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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AE/LBC/2016/0018**
Property	:	**Ground Floor Flat, 162 Randall Avenue, London NW2**
Applicant	:	**Coralie Ventures Limited ("the Landlord")**
Representative	:	**Anthony Tse, solicitors**
Respondent	:	**Ms Malgorzata Dudziak ("the Tenant")**
Representative	:	**S Z Solicitors**
Type of application	:	**Application for permission to appeal**
Tribunal members	:	**1. Judge Amran Vance** **2. Mr M Taylor, FRICS**
Date of decision	:	**16 September 2016**

DECISION ON REVIEW

DECISION OF THE TRIBUNAL ON REVIEW

1. We determine that the respondent has breached the covenant at paragraph 7 of the Third Schedule to her lease for the reasons set out below.

2. We determine that she has not breached the covenants at paragraph 15 and 16 of the Third Schedule to her lease. Our reasons are set out below and the applcicant's request for permission to appeal to the Upper Tribunal (Lands Chamber) in respect of our original decision relating to these two covenants is refused.

3. If either party wishes to seek permission to appeal in respect of any aspect of this review decision they should note the information set out in the appendix to this decision.

BACKGROUND

4. This is the tribunal's review of its decision dated 11 May 2016 concerning an application under section 168(4) of the Commonhold and Leasehold Reform Act 2002 (the "2002 Act") for a determination that there has been a breach of covenant by the respondent in respect of her lease of Ground Floor Flat 162 Randall Avenue, London NW2 ("the Flat").

5. In our original decision we determined that the respondent had breached the provisions of her lease by non-payment of service charge demanded in respect of insurance contributions. However, we did not accept that additional breaches of covenant alleged by the applicant had been established.

6. In an application notice received by the tribunal on 6 June 2016 the applicant sought permission to appeal the decision dated 11 May 2016.

7. Having considered the grounds of appeal relied upon by the applicant and the overriding objective, the tribunal notified the parties that it intended to carry out a review of its earlier decision as there appeared to be a ground of appeal on which the applicant was likely to be successful.

8. The tribunal issued directions at the same time as notifying the parties of the decision to review its decision. In response to those directions the tribunal has now received:

    (i) Statements of case from both parties;

    (ii) Copies of legal authorities relied upon by the applicant

    (iii) A witness statement dated 20 July 2016 from Rajesh Tankaria on behalf of the applicant.

    (iv) A witness statement from the respondent, Ms Dudziak.

9. A substantial amount of additional information, not before us at the original hearing, has been provided. We are grateful to Mr Edward Denehan, counsel for the applicant and Mr Robin Halstead, counsel for the applicant who drafted the parties' respective statements of case for this review.

10. The factual background can be summarised as follows:

(i) In 2005, OPM Property Services Limited ("OPM") the then freeholder of 162 Randall Avenue, London NW2 ("the Building") converted the Building from a dwelling in single occupation into two residential flats. This involved constructing a single-storey extension to the rear of the Building. This conversion was carried out without planning permission.

(ii) On 14 June 2006 OPM granted the respondent a lease of the ground floor flat in the Building ("the Flat") for a premium of £225,000 and for a term of 99 years from 29 September 2005.

(iii) On 15 September 2006 OPM granted a lease of the Upper Flat to Sanjay Budheo, also for a term of 99 years from 29 September 2005

(iv) On 16 September 2009 London Borough of Brent ("Brent Council") served an enforcement notice (the "Enforcement Notice") under section 172 Town and Country Planning Act 1990 ("the 1990 Act") citing breaches of planning control in respect of: (a) the change of use from a single dwelling house into two self-contained flats; and (b) the erection of the rear extension.

(v) The Enforcement Notice was served on OPM and on the respondent, as well as several other parties. Contrary to what was stated at paragraph 31 of the tribunal's original decision, the respondent was specifically named as a recipient.

(vi) The Enforcement Notice required: (a) the cessation of the use of the Building as two flats which included the removal of the kitchen on the first floor; and (b) the demolition of the rear extension. The Enforcement Notice took effect on 26 October 2009 and the time limit for compliance was six months from that date.

