Residential Property
TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

COMMONHOLD & LEASEHOLD REFORM ACT 2002:

Section 168(4)

Upper Maisonette, 246 Hither Green Lane, London SE13

Ref: LON/00AZ/LBC/2010/0068

Mr Andrew Michael Galloway — **Applicant**

Alliance Homes (UK) Limited — **Respondent**

Date of hearing:	17 November 2010
Tribunal:	Mr M Martynski (Solicitor) Mr J Francis
Appearances:	Mr G Benson (Solicitor for the Applicant) Mr G Menzies (Counsel for the Respondent) Mr D Peter (Respondent's manager of premises)

DECISION

Decision summary

1. It is determined that there has been a breach of clause 3(9)(a) of the Respondent's lease of the Upper Maisonette, 246 Hither Green Lane, London SE13 ('the Property') in that the Respondent has, since in or about 2006, underlet part only of the Property.

Background

2. The building in which the Property is situated has three storeys. On the ground floor there is the Applicant's car showroom from where he operates his second hand car sales business. Within the Property on the first and second floors there are five bedrooms. Two of those rooms

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are fully self contained with washing and cooking facilities. The other three rooms have shared use of a kitchen and bathroom. The Property is connected to the neighbouring building at number 248 (the freehold of which was purchased by the Respondent at the same time as the purchase of the Property) insofar as the residents of the Property are obliged to go through number 248 in order to get in and out of the Property.

3. The lease in question is dated 19 August 1992 and is for a period of 99 years. The Respondent purchased the lease in October 2005. The relevant terms of the lease are as follows:-

> Not to use the Maisonette nor permit the same to be used for any purpose whatsoever other than as a dwellinghouse or as a Guest House or Hotel for bonafide temporary stay guests
> [clause 3(8)(c)]

> Not to assign underlet mortgage charge or otherwise part with possession of part only of the Maisonette
> [clause 3(9)(a)]

4. The Respondent company undertook significant refurbishment of the Property after purchasing it and in July 2006 applied to the local authority for a licence to operate the Property (together with the freehold property at number 248) as a House in Multiple Occupation ('HMO'). A licence was granted in January 2007.

5. Since refurbishing the Property, the Applicant has let out the individual rooms in the Property and in number 248 on assured shorthold six-month tenancies.

6. By notice dated 16 March 2010, the Respondent sought to exercise the right to acquire a new lease of the Property. A counter-notice was served by Applicant denying the validity of the Respondent's notice. As to its invalidity, the Applicant raised a technical point on the signature to the Respondent's notice (which was conceded by the Respondent) and raised questions regarding the use of the Property. By letter dated 29 June 2010, the Respondent's solicitors stated that the Property was being used:-

> ...as a dwelling house and the occupants are professional tenants on assured shorthold tenancies on a six month renewable basis. Rooms are let out on a room by room basis.

In response to this letter the Applicant's solicitors stated that they were of the opinion that there was a breach of clause 3(9)(a) of the lease.

7. There was some confusion in the Application for a declaration that there has been a breach of the lease, as it referred on the one hand to a breach of clause 3(9)(a) of the lease and referred, in conjunction with this, to underlettings without the landlord's consent. At the hearing it was confirmed by both parties that the application related solely to an allegation of breach of clause 3(9)(a) by way of underletting per se, not underletting without consent.

The evidence

8. The only evidence adduced by the Applicant was the lease, office copy entries from the Land Registry confirming the freehold and leasehold interests in the Property and the correspondence regarding the claim for a new lease and the alleged breach of covenant. The background facts as set out above were agreed between the parties.

9. For the Respondent, evidence was given by way of witness statement (served in accordance with the directions given by the Tribunal) of Mr Daniel Peters, that evidence being supplemented by his further evidence given direct to the Tribunal.

