FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOAF/LBC/2014/0081**
Property	:	**3c Cambridge Road Anerley London SE20 7XJ**
Applicant	:	**Anthony Albert Ehrenzweig**
Representatives	:	**In person**
Respondents	:	**Clive Anthony Grandison (First Respondent) and Capital home Loans Limited (Second Respondent)**
Representative	:	**Mr P de la Piquêrie - (Barrister)**
Type of Application	:	**Application for an order that a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002**
Tribunal Members	:	**Prof. Robert M Abbey (Solicitor)** **Mrs Evelyn Flint FRICS**
Date and venue of Hearing	:	**5th February 2015 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**16 February 2015**

DECISION

Decisions of the Tribunal

(1) The Tribunal grants the application for an order that a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002.

(2) The reasons for our decisions are set out below.

The background to the application

1. The Applicant seeks an order that a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002. The application concerns alleged breaches ("the alleged breaches") carried out to 3c Cambridge Road Anerley London SE20 7XJ ("the property.").

2. S. 168 of the Commonhold and Leasehold Reform Act 2002 provides as follows with sub-section (4) shown in bold:

> *(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.*

3. The property contains three flats all let on long leases. The First Respondent is the tenant of flat 3c being the first and second floor maisonette. 3c is held under a registered lease for a term of 125 years from 24 June 2006 ("the lease"). The First Respondent was registered as proprietor of the leasehold title on 05 February 2007. The Second Respondent is the proprietor of a registered charge against the leasehold title and that charge was also registered on 05 February 2007.

4. The Applicant asserts the alleged breaches of the lease namely of three clauses being clauses 4.15, use of the property as a single private dwelling, 4.14, making the insurance void or voidable, and 4.25 notice of dealings. Originally the landlord also asserted a breach of clause 4.24 regarding subletting of parts of the property. However, at the hearing the landlord confirmed that he was satisfied that there was no breach of this covenant and was not therefore pursuing this aspect of the claim. The First and second Respondents do not accept that there have been any breaches of the lease terms.

5. The Tribunal needs to establish from the evidence presented to it whether or not, on the balance of probabilities, the Respondent has acted in such a way that he is in breach of a covenant or covenants listed above. As was noted at the time of the case management hearing mentioned in paragraph 10 below, the Tribunal need to be satisfied that the Applicant is not estopped from relying on the covenants in the lease as a consequence of the conduct of the landlord subsequent to the granting of the lease.

The hearing

6. The Tribunal had before it a bundle of documents prepared by the Applicant in the form of a lever arch file containing copies of documentation and authorities regarding legal submissions. A bundle was also submitted by the Second Respondent also containing copies of documentation and authorities regarding legal submissions.

7. Neither party requested an inspection and the Tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

8. First to give evidence was the Applicant. He explained that when sold the property had the benefit of a House in Multiple Occupation (HMO) Licence issued by the London Borough of Bromley. This allowed 5 occupants. He also confirmed that he had received written notification of renewals of this registration of the HMO after the lease was granted in 2009. However, in 2014 Bromley wrote to him to advise him that they had registered the HMO but this time for 11 occupants. As a result he was of the view that this would be in breach of clause 4.15 of the lease of the property.

9. He also confirmed that he sent details of the changed HMO to his insurance broker who said that his current insurers would not continue with their cover and that the broker had to place cover with other insurers at an increased premium. As a result the landlord was of the view that this was in breach of clause 4.14 of the lease of the property.

10. At the case management hearing that took place on 6 November 2014 before Judge Dowell when the landlord attended, the First Respondent's solicitor produced to the Tribunal and to the Respondents a copy of an agreement made between the First Respondent as landlord and TLK Property and Investments Ltd as tenant in respect of the whole of the property. It is a letting agreement for three years from 8 May 2014. The Applicant/Landlord says that prior to this no notice was given of the existence of such an agreement and that as a result the Applicant was of the view that this was in breach of clause 4.24 of the lease of the property.

11. The Applicant then went on to say that the reason he had commenced action was that the First Respondent was a bad payer of his rent and service charges. He said "If Mr Grandison paid up on time I wouldn't have brought this action. I decided to throw the book at him".

12. The First Respondent then gave evidence and sought to explain why he had not breached the lease terms. As to the occupation of the property the First Respondent asserted that he had purchased the property for the sole purpose of using it as a house in multiple occupation. He knew that it had the HMO Licence when he bought and had simply renewed it from time to time. He says that the Applicant knew all of this and did not object at any time until the latest registration was issued. He said he had not applied for the numbers to be increased to 11 and that this had been done by Bromley and said "I have no idea why it became 11".

13. The Second Respondent offered no evidence but wished to make lengthy legal submissions and these are discussed and considered below.

The issues

14. The only issue for the Tribunal to decide is whether or not a breach of covenant or a condition in the lease has occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002. Having heard evidence and submissions from the Applicant and from the two Respondents and having considered all of the documents provided, the Tribunal determines the issue as follows.

