancy agreement or agreements entered into in 2004.

52. The Tribunal turns to consider the position as far as reliance and allegations of "turning a blind eye" in 2005 are concerned. The correspondence shows that by 15th July 2005 at the latest, Nigel Carter's solicitors knew there was an issue about whether the covenant could be enforced or whether it would be interpreted in the

way which they (his solicitors) suggested. The Tribunal has not been persuaded that there was any change of position by the Respondent in reliance upon the alleged waiver or consent, let alone a change of position which has operated to his disadvantage. The Tribunal accepts the Applicants' submission that the Respondent has not adduced any evidence 7A Meads Street cannot be let out in accordance with the covenant or that he is unable to reorganise his affairs to take account of the need to comply with the covenant. It makes no difference for this purpose that the motivation behind the Applicants wishing to enforce the covenant is the classification of the property as a House in Multiple Occupation under the Housing Act 2004. The Tribunal does not find Nigel Carter changed his position or relied upon any conduct of the Applicants which indicated that they would not wish to take steps to enforce the covenant if such a classification should occur.

53. The Respondent asserts it would be inequitable for the Applicants to be permitted to rely upon the historic breach of the covenant for the purposes of forfeiture. It is said on his behalf that the Respondent honestly genuinely and reasonably relied upon the representations by the Applicants that the covenant would not be so enforced: see paragraph 54 of the Respondent's skeleton argument. The difficulty with this is that no express representations are relied upon. At highest the Respondent points to allegations of knowledge of user by students before the Applicants acquired the freehold and some user in the short period before Mr. Pavey's letter of 24th June 2005. Even if the Applicants had a vague idea that students might be occupying the upper floors of 7A Meads Street, the Tribunal does not find those matters amounted to a conduct representing that the covenant could or should have been so construed or regarded as unenforceable or modified. In fact there is a significant absence of evidence about the Respondent's position or his reliance upon the alleged representation between the date of completion of the sale to the Applicants on 30th April 2005 and receipt of Mr. Pavey's letter of 24th June 2005 which his solicitors read as an allegation of breach of covenant. The Respondent has not adduced any evidence about the advice he received at the time of the sale or his personal or financial position. Nor has he explained why such evidence is no longer available, if that is the case. In those circumstances the Respondent has failed to satisfy the Tribunal that it is inequitable that the terms of the covenant should be enforced or the Applicants should not be able to assert a breach of covenant.

54. The Tribunal accepts each case turns on its own facts. It has considered some of the decisions cited by the Respondent as examples of waiver by estoppel including *MSAS Global Logistics Ltd v Power Packaging Inc, Bremer Handels GmbH v Vanden-Avenne Izegem PVBA* [1978] 2 Lloyd's Rep. 109 and *Bremer Handels GmbH v Mackprang* [1981] 1 Lloyd's Rep. 292 and found the circumstances and the commercial background to be very different from this of case.

55. The Tribunal did not find *Metropolitan Properties Co Ltd v Cordery* to be of assistance on the question of promissory estoppel or waiver as that was a case where landlords demanded and accepted rent over a long period some 3 years and

were deemed to have knowledge of the breach of covenant by subletting. The facts of that decision are a long way from this case.

Waiver or forbearance at common law

56. The Tribunal adopt a similar approach to the question of jurisdiction to consider waiver by forbearance to the Lands Tribunal in *Swanston*. If the effect of such a forbearance is to prevent the Applicants from asserting a breach of the covenant, then the Tribunal must have jurisdiction to consider this issue. The Tribunal consider this follows from the approach taken in *Swanston*.

57. The Respondent relied upon the same facts and matters said to amount to promissory estoppel – those contained in paragraphs 18-24 of the Respondent's skeleton argument: see paragraph 37 of his skeleton argument.

58. As before in relation to promissory estoppel, the Respondent argued the Applicants knew or must have known 7A Meads Street was being let to students in breach of covenant, their conduct "in pursuing sale and demanding and accepting rent after purchase inferred their consent to the breach": see paragraph 37 of his skeleton argument.