(vii) The applicant purchased the Upper Flat on 7 July 2011. Land Registry office copy entries records the price stated to have been paid as £80,000.

(viii) On 10 July 2011, the council used its powers under section 178 of the 1990 Act to remove the upstairs kitchen and the

partition in the entrance hall separating the two parts of the Building. However, the first floor kitchen was subsequently reinstated and use of the Upper Flat as a separate residential unit for multiple tenants resumed.

(ix) On 18 August 2011 the applicant was registered as proprietor of the Upper Flat.

(x) On 28 June 2012 the applicant was registered as the freehold proprietor of the Building.

THE APPLICANT'S CASE

11. The applicant's case is that the respondent has breached the following three covenants in the Lease:

Paragraph 7 of the Third Schedule

"At all times to execute all such works as are or may at any time during the Term be directed or required by any national or local or other public authority to be executed upon the Demised Premises or any part or parts thereof whether by the Lessor or Lessee or owner occupier thereof" (the "Works Covenant").

Paragraph 15 of the Third Schedule

"Not at any time during the continuance of the Term [to] directly or indirectly convert or occupy or permit to be used or occupied the Demised Premises or any part or parts thereof or use or permit the same to be used for any illegal or immoral purposes....." (the "User Covenant")

Paragraph 16 of the Third Schedule

12. *"Not to do or permit to suffer to be done upon the Demised Premises or any part thereof any act or thing which may be or become a nuisance annoyance damage or inconvenience to the Lessor or the owners or occupiers of any other part of the Property or any neighbouring property"* (the "Annoyance Covenant").

13. As to the Works Covenant, Mr Denehan submits that a breach has been established as Brent Council, a public authority, has, through the Enforcement Notice, directed or required the execution of works in the demised Flat and these works have not been carried out by the respondent. The applicant contends that it is the respondent who, as owner and lessee of the Flat, must execute the works needed to remove the ground floor bathroom and demolish the rear extension. If that is

wrong, and it is the applicant who is required to take these steps then, says Mr Denehan, the respondent is still obliged to execute the works as they fall within the scope of the Works Covenant. That is because they are works that Brent Council had directed the applicant, as lessor, to carry out and the covenant refers to works that are directed or required to be carried out *"whether by the Lessor or Lessee or owner occupier thereof"*.

14. With regard to the User Covenant, Mr Denehan's position is that the respondent's current occupation and/or use of the Flat is illegal because it is in breach of planning control. He relies upon the case of ***Turner and Bell v Searles (Stanford-le-Hope) Ltd*** (1977) 33 P & CR 208, pages 211-212 in support of the proposition that use of premises in breach of planning control is an illegal use of the premises.

15. He contends that the respondent's residence in the Flat in circumstances where there is no planning permission for the use of the house as two dwelling houses, or for the erection of the extension, is illegal. That the continued existence and use of the extension by the respondent is a criminal offence is clear, he says, from sections 179(1) and (2) of the 1990 Act which provide as follows:

> *(1) Where, at any time after the end of the period for compliance with an enforcement notice, any step required by the notice to be taken has not been taken or any activity required by the notice to cease is being carried on, the person who is then the owner of the land is in breach of the notice.*
>
> *(2) Where the owner of the land is in breach of an enforcement notice he shall be guilty of an offence.*

16. Further, according to Mr Denehan, even if she were not the "owner" of the Flat for the purposes of section 179 of the 1990 Act, she is a person who has control of, or has an interest in it and has therefore committed a criminal offence by virtue of sections 179(4) and (5) of the 1990 Act which state that:

> *(4) A person who has control of or an interest in the land to which an enforcement notice relates (other than the owner) must not carry on any activity which is required by the notice to cease or cause or permit such an activity to be carried on.*
>
> *(5) A person who, at any time after the end of the period for compliance with the notice, contravenes subsection (4) shall be guilty of an offence.*

