FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOAJ/LBC/2017/0041**
Property	:	**3 Priory Lodge, 64-66 Castlebar Road, Ealing, London W5 2DE**
Applicant	:	**Giovanni Cataldo & Julie Francesco Cataldo**
Representative	:	**Mills Chody LLP**
Respondent	:	**Dhiren Ranchod Raghvani** **Pushwinder Raghvani**
Representative	:	**In person**
Type of Application	:	**For the determination of an alleged breach of covenant**
Tribunal Members	:	**Mrs S O'Sullivan** **Mr JBarlow FRICS**
Date and venue of Hearing	:	**14 June 2017 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**4 August 2017**

DECISION

Decision of the tribunal

The Tribunal determines pursuant to section 168(4) of the Commonhold and Leasehold Act 2002 that there has been no breach of covenant of the New Lease.

The application

1. The Applicant seeks a determination pursuant to s. 168(4) of the Commonhold and Leasehold Reform Act 2002 that the Respondent tenants are in breach of various covenants contained in the lease.

2. Section 168(4) provides that;

   "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 covenant or condition in the lease has occurred."

3. The property which is the subject of this application is known as 3 Priory Lodge, 64-66 Castlebar Road, Ealing, London W5 2DE (the "Flat").

4. Directions were made dated 25 April 2017 which set out the steps to be taken by the parties and provided for this matter to be considered at an oral hearing.

5. In accordance with those directions both parties lodged bundles of documents.

6. Given the nature of the issues in dispute we did not consider an inspection of the Flat would assist us. In any event we had been provided with photographs relevant to the issues in dispute in the bundles.

The hearing

7. A hearing took place on 14 June 2017. The Applicant was represented by Mr Hardman of Counsel and the Respondents were represented by Mr Alford of Counsel. Mr Ahmad, a property manager, and Mr Adams, a surveyor, also attended for the Applicant. Mr Raghvani appeared to give evidence in person.

8. The Applicant relied on a bundle of documents and the witness statement of Danish Ahmad dated 10 May 2017. The Applicant further relies on a statement made by Mills Chody LLP 10 May 2017. The Respondents likewise relied on a bundle of documents containing the

witness statements of Pushwinder Raghvani and Dhiren Raghvani together with a statement of case and legal submissions.

9. The Flat is described in the application as a two bed flat in a purpose built block of 13 flats. The Respondent is the leasehold owner of the Flat pursuant to a lease dated 14 August 2015 entered into by the parties to this application (the "Lease"). It should be noted that there was a lease (the "Old Lease") dated 14 February 1975 by which the Applicant's predecessor in title demised a ground floor flat and garage, namely flat 3 and garage 9 to the predecessor in title of the respondent.

The Issues

10. The relevant clauses of the Lease said to have been breached are set out below together with a summary of each party's position and the tribunal's decision.

11. The Applicant became the registered proprietor of the building known as Priory Lodge, 64-66 Castlebar Road, London on 1 July 1993 which comprises 13 flats.

12. By a lease dated 14 February 1975 (the "Old Lease") the lessee covenants at clause 2(15)(ii) *"not at any time to assign underlet or part with possession thereof except as a whole"*. Clause 2 (15)(v) contains a further covenant on the part of the lessee *"upon every assignment transfer underlease mortgage charge or other document affecting this lease to give to the Lessor within one month thereafter notice in writing thereof and also if required by the lessor to produce each such document to the Lessor's solicitors and pay a fee of £4 for the registration of each such notice or document"*.

13. The breach alleged is that on 22 January 2015 the Respondents entered into an assured shorthold tenancy (the "AST") for only part of the demised premises. It is alleged that the AST did not include the garage and is therefore a breach of the above covenant.

14. The Old Lease was surrendered on 10 August 2015 and a new lease was granted on 10 August 2015 (the "New Lease").

The Applicant's case

15. The Applicants rely on the provisions of the Old Lease insofar as in the New Lease pursuant to clause 3.2 the Respondents covenant to observe and perform the obligations on the part of the lessee contained in the Old Lease.

16. The Applicant sets out the history of the alleged breach in its statement. It became aware on or around May 2015 that the Respondents had sublet the flat without the garage. A letter before action was sent requesting a copy of the tenancy agreement and when there was no response a chasing letter was sent on 19 August 2015. On receipt of the tenancy agreement the Applicant noted that there was no mention of the garage and averred that clear inference was to be drawn that it was not included. The Applicants say that the letter dated 28 August 2015 should be disregarded as it was created after the grant of the tenancy and is extrinsic evidence.