10. Mr Peters said that he inspected the Property upon its purchase and that it was empty and in its current form, that is split into a number of rooms which appeared to be for the purpose of letting out. Prior to the Respondent's refurbishment of the Property, none of the rooms were self-contained with cooking and washing facilities as far as Mr Peters could recall. He stated that the refurbishment was extensive, costing over £100,000 and that the Applicant used the Respondent's workmen to carry out works to his property on the ground floor at the same time. The specific examples of works to the Applicant's property given by Mr Peters were upgrading the fire separation between the ground and upper floors and dealing with leaks from the upper floors into the Applicant's showroom.

11. In relation to the works carried out at the Property, Mr Peters said that the Applicant was "fully aware of these works" and was "aware of what was going on". Mr Peters was unable to give any further evidence as to the Applicant's knowledge of arrangements in the Property and how he came by that knowledge.

12. It was during Mr Peter's evidence that, following questions of exactly how much the Applicant knew of arrangements within the Property, an application was made by Counsel for the Respondent for a Mr Elliot, a director of the Respondent company, to give evidence (on the basis that this evidence would shed further light on the Applicant's knowledge of the matters in question). No witness statement from Mr Elliot had been included in the bundle of documents for the hearing or sent to the Applicant prior to the hearing (there being no statement from him in existence in any event). No indication had been given to the Applicant that evidence of this nature was to be given and relied upon and no application to adduce such evidence had been made at the outset of the hearing. Counsel for the Respondent confirmed that he was not seeking an adjournment of the hearing in order to prepare and adduce such evidence. The Applicant's solicitor objected to the introduction of evidence from Mr Elliot.

13. The Tribunal refused permission for the Respondent to adduce Mr Elliot's evidence on the following grounds:-

(a) No witness statement had been prepared and disclosed in line with the directions given by the Tribunal on 30 September 2010
(b) No application had been made prior to the start of the hearing for such evidence to be adduced
(c) If such evidence were adduced, in order to cross examine Mr Elliot, the Applicant's solicitor may have had to call the Applicant to give evidence himself (the Applicant was

not present at the hearing) so that a positive case, based on the Applicant's evidence, could be put by way of cross examination to Mr Elliot, this would inevitably have resulted in the hearing being adjourned and there was no application for an adjournment.

(d) If (as was put in answer to this point by Counsel for the Respondent) Mr Elliot simply gave evidence to support the generality of what had been said by Mr Peter without further detail (thus avoiding the need for the Applicant's solicitor to take instructions/call the Applicant to give evidence), that evidence would not add anything to the Respondent's case and would therefore have been largely pointless

14. The other evidence produced by the Respondent consisted of copies of the application for the HMO licence and the decision to grant the licence, the licence itself and the various demands for ground rent that had been made over the years.

The Respondent's case

15. The Respondent agreed that, if the only clause in question were clause 3(9)(a) and if that clause were operative at the material times and valid, there would have been a breach of that clause by way of the subletting of the individual rooms in the Property.

16. It was the Respondent's case that the Applicant knew, or must have known, that the Property was being let out in the way that it was and that it was not being run as a hotel or a guest house. Counsel for the Respondent pointed out that there was no sign outside the Property indicating that it was a guest house or hotel and that there was no reception in the Property that one would normally find in a guest house or hotel and that this must have been clear even before the Respondent acquired the lease of the Property. It was further argued that it would have been clear to the Applicant that the Respondent was a commercial landlord granting tenancies.

17. Mr Peter's evidence was that he served a copy of the HMO licence application form upon the Applicant. Counsel for the Respondent argued that the Applicant, as a result of being served with the application, would have been aware of the manner in which that the Property was being sublet. He relied on the following matters in the application;

(a) A statement that the property to which it related was divided into flats, some of which were self contained
(b) A statement that there were 10 separate letting units in the HMO
(c) A statement about the number of separate households in the HMO
(d) Numerous references to 'landlord' and 'tenant'
(e) Confirmation that no housekeeping or meals were provided to tenants
(f) An affirmative answer to the question; 'has each tenant been provided with a true copy of a written tenancy agreement or a statement of the terms on which they occupy the property?'
(g) An answer to the question 'is the tenants' rent payable weekly, monthly or over some other period of the term?'
(h) Confirmations that deposits of four weeks rent were taken from tenants

18. In Mr Peter's witness statement he said that a copy of the HMO licence 'would have' been served on the Applicant. Counsel for the Respondent relied on the schedule of conditions attached to the licence which contained reference to tenants and tenancies.