15. The Tribunal partially preferred the evidence of the Applicant which appeared to show to the Tribunal that there had been one breach of covenant and this is set out below. The Tribunal was not satisfied that

there had been breaches of the remaining two covenants as also set out below. Clause numbers mentioned below are all clauses from the lease of the property.

16. Clause 4.25 requires the tenant *"....within one month of every change of ownership of this lease or of every subletting ....to give notice of it to the landlord or the landlord's solicitors and to pay a reasonable registration fee. At the same time to produce for inspection a copy of any document transferring the ownership or a counterpart of the sublease"*. The Tribunal noted that on 6 November 2014 the First Respondent's solicitor produced to the Tribunal and to the Respondents a copy of an agreement made between the First Respondent as landlord and TLK Property and Investments Ltd as tenant in respect of the whole of the property. It is a letting agreement for three years from 8 May 2014. Clearly the span of time between these two dates exceeds one month. The Tribunal was therefore satisfied that this was a contravention of clause 4.25.

17. Clause 4.15 requires the tenant *"Only to use the Property as a single private dwelling occupied by one family.... And not to use it or any part of it for any other purpose nor to allow anyone else to do so"*. It was clear to the Tribunal from the evidence put before it that this property had been licensed as an HMO prior to the sale to the First Respondent and continued to be so right up to the time of the hearing. Counsel for the Second Respondent made the point that the Applicant is estopped from relying on the covenants in the lease as a consequence of the conduct of the landlord subsequent to the granting of the lease. The position of the Second Respondent was that there had been "forbearance" or an estoppel on the part of the Applicant that would stop him relying on the strict terms of the covenant regarding user. The Tribunal was mindful that the First Respondent asserted that he had purchased the property for the sole purpose of using it as a house in multiple occupation. He knew that it had the HMO Licence when he bought (because the Applicant/seller disclosed it to him) and had simply renewed it in 2009 and 2014. He says that the Applicant knew all of this and did not object at any time until the latest registration was issued. We accept this evidence from the First Respondent.

18. The Applicant says that the position was different once the HMO Licence changed from a maximum of 5 to 11 individuals. The Tribunal were not persuaded by this argument. Whether the premises were used by 5 or 11 was of no consequence in that in both cases it was clear evidence of multiple occupation and was at all time at odds with the strict terms of the user covenant.

19. Counsel referred the Tribunal to the law and the case of *Hughes v Metropolitan Railway* (1877) 2 App Cas. 439. In that case it was made clear that if one party leads the other to suppose that the strict rights arising under the contract will not be enforced, or will be kept in

suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which had taken place between the parties. Conduct of the parties will thereby give rise to estoppel.

20. The Tribunal was satisfied that the conditions for this estoppel to arise existed, bearing in mind the evidence before them. Given that the Applicant knew of the HMO and that this had been renewed in 2009 and that he had written notice of the renewal, then his failure to object to this apparent breach could be regarded as an unequivocal indication of his intention not to insist upon his strict legal rights. (See *Hazell v Akhtar* [2001] EWCA Civ 1883.) The Tribunal was therefore satisfied that it would be inequitable to allow the Applicant to succeed in this respect and so the Applicant is estopped from enforcing clause 4.14 of the lease of the property.

21. Clause 4.14 requires the tenant *"not to act in any way which will or may result in the insurance of the Property being void or voidable, or in the premium for it being increased, nor to allow any one else to do so"*. The Applicant was required to pay a higher premium as a result of the disclosure to the insurers of the new 2014 HMO allowing 11 occupants in the property. On the face of it this would seem to be a breach. However, other issues reflect upon this and were considered during the hearing and are considered below.

22. It was apparent from the paperwork that from the commencement of the lease the property was used under the terms of the HMO Licence. It was also apparent that the Applicant had not informed his insurers of the use of the property being in multiple occupation. The Tribunal was shown several yearly renewal papers where the user was described in non-multiple use terms. (In fact according to the paperwork disclosed to the Tribunal the insurers thought the property was occupied by a single long leaseholder). Consequently Counsel for the Second Respondent argued that the premium should have been higher from the start of the long leasehold relationship in 2007. The Tribunal takes the view that the error lies with the Applicant in not fully appraising the insurers of the correct position regarding user. The Applicant is estopped from benefiting from his own error and so the Applicant is estopped from enforcing clause 4.14 of the lease of the property.

23. In the light of the single breach found to have occurred and set out in paragraph 16 above, the Application must, in part, succeed.

24. Finally, at the hearing there was an application for costs. Rule 13 of the Tribunal rules relates to orders for costs and provides:-

(1) The Tribunal may make an order in respect of costs only—
(a)....

(b)if a person has acted unreasonably in bringing, defending or conducting proceedings in—
(i)....
(ii)a residential property case, or
(iii)a leasehold case
(c)....
(2) The Tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid by the other party which has not been remitted by the Lord Chancellor.
(3) The Tribunal may make an order under this rule on an application or on its own initiative.

In the circumstances of this dispute the Tribunal was not satisfied that either party had acted unreasonably in bringing, defending or conducting these proceedings and therefore no order for costs will be made.

Name: Prof. Robert M. Abbey **Date:** 16.02.15