17. In respect of the Annoyance Covenant, Mr Denehan submits that the respondent's failure to comply with the Enforcement Notice to the extent that it relates to the Flat amounts to an *"annoyance"* and/or an

"inconvenience" to the applicant within the meaning of the User Covenant and that it has caused the applicant *"damage"*. He has referred us to the following passage from the judgment of Cotton LJ in ***Tod-Heatly v Benham*** (1888) 40 Ch D 80,

> *"The expression "annoyance," however, is wider than nuisance, and if you find a thing that reasonably troubles the mind and pleasure, not of a fanciful person, or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house, if there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort. You must not take fanciful people on the one side, or skilled people on the other, and that is the key, as it seems to me, of this case."*

18. He submits that the unlawful retention of the rear extension has led to Brent Council pursuing the Applicant who is at risk of criminal prosecution. This, he says, amounts to an annoyance and an inconvenience within the meaning of the Annoyance Covenant. Further it is asserted that the applicant's reversionary interest in the Flat is blighted whilst the illegal use of the Flat continues.

THE RESPONDENT'S CASE

19. In reply, Mr Halstead submits that on 10 July 2011 use of the Building as two self-contained flats had ceased. By reinstating the kitchen in the Upper Flat and re-letting it the applicant had committed an offence under s.181 of the 1990 Act. He argues that up until the date of that offence any breach of the Works Covenant had been waived by acceptance of ground rent by the respondent. For the period after commission of the offence Mr Halstead argues the applicant is estopped from obtaining a declaration under s.168 of 2002 Act by virtue of the applicant's failure to enforce the similar covenant against itself as owner of the Upper Flat which amounted to an unequivocal representation that it would not enforce the like covenant against the respondent. He argues that the applicant is relying on its own illegal act to enforce a covenant in circumstances where it has itself breached planning legislation.

20. Mr Halstead submits that any annoyance suffered by the Applicant was of its own making and by reinstating the kitchen in the Upper Flat it had opened itself up to a more serious criminal prosecution. He submits that the doctrine of *ex turpi caua* applies.

21. In her witness statement, the respondent suggests that persons involved in the applicant company are the "same people" who sold her

the Flat. In his submissions Mr Halstead refers to the respondent's belief that the transfer of the leasehold interest in the Upper Flat and the transfer of the freehold of the Building to the applicant were both shams to avoid the consequence of OPM failing to disclose the lack of planning permission to the respondent (we presume this is a reference to lack of planning permission for the conversion of the dwelling from a single dwelling into two flats and the construction of the rear extension).

22. In her statement the respondent says that when she became aware of the issues regarding lack of planning permission she contacted her conveyancing solicitors only to find that they had closed down. She instructed other solicitors to pursue a professional negligence claim against them and was advised that her conveyancing solicitors had been the subject of an intervention by the Law Society. The solicitors helping her with the professional negligence claim were themselves then the subject of a Law Society intervention and, it appears, the intended professional negligence claim was not pursued further.

23. The respondent contacted Brent Council following our original decision who then wrote to her on 1 August 2016. A copy of that letter is exhibited to her witness statement. In it Mr Scott Davies, Deputy Planning Enforcement Manager states that the leasehold title for the Upper Flat and the freehold in the Building were sold to the applicant at what appears to have been a heavily discounted price, notwithstanding the existence of the Enforcement Notice. The council's Land Charges team had informed him that the existence of the Enforcement Notice was revealed to the buyer in a search done prior to the purchase. It is not clear whether this was in respect of the purchase of the leasehold or freehold title, or both.

24. Mr Davies confirms that despite the council removing the kitchen in the Upper Flat on 10 July 2011 it was subsequently reinstated and residential use of the Upper Flat was resumed. He states that the council regard these actions as criminal offences under section 181 of the 1990 Act and that it is his "firm view" that the circumstances of the case warrant prosecution. Prosecution has, he states, been delayed by the failure of the applicant's representatives to reveal the names of its directors, despite the council's requests that they do so. The applicant company is registered in the Seychelles.

