FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/00KA/LBC/2018/0009**
Property	:	The Burnham Suite, 25 Ashburnham Road, Luton, Bedfordshire LY1 1JN
Applicant	:	Barbara Ann Addrison
Representative	:	Gisby Harrison, Goffs Oak House, Goffs Lane, Goffs Oak, Cuffley, Herts EN7 5HG [Ref MA/BA/A808-12/Ashburnham]
Respondent	:	Inzi Properties Ltd
Representative	:	L Jones FRICS, Peter Hill Chartered Surveyors, 7/9 George Street, Luton LU1 2BJ
Type of Application	:	For a determination that a breach of covenant or condition in the lease has occurred [CLRA 2002, s.168]
Tribunal	:	G K Sinclair & D S Brown FRICS
Date of decision	:	25th June 2018

DECISION following a paper determination

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1. Neither party having sought an oral hearing, and for the reasons which follow, the tribunal determines on the basis of the statements and documents submitted that the respondent lessee is in breach of or has breached the following covenants in its lease :
   a. Clause 2(xiv) – namely by failing within 14 days or at all to inform the appellant that Luton Borough Council had on at least two occasions served

notice on the respondent or its agent concerning rubbish at the premises; and

b. Clause 2(xviii) – namely by failing to provide any details of the subletting of the demised premises despite employing a firm of letting agents to manage the property on its behalf.

2. The tribunal does not find proved the alleged breach of clause 2(xvi) by doing or permitting any waste spoil or destruction upon the demised premises.

3. As the applicant lessor seems content with the details concerning the property insurance arranged by the lessee that have now been produced the tribunal makes no finding on that alleged breach of clause 2(xxii).

Background

4. The demised premises comprise one of two residential flats in the building. Each enjoys a distinct section of the space in front and to the rear of the building, including a parking space. The respondent is a limited company with various addresses for service, one of which is offshore and another within Luton. At the beginning of February 2018 Claire Kitchener, a Neighbourhood Enforcement Officer at Luton Borough Council served on the applicant, in her capacity as owner of the demised property, a warning letter under section 43 of the Anti-social Behaviour, Crime and Policing Act 2014. This concerned the storage of waste, and rubbish in the bin store area of 25 Ashburnham Road in an unsightly manner.

5. On 15 February 2018 one Daniel Thomas, who describes himself as an Assistant Manager at Opel Estates, sent an email to the author of the above warning letter (with a copy to the lessor's solicitors) in the following terms :

> I have been passed a letter regarding the rubbish on the site of a flat that we manage '25a Ashburnham Road, Luton'.
>
> We have been written to about this in the past and it seems we are the only ones who do anything about it, we have in the past cleared rubbish that is not ours from the site either fly tipped and thrown from the flat above (I suspect the later). *(sic)*
>
> We have never got anywhere with the managing agents of the top flat and wish to know if you are pursuing the owner of that flat as you are with our landlord?
>
> Our landlord has a long lease on the flat and the freehold is looked after by someone else, it is my understanding that as the rubbish is dumped on the freeholders land it is their responsibility to sort this out, is it not?
>
> I look forward to hearing from you

6. From the information contained in that email, but with no other direct evidence, the applicant lessor concluded :

a. That on two occasions the local authority had served notice on the lessee for rubbish demised premises, of which no particulars had been provided to herself as lessor

b. That the lessee had therefore permitted waste and destruction by allowing refuse to be on the property and not removing it, and
c. That the premises were under that, as the lessee is a limited company incorporated in the British Virgin Islands, and that no notice of under letting had ever been received.

7. By way of further complaint the applicant contends that despite demands for evidence of the insurance effected by the lessee no evidence of that insurance had ever been provided.

8. Directions for the trial of this application were issued by the tribunal on 17th April 2018. These are required the applicant to produce evidence that the applicant and respondent were current lessor and lessee respectively of the demised premises, for the filing of a witness statement on behalf of the applicant endorsed with a signed statement of truth, and that the respondent must by Friday 18th May 2018 file with the tribunal and serve on the applicant written witness statements endorsed with statements of truth from any witness (including a director of the respondent) who can admit or deny the allegations set out in the application. The directions stressed that failure to comply may mean that the tribunal will refuse permission for that witness to give evidence.