17. Counsel for the Applicant addressed us on the Respondents' assertion that the one off breach committed during the currency of a previous lease does not take affect against a subsequent lease. He relies on *Ward v Day & Another (1864) 5 Best and Smith 359* as authority for the proposition that a landlord may not pursue forfeiture proceedings following the negotiation of a new tenancy but that the argument rests on whether the landlord elects and/or waives his right to forfeit; waiver resting on knowledge.

18. Counsel also submitted that it would be strange if a nefarious tenant could escape the consequences of any serious breach such as dramatic alterations by simply surrendering a lease and obtaining a new tenancy. The correct interpretation is that the Respondents are in breach of the New Lease as soon as it is executed given that the breach continues until such time that it is waived.

19. It is denied that the Applicant has waived the breach. Reliance is placed on *Swanston Grange (Luton) Management Limited v Eileen Langley-Essen [2008] L & T.R 20*. Counsel submits that there is clear authority that the tribunal's jurisdiction is not ousted by waiver. The only question before us he said was whether there had been a breach of covenant.

20. In answer to the Respondent's question as to why the Applicant was pursuing what was a very historical one off breach of covenant we heard that there have been multiple litigations in relation to alleged breaches of covenant. The Applicant was now trying to make a stand on matters to prevent them from becoming bigger issues.

The Respondents' case

21. The Respondents say that the alleged breach was of the Old Lease. This will in any event have been waived on the grant of a new extended lease. In any event the alleged breach is denied as on true construction of the AST it includes both the flat and garage.

22. The AST does not make express reference to the garage and the property description is "Flat 3, Priory Lodge". On 28 January 2015 the Respondents wrote to the tenant to state that the garage had been omitted from the document and although it was understood the tenant had no need of it, the garage would be clean and ready should she do so.

23. Counsel for the Respondents referred the tribunal to subsection 56(1) of the Leasehold Reform Housing and Urban Development Act 1993 which provides that where a notice of claim is given the landlord shall be bound to grant and the tenant shall be bound to accept *"in substitution for the existing lease"* a new lease. It is submitted that as a matter of law the existing lease is surrendered and no longer exists. Reliance is placed on Woodfall on Landlord and Tenant (17.023) where it is stated that *"The grant by the landlord of valid new lease to the tenant is a surrender by operation of law, if the new lease is to begin during the currency of the existing lease, because the landlord would have no power to make such a grant unless the old lease had been surrendered".*

24. It is submitted that the sub-lease subsists and is not affected by the operation of law. An unlawful subletting is said to be a once and for all breach (*Scala House and District Property Co v Forbes [1974] Q.B 575*).

25. In summary it is the Respondents' case that if the breach is made out it was a one-off act on 22 January 2015 and did not take place within the term of the New Lease and the Applicant granted the New Lease while possessed of the knowledge of the facts. Put simply it is said that the New Lease had not been breached.

26. In any event the alleged breach is denied. The First Respondent's evidence was that it was always his intention to let the garage with the Flat. He wrote to the tenant to correct the error once it was pointed out.

Conclusion

27. We first considered whether there had been a breach of the Old Lease. In our view there was a breach. The Respondents had sublet the Flat and on the face of the tenancy agreement the property demised was limited to the flat itself and did not include the garage. This conclusion is supported by the subtenant's letter to the Applicant which confirms her understanding that the tenancy did not include the use of a garage. This conclusion would seem to us to be purely academic and of no practical import given this lease no longer subsists.

28. However we do not agree that by implication a breach of the Old Lease is a breach of the New Lease. The breach of covenant occurred before

the grant of the New Lease. The Respondents cannot sensibly be said to be in breach of the New Lease in respect of a one off breach occurring before its grant. Taking a commonsense approach therefore we found there was no breach of the New Lease pursuant to section 168(4).

29. We did not find it necessary to go on to consider the various arguments raised in respect of waiver and knowledge.

Applications for costs

30. Although the parties had both attended the hearing with a statement of costs the tribunal directed that if so advised the parties should make an application under Rule 13 after the decision has been issued. It therefore remains open for the parties to make such an application within the statutory time limits.

Name: S O'Sullivan **Date:** 4 August 2017