25. Mr Davies also states in his letter that the matter of the single storey extension was less serious than the ongoing change of use but that it also needed to be resolved in the long term.

DECISION AND REASONS

26. We have sought to construe the meaning of the three covenants in issue by considering the ordinary and natural meaning of the words of each covenant, read together with the whole of the Lease, having regard to the factual context surrounding entry into the Lease in so far as this can be identified.

The Works Covenant

27. The Works Covenant obliges the respondent during the term of the lease to execute *"all works directed or required by any national or local or other public authority to be executed upon the Demised Premises or any part or parts thereof"*.

28. It is clear that Brent Council is a public authority and that by serving the Enforcement Notice it directed or required the execution of works to the demised Flat.

29. Under section 172(2) of the 1990 Act Brent Council was required to serve the Enforcement Notice "*on the owner and on the occupier of the land to which it relates*" and also on *any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice.* That the Enforcement Notice was served on the respondent was not in dispute. As well as being served on her as a named recipient it was also served on her as the owner and occupier of the Flat.

30. Whilst the Enforcement Notice included works to other parts of the Building not demised to the respondent we accept Mr Denehan's submission that the language of the Works Covenant required her, as owner and lessee of the Flat, to execute the required works to remove the ground floor bathroom and to demolish the rear extension.

31. As the required works have not been carried out it follows that the respondent is in breach of the Works Covenant. We recognise that carrying out the required works would probably have rendered the Flat unsuitable for the occupation of her and her family as well as greatly diminishing the value the Flat. We acknowledge that she may consider this to be a very harsh decision given that she purchased her leasehold interest in the Flat after the unauthorised works were carried out. However, the wording of the Works Covenant is clear and it required her as owner and also as occupier of the Flat to carry out the works set out in the Enforcement Notice in so far as they concerned the Flat demised to her.

32. We also accept Mr Denehan's submission that she would still have been obliged to execute the works even if it was the lessor's obligation to carry out the works in question as the Works covenant refers to works directed or required to be carried out "*whether by the Lessor or Lessee or owner occupier thereof*".

33. We are not persuaded by Mr Halstead's submissions concerning waiver and estoppel by representation.

34. In so far as waiver is concerned it seems to us that the failure to carry out the required works amounts to a continuing breach of covenant which provides the applicant with a continually recurring cause of forfeiture regardless of acceptance of rent.

35. As to estoppel by representation, in order for this to have arisen:

    (i) the applicant would need to have made a clear and unequivocal representation of fact to her, whether by words or by conduct; and

    (ii) the respondent would need to have has acted upon such representation and thereby altered her position

36. We do not accept that the asserted failure by the applicant to enforce the similar covenant against itself as owner of the Upper Flat amounts to an unequivocal representation that it would not enforce the like covenant against the owner of the Flat. Even if this were the case there is simply no evidence that the respondent acted upon such a representation and altered her position in any way. As such, no estoppel can arise.

37. We cannot see how the doctrine of ex turpi causa is relevant to this application. Mr Halstead submits that it would be contrary to public policy to allow the applicant to bring this application but does not expand upon that submission in the respondent's statement of case. Nor does he identify the public policy issue he believed would be breached. We do not consider any public policy issues arise. Further, for the doctrine to apply there has to be a direct chain of causation between participation in a criminal enterprise by the applicant and losses or damage arising from from the illegal activity.

38. This application is concerned with the respondent's alledged breach of covenant by virtue of her non-compliance with the terms of the Enforcement Notice. That notice was served several years prior to the applicant's acquisition of the freehold of the Building and concerns an unlawful development of the Building that pre-dates its acquisition. We do not consider the evidence indicates that the respondent's breach of covenant in not complying with the Enforcement Notice was caused by an illegal act of the applicant. We accept that by reinstating and re-letting the Upper Flat as a single dwelling the applicant may well have commited a criminal act in contravention of the Enforcement Notice but we do not consider this can be said to be causative of the respondent's own non-compliance with that notice.

