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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOBJ/LBC/2016/0104 and 0103**
Property	:	**Flats 1 and 2, 12 Hardwicks Square London SW18 4JS**
Applicant	:	**Thackeray Shops Limited**
Representatives	:	**James Sandham of Counsel**
Respondents	:	**Trevor Fitzy Williams**
Representative	:	**Timothy Polli of Counsel**
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	:	**Professor Robert M Abbey (Solicitor)**
Date and venue of paper based decision	:	**9th March 2017 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**9th March 2017**

DECISION

Decisions of the Tribunal

(1) The Tribunal determines on a preliminary issue that it has jurisdiction to consider these two applications seeking orders that a breach or breaches of covenant in the leases of the property have occurred pursuant to S. 168(4) of the Commonhold and Leasehold Reform Act 2002.

(2) The reasons for our preliminary issue determination 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 **Flats 1 and 2, 12 Hardwicks Square London SW18 4JS** ("the property.").

2. Section 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. Section 169 of the Commonhold and Leasehold Reform Act 2002 provides as follows with sub-sections (4) (a) and part of (5) shown in bold:

169 Supplemenary

(1)....

(4)In section 168 and this section "long lease of a dwelling" does not include—

(a)a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (c. 56) (business tenancies) applies,

(b)a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 (c. 5) in relation to which that Act applies, or

(c)a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995 (c. 8).

(5)In section 168 and this section—

"arbitration agreement" and "arbitral tribunal" have the same meaning as in Part 1 of the Arbitration Act 1996 (c. 23) and "post-dispute arbitration agreement", in relation to any breach (or alleged breach), means an arbitration agreement made after the breach has occurred (or is alleged to have occurred),

"dwelling" has the same meaning as in the 1985 Act,

"landlord" and "tenant" have the same meaning as in Chapter 1 of this Part, and

"long lease" has the meaning given by sections 76 and 77 of this Act, except that a shared ownership lease is a long lease whatever the tenant's total share.

(6)....

4. Section 76 of the Commonhold and Leasehold Reform Act 2002 provides as follows with sub-section (2) (a) shown in bold:

76 Long leases

(1)This section and section 77 specify what is a long lease for the purposes of this Chapter.

(2)Subject to section 77, a lease is a long lease if—

(a)it is granted for a term of years certain exceeding 21 years, whether or not it is (or may become) terminable before the end of that term by notice given by or to the tenant, by re-entry or forfeiture or otherwise,

(b)it is for a term fixed by law under a grant with a covenant or obligation for perpetual renewal (but is not a lease by sub-demise from one which is not a long lease), ...

5. Section 38 of the Landlord and Tenant Act 1985 provides as follows with part of the definitions clause shown in bold as to what is adwelling:

38 Minor definitions.

In this Act—

....

"dwelling" means a building or part of a building occupied or intended to be occupied as a separate dwelling together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it; ....

A "dwelling" has the common meaning of, and would be generally understood and accepted to mean a house flat or other place of residence. In recent years (since 2001) a dwelling is defined (in line with the 2001 Government Census definition) as a self-contained unit of accommodation. Self-containment is where all the rooms (including kitchen, bathroom and toilet) in a household's accommodation are behind a single door which only that household can use. Accordingly to enable the tribunal to consider an application regarding the alleged breaches an applicant must be able to show that the dispute relates to long leases of dwellings.

The legal relationships

6. The property is within a larger estate where the freeholder is RG Securities (No 2) Limited. It seems that the freehold is subject to some 107 leasehold interests. The applicant is the head leaseholder of a lease of premises a part of which is the property. This head lease is subject to seven under leases and the respondent is the lessee of two of these

under leases. Flat 1 is held on a 999 year lease (less 5 days) commencing on 26 April 2013 and the same is true for flat 2.

The preliminary issue - jurisdiction

7. The applications before the Tribunal were dated14 November 2016 and were made pursuant to the terms of S.168(4) of the 2002 Act. The applicant alleges in its application several breaches of the lease covenants. The Tribunal had before it a statement of case prepared by the respondent in the form of a file containing a submission on the issue of jurisdiction, copies of documentation and registered title copies and a copy of the leases as well as copy correspondence. A statement of case was also submitted by the applicant being a submission on the jurisdictional issue. The problem that has presented itself as a preliminary issue revolves around the question of whether the application concerns long leases of dwellings

8. The reason the issue has come about is because one of the covenant breaches would appear to be about the nature of the permitted use of the property. The point being, as shown in the above statute extracts, the tribunal has no jurisdiction if there is a business tenancy. So, the tribunal must consider the effect of statute to decide if it has jurisdiction in this case.

9. In s.168 the initial requirement is for a long lease. This is subsequently defined as a lease of over 21 years. As has been mentioned above these two leases are for 999 years and are therefore clearly long leases under the Act.

10. The subsequent requirement is for there to be a dwelling. The Act then defines a dwelling as being a building or part of a building occupied or intended to be occupied as a separate dwelling. A dwelling would include a house flat or other place of residence. In this dispute the parties would appear to have accepted that the two flats have been arranged and used as residential dwellings. The lease plans purport to show self contained units. The statutory test is directed to the actual use of the subject premises and not the lease covenant regarding user. Thus, whether or not the user clause permits a residential user (Use Class C3) is not relevant when considering the question of jurisdiction for this tribunal.

11. I am therefore satisfied that the tribunal has jurisdiction to consider this application. There is a landlord, (the applicant), there is a long lease, (two 999 year leases) and the property that forms the subject of the two applications is plainly accepted as residential in nature and thus must be a dwelling or dwellings.

12. Rights of appeal available to the parties are set out in the annex to this determination.

Name: Prof. Robert M. Abbey **Date:** 09 March 2017

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this 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.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. 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.

4. 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.