19. As to the fact of the application for and grant of the HMO licence, it was argued that a guest house or hotel would not meet the definition of HMO in the Housing Act 2004 and that the fact that a licence was being applied for and granted would alert the Applicant to the type of letting that was going on.

20. Based on the Applicant's purported knowledge of the type of letting going on from the facts described above, Counsel for the Respondent argued (as his principle contention) that in the face of this knowledge, the Applicant's silence or lack of action amounted to a representation to the effect that he would not rely on clause 3(9)(a) of the lease; there was reliance on that representation to the Respondent's detriment (that is the refurbishment of the Property and the running of a business there); the Applicant now seeks to resile from the representation and should be prevented from so doing.

21. Running alongside this argument was the contention that the Applicant was demanding and receiving rent over time with the knowledge of how the Property was let and so had waived any breach of tenancy.

22. An alternative argument put on behalf of the Respondent was that clause 3(8)(c) (set out above) allowed 'bonafide temporary stay guests' and that this phrase was sufficiently wide to include and allow the letting of individual rooms in the Property in any event. Clause 3(9)(a) had to be read and interpreted in relation to this. Therefore any attempt to restrict the use of the Property to disallow the letting of rooms on assured shorthold tenancies was a derogation from grant.

Jurisdiction and relevant law

23. The Tribunal has jurisdiction to determine whether or not a breach of the lease has occurred. Although it has no jurisdiction to take into account whether or not the right to forfeiture for breach has been waived, in order to determine if a breach has occurred, the Tribunal is entitled to consider whether the lease term in question has been waived or suspended or is otherwise of no effect with the result that there can be no breach of it.

24. The Tribunal had regard to the Lands Tribunal decision in *Swanston Grange (Luton) Management Limited and Eileen Langley-Essen LRX/12/2007*. The facts of that case, being similar to the facts in this application, are worth reciting in brief as follows.

25. The case involved a lease which contained covenants on the part of the lessee Ms Langley-Essen; (a) not to underlet the premises without obtaining a deed executed by the underlessee containing a direct covenant with the head landlord company; (b) to give notice of any underlease within one month, and; (c) not to effect any underlease without a transfer of the share held by the lessee in the lessor company to the underlessee.

26. Ms Langley-Essen sublet her property without arranging for her sub-tenant to enter into a direct covenant with the landlord company and without complying with the two other covenants mentioned above.

27. Upon the landlord company's application to the Leasehold Valuation Tribunal ('LVT') for a declaration that there had been a breach of the lease, it was Ms Langley-Essen's case that the alleged breaches had been waived inasmuch as the landlord company had waived the right to assert a breach of lease. It was argued by the tenant that no requests for compliance had been made to her (or other lessees in the block) in respect of sublettings (this argument was set out in the tenant's statement of case, no other evidence was given or adduced by the tenant).

28. The LVT found that the landlord company had been aware for a number of years that Ms Langley-Essen had been subletting her flat and had not (until it made the application to the LVT) taken any action nor made any comment regarding the breaches of the lease in relation to that subletting. It went on to conclude that the landlord company had accordingly waived compliance with the covenants in question and found that there could not therefore have been any breach of those covenants.

29. In overturning the LVT's decision, H.H.J. Huskinson sitting as the member of the Lands Tribunal, considered the LVT's jurisdiction on applications of this nature. The Judge commented at paragraph 16:-

> I am conscious of the fact that the question of the jurisdiction of the LVT to consider whether a landlord has waived a covenant (in the sense of being estopped from relying upon its rights against the tenant under the covenant) is a matter of some potential importance. .....For the reasons set out below I agree with the LVT that it did have jurisdiction to consider this question of waiver of the covenant – using this expression in the sense mentioned above. .....