39. As to the assertion that that the persons involved in the applicant company are the same people who were involved with OPM, this is amounts to bare assertion, unsupported by evidence and we therefore disregard it.

The User Covenant

40. In our view the mischief that the lessor must have intended to prevent by entry into this covenant was the use of the Flat for any illegal or immoral *purpose*. It is significant that the covenant immediately preceding the User Covenant is a covenant by the lessee not to use the Flat or any part of it otherwise than as residential accommodation.

41. The Lease therefore provides for the Flat to be let for a specified purpose, namely as residential accommodation, and prohibits its use or occupation for illegal or immoral purposes. The question is, therefore, whether the respondent, as well as using the Flat for the lawful purpose of residential accommodation, has also been using it for an illegal purpose as the applicant suggests.

42. It cannot be correct that simply residing in the Flat in circumstances where no planning permission had been obtained for the use of the Building as two dwelling houses and for the erection of the extension amounts to a breach of the User Covenant. The unauthorised development of the Building took place prior to the grant of the Lease to the respondent and she would have been in immediate breach of the covenant as soon as she started residing in the Flat if mere residence in these circumstances amounted to use for an illegal purpose. This cannot conceivably have been the intention of the contracting parties.

43. Mr Denehan suggests that continued residence after service of the Enforcement Notice amounts to illegal use. He may be correct in saying that the respondent has committed a criminal offence by reason of non-compliance with the enforcement notice, although we note that section 179 (3) of the 1990 Act states that:

> *"in proceedings against any person for an offence under subsection (2), it shall be a defence for him to show that he did everything he could be expected to do to secure compliance with the notice".*

44. It is not the role of this tribunal to determine whether or not such an offence has been committed. What we are required to determine is whether the respondent has breached the terms of the covenant in question.

45. In our view non-compliance with the Enforcement Notice, irrespective of whether this amounts to an offence, does not convert lawful residential use into use for an illegal purpose. The use being made of the Flat both before and after time for compliance with the Enforcement Notice remained the same, namely lawful residential use.

46. The only use that the respondent has made of the Flat is residential use. The Enforcement Notice did not require her to cease such use and we do not, therefore, consider that the provisions of sections 179(4) and (5) of the 1990 Act are of any relevance.

47. We do not consider the case of ***Turner and Bell v Searles (Stanford-le-Hope) Ltd*** relied upon by Mr Denehan to be of assistance. This was an appeal concerning the refusal of a County Court Judge to order the grant to the appellants, by the respondents, of a new tenancy of business premise under Part II of Landlord and Tenant Act 1954. The appellants had been using premises as a depot in connection with their coach transport business. The local planning authority served on them an enforcement notice requiring them to discontinue the use of the premises for the purpose of the operation of a coach transport business. The local authority therefore specifically required the cessation of the use being made of premises. That contrasts markedly with the situation we are considering where no cessation of use was directed.

48. We conclude that no breach of the User Covenant has been established.

The Annoyance Covenant

49. The Annoyance Covenant is a *restrictive* covenant in that it restricts the use that the respondent can make of the Flat. She covenants, not to carry out an act, or to permit anyone else to carry out an act, which may be, or which may become, a nuisance, annoyance, inconvenience, or source of damage to the applicant or to the owners or occupiers of any other part of the Building or neighbouring property.

50. In our view, if any annoyance, inconvenience or damage has been caused to the applicant this is not as a result of any act carried out by the respondent but, rather, from an omission to act, namely her failure to comply with the Enforcement Notice. This omission to act does not, in our determination, breach the covenant.

51. The covenant would, of course, be very likely to have been breached if the respondent had constructed the extension herself, but that is not the case. Instead, the demise of the Flat to her included the rear extension. As we conclude above, the use that she is making of the Flat

remains lawful residential use and we do not accept lawfully residing in the Flat as demised to her breaches this covenant.

Name: Amran Vance **Date:** 16 September 2016

Appendix - Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this reviewed decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the reviewed and amended decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).