59. The completion of sale and the demand and acceptance of rent after such completion are not in the circumstances of this case material from which the Tribunal infers an agreement or consent by the Applicants that their strict legal rights in relation to the covenant would not be relied upon. Knowledge of a breach of covenant, or even a decision not to take enforcement action, if proved, is not without more, evidence from which the consent of the Applicants can properly be inferred. Knowledge of a state of affairs such as occupation by students of the upper floors of 7A Meads Street is very different from knowledge that such occupation was in breach of the covenant not to use as *other than a single private dwelling or dwellings in the occupation of one family*. The same point applies to the knowledge of user by students before completion of the sale in April 2005. If the Respondents thought or believed that the Applicants had such knowledge, the existence of such knowledge would not by itself amount to a conduct from which a clear or unequivocal representation that they would not enforce their strict legal rights.

60. The Tribunal is not satisfied that the Applicants (or even Mrs. Pavey) knew that paragraph 8.1 of the Sellers Property Information Form related solely to his status as owner of a long lease as the Respondent contends in paragraph 40 of the skeleton argument. That reading of the answers to that form would be a curious one. The Tribunal does not conclude or infer from paragraph 3 of her witness statement of 15th January 2008 that she understood paragraph 8.1 of the Sellers Property Information Form to refer to the long leasehold interest as the Respondent argues in paragraph 41 of his skeleton argument.

61. Nor is the Tribunal satisfied that the issue of what "any reasonable purchaser" would or would not have done in relation to pre-contract enquiries about the occupancy, is of assistance in deciding whether the Applicants consented or made any forbearance in relation to the breach of the covenant, as the Respondent seems to argue in paragraphs 42 and 45 of his skeleton argument. The issue is whether their consent can be inferred from the circumstances, whether there is a clear representation effect by conduct of the Applicants and the likely effect (objectively speaking) of the words or conduct in question alleged to amount to a forbearance: see *MSAS Global Logistics Ltd v Power Packaging Inc* [2003] EWHC 1393 at paragraph 52.

62. If contrary to the Tribunal's finding there was a forbearance or representation by the conduct of the Applicants to the effect the covenant would not be enforced, the Tribunal finds that by the date of receipt of the Quinn Mannion letter of 29th November 2005 the Respondent had notice that any waiver or consent to user for the purpose of student letting in breach of covenant which may have existed was being removed. By that stage the tenancy agreement with the students in September 2005 had been entered into.

Waiver of forfeiture

63. Waiver of forfeiture is a doctrine deriving from of election of remedies. As such the Tribunal determines this type of waiver has no bearing upon whether there has been a breach of the covenant or a breach upon which the Applicants can rely for the purpose of section 168 of the 2002 Act. The Tribunal does not have jurisdiction to consider this issue.

64. If the Tribunal is wrong about that conclusion, the Tribunal finds the demand and acceptance of rent in June 2005 is not such an unequivocal statement or act that could only be regarded as being consistent with the lease continuing. The Tribunal finds that stage the Applicant were still enquiring about the user of 7A Meads Street and did not have sufficient knowledge of the facts to make such an election.

65. The Tribunal finds that the statements made in the Applicants' solicitors letter of 12th October 2005 are not so unequivocal that when considered objectively they could only be regarded as being consistent with the lease continuing. That letter seeks to reserve the Applicants' position in relation to complaints of breach of the covenant. If that is wrong, any waiver which may have taken place was not continued or repeated by Quinn Mannion's letter of 29th November 2005 or by Mr Pavey's letter of 17th March 2006. Whatever the position was in relation to the letting to students which took place in about September 2005, by 2006 and the date of the Respondent's letting to students in September 2006 there was no waiver of the right to forfeit in the correspondence from the Applicants or their solicitors. The Respondent does not identify any letters from the Applicants or their solicitors which are argued to contain statements unequivocally acknowledging the

continuation of the Lease after the Applicants' solicitors letter of 12th October 2005.

Disposal

66. The parties do have a further 14 days from the date of this decision being sent to submit further written representations on the *Glass* decision and to apply in writing for permission to appeal against this decision and the decision of this Tribunal dated 19th December 2007 and make any further applications relating to costs.

HD Lederman
Chairman
26th June 2008