After considering the elements of promissory estopple and the *High Trees* doctrine, the Judge continued at paragraph 19:-

> Accordingly .....the LVT needs to decide (and must consequently have jurisdiction to decide) whether at the relevant date the covenant was suspended by reason of a waiver or estopple (in which case a breach will not have occurred) or whether at the relevant date the covenant was not suspended (in which case a breach will have occurred if the facts show non-compliance with the terms of the covenant)

Upon considering the facts of the case, the Judge concluded at paragraphs 23 & 24:-

> For the Appellant to be prevented by waiver or promissory estopple from relying on the relevant covenants the Respondent would need to be able to show an unambiguous promise or representation whereby she was led to suppose that the Appellant would not insist on its legal rights under the relevant covenants regarding underlettings either at all or for the time being. The Respondent would need to establish that she had altered her position to her detriment on the strength of such a promise or representation and that the assertion by the Appellant of the Appellant's strict legal rights under the relevant covenants would be unconscionable, see Halsbury's Laws 4 Ed Reissue Vol 16(2) paragraph 1082 and following.

In the present case I cannot see how such a waiver or estopple can be made out bearing in mind the absence of any evidence from the Respondent as to her understanding of the facts at any relevant time or as to any change of position by her in reliance upon such understanding. The very limited evidence contained in paragraph 4 and 5 of her statement of case are insufficient, nor can I see anything sufficient which has been identified by the LVT contained in any other material. At highest all that appears to have happened is that the Appellant has for a period in the past not actively enforced the covenants controlling subletting, but this of itself is insufficient to constitute a clear and unequivocal representation (capable of founding an estopple) that it would not do so in the future.

30. This Tribunal has also had regard to the following extracts from Halsbury's Laws 4th Ed Reissue; First, volume 16(2) paragraph 1059 which deals with Estopple by Representation:-

In the absence of a duty to speak, mere silence or inaction is not such conduct as amounts to a representation.....
With regard to promissory estopple, mere inactivity is usually insufficient to attract the *High Trees* doctrine.....

Then from volume 9(1) paragraph 1032:-

The basis of the *High Trees* doctrine of promissory estopple is that one party (A) has been led by the conduct of the other (B) to believe that B's strict rights under the contract will not be enforced. Whatever the position with regard to other types of estopple may be, an application of the *High Trees* doctrine can only be founded upon a promise by B of future action which is intended to affect the legal relations between A and B and which indicates in a manner which is clear and unambiguous that B will not insist on his strict legal rights.

Findings and decision

31. The Tribunal rejects the contention that clause 3(8)(c) of the lease authorises short term lettings. The words in that clause 'bonafide temporary stay guests' are quite clearly linked to the words 'Hotel for' which immediately precede them. The words make up one complete phrase - 'Hotel for bonafide temporary stay guests'. Such a phrase clearly does not contemplate the actual letting that was going on at the Property. Further, the Tribunal finds, in any event, that the words 'temporary stay guests' cannot be stretched to cover assured shorthold tenants. Yet further, the Tribunal would, in the light of the wording of clause 3(9)(a), find it impossible to give the meaning to clause 3(8)(c) argued for.

32. It follows that the Tribunal rejects the argument that clause 3(9)(a) is of no effect as there can be no conflict (as argued by the Respondent) between that clause and clause 3(8)(c) if the latter clause is given its natural meaning.

33. In the Respondent's statement of case, it was argued that it was the intention of the parties on the grant of the lease that the Lessee has the right to sublet part of the premises, as a result, the Applicant's reliance on clause 3(9)(a) is a derogation from grant.

34. This argument fails for two reasons. First, neither party to this application was an original party to the lease. Second, there is no evidence as to the intention or conduct of the original parties to the lease.

35. It was further argued in the Respondent's statement of case that the configuration of the Property itself evidenced an intention on the part of the parties to allow a subletting of part. This argument can be dealt with alongside the Respondent's argument as to waiver/estopple (dealt with below).

36. The Tribunal is not satisfied on the evidence and on the balance of probabilities that the Applicant necessarily knew of the letting arrangements at the Property prior to the Respondent's application for a lease extension.

37. Mr Peters gave evidence as to the configuration of the Property prior to his company's refurbishment. There is nothing in that configuration that would lead to a conclusion that subletting of part on tenancies was inevitable.

38. Mr Peters stated in his evidence that the Applicant was aware of what works were being carried out at the Property by the Respondent company, however he was unable to point to any specific fact (that is for example, conversation or inspection) to support such a contention.

39. As to the application for the HMO licence, there is no evidence that the Applicant read or considered this document. Further, it has to be borne in mind that the application concerned not only the Property, it also concerned the adjacent property at number 248. The application itself did not make clear what parts of each property were being used for what purpose.

40. As to the statements in the application that; the property to which it related was divided into flats, some of which were self contained; there were 10 separate letting units in the HMO; there were a number of separate households in the HMO-the Tribunal repeats what is said in paragraph 39 above.

41. As to the numerous references in the application to 'landlord' and 'tenant', such phrases to a laymen may not be significant and in ordinary language, those words are equally applied to a guest house arrangement where the proprietor may be referred to as 'landlord' or 'landlady'.

42. As to the confirmation that no housekeeping or meals were provided to tenants, this statement as to absence could not be relied upon on to import the necessary knowledge of letting arrangements to the Applicant.

43. The questions and answers regarding written tenancy agreements, payments of rent and deposits again may not be significant to a layman and again in ordinary language, those words could be equally applied to a guest house arrangement.

44. There is no evidence that the Applicant ever received a copy of the HMO licence that was granted. If he did, there is no evidence that he read it or considered its terms. If he did, for the reasons given above, there is nothing in those terms that would lead him to the firm conclusion that there was a subletting of part of the Property (bearing in mind again that the licence was in respect of both the Property and the adjoining property).

45. The facts that the Applicant runs a business on the ground floor of the Property and/or that there was no indication by way of signage that the upper floors of the Property were being used as a guest house or hotel cannot be turned into imputed knowledge on his part of the actual letting that was taking place.

46. The Applicant had no duty to respond to the application for a licence. On the facts of this case, his lack of action or representation cannot in any way be taken as a representation as to the terms of the lease.

47. The Tribunal was not convinced with the submission that a guest house or hotel would not require an HMO licence and that such establishments would fall outside the definitions of HMO set out in the Housing Act 2004. Even if they did not require a licence, it would be impossible to impute the necessary legal knowledge to the Applicant and suppose from that that he must have deduced that there was subletting of part.

48. Even if the Tribunal is wrong in its conclusions as to knowledge and the Applicant did have knowledge of the letting arrangements at a point prior to its enquiries in connection with the lease extension notice, the Applicant's silence and his lack of action could not be sufficient to amount to a representation that subletting of part was permitted or to become part of any kind of estopple or to be any sort of waiver (if there is any difference in this context between waiver and estopple).

49. Finally on this question, it is worth considering briefly the other necessary element in an estopple, that is a change of position or act on the part of the Respondent to its detriment in response to the representation (assuming there were a unequivocal representation of the type required). The only such change or act in this case would have been the refurbishment work carried out to the Property by the Respondent. That work, according to Mr Peters, was carried out after the Respondent had purchased the Property in October 2005. It appears that work was done prior to the application for the HMO licence. The only representation therefore that could be relevant therefore was a representation made or imputed to the Applicant before or whilst the works were being carried out. The later application for and grant of the licence, if not associated directly with or followed by an act or change of position on the part of the Respondent, may have been irrelevant.

50. The Tribunal concludes that clause 3(9)(a) of the lease is operative and there has been a breach of that clause on the part of the Respondent by virtue of subletting parts of the Property on assured shorthold tenancies.

Mark Martynski

Mark Martynski
Tribunal Chairman
1 December 2010

Relevant statutory law referred to in this decision

Commonhold and Leasehold Reform Act 2002

168 No forfeiture notice before determination of breach

(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2) This subsection is satisfied if—

(a) it has been finally determined on an application under subsection (4) that the breach has occurred,

(b) the tenant has admitted the breach, or

(c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

(3) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(4) A landlord under a long lease of a dwelling may make an application to a leasehold valuation tribunal for a determination that a breach of a covenant or condition in the lease has occurred.

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

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

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

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