9. The applicant duly complied. The respondent did not, but instead submitted a letter from Peter Hill Chartered Surveyors. This can be found at page 35 of the application bundle. The letter states that the firm had been asked by the lessee to respond to a letter from the tribunal and the application for an order that breach of covenant or condition and lease has occurred. The letter :
a. Contends that the freeholder has only recently requested the buildings insurance, in February, and that there had never been a request previously although the client has had the building insured
b. Admits that the flat is let on an assured short hold tenancy agreement and attaches a copy
c. Admits that Inzi Properties Ltd had received from Luton Borough Council notices relating to the clearance of rubbish, referring exclusively to a section of the front garden which is surfaced with concrete as a parking area
d. Contends that rubbish that has been dumped is not connected at all with the occupants of 25 Ashburnham Road but is as a result of fly tipping which is an ongoing problem in the Luton town centre area generally, but that the lessee did arrange to have rubbish cleared by the contractor at their own expense (providing copy receipts), and
e. Admits that copies of the notices were not passed by the lessee onto the lessor as they did not consider these to be relevant to the security of the property as a whole and merely related to fly tipping.

10. For completeness it should be recorded that on 25th May 2018 a second witness statement by Mr Martin Addrison was filed on behalf of the applicant. In that he responded to various points made in the letter received from Peter Hill Chartered Surveyors and, in respect of the covenant at clause 2(xxii), observed on the final page that :

> A policy of insurance had has been supplied. It would appear that this point is substantially and largely resolved.

11. On 8th June 2018 a further letter was emailed to the tribunal (copied also to the applicant's solicitors) by Les Jones FRICS of Peter Hill Chartered Surveyors, to which was attached some correspondence with the Luton Enforcement Team and a photograph. The letter sought to make the point that if the fly-tipping affected land within each of the two leasehold titles he would expect the applicant to be alleging that each lessee was in breach of covenant, yet enquiries of the letting agent for the upper flat (the Ash Suite) had revealed that neither it nor its client had received any correspondence whatever from the lessor about this issue. In the attached email exchange with Luton was an email from Claire Kitchener to the effect that if the rubbish was not cleared by 15th June them both letting agents would be issued with a Community Protection Notice for the removal of the rubbish, thus making it an official request which if not complied with could result in a fine or prosecution.

Relevant lease provisions

12. The application alleges breaches by the respondent current lessee of the following covenants in clause 2 of a 99 year lease dated 31st May 1989 made between Stephen Smith and Lilani Smith (lessor) and Kevin Ian Lyons (lessee) of one of two flats at 25 Ashburnham Road, Luton :

(xiv) Within 14 days of the receipt of notice of the same to give full particulars to the lessor of any permission notice order or proposal for a notice or order made or given or issued to the lessee by any government department local or public authority under or by virtue of any statutory powers... and also without delay to take all reasonable or necessary steps to comply with any such notice or order...

(xvi) Not to do or permit any waste spoil or destruction to or upon the demised premises nor to do or permit any act or thing which shall or may be or become a nuisance damage or annoyance or inconvenience to the lessor or the owners or occupiers of the flats or of any adjoining or adjacent property

(xviii) Within one month of every transfer devolution disposition or underlease of or relating to the demised premises to give notice thereof to the lessor's solicitors and produce to them the instrument under which such devolution arises (or a certified copy thereof) and pay to them a registration fee of fifteen pounds plus Value Added Tax in respect of the same

(xxii) The lessee will at all times during the said term insure and keep insured the demised premises against loss or damage by fire and such other risks as the lessor thinks fit in some insurance office of repute in such sum as the lessee shall think fit but not less than the full reinstatement cost and whenever required reduced to the less or the policy or policies of such insurance and the receipt for the last premium of the same...

Material statutory provisions

13. Section 168 of the Commonhold and Leasehold Reform Act 2002 provides :

(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 (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) ...

14. Section 169 contains supplementary provisions, none of which are material to this decision.

15. The question whether a lease is forfeit remains one for the court, as is the exercise of its discretion to grant relief against forfeiture; an issue which in the context of a long lease is usually of considerable concern to any mortgagee of the tenant's leasehold interest.

Determination

16. Although Mr Addrison took the procedural point that the letter filed on behalf of the respondent on 18th May was not a statement endorsed with a statement of truth, and was therefore non-compliant, the tribunal regards it as a statement contrary to interest because it makes admissions behalf of the lessee. It's content is therefore taken into account in this decision. While even later, the further letter dated 7th June 2018 is also admitted because of the observations made by Luton that if rubbish is not cleared up then action will be taken against the two firms of letting agents concerned.

17. On the basis of the admissions made the tribunal has no hesitation in accepting that notices warning letters had been issued by the local authority addressed to the respondent lessee and that neither it nor its letting agent had bothered to pass that information on the lessor. There is therefore a breach of clause 2(xiv).

18. The letter dated 18th May also admits that the premises were let on an assured shorthold tenancy, and a copy tenancy agreement was provided. On how many previous occasions the premises been let without informing the freeholder has not been clarified, but here at least is one instance of a breach of clause 2(xviii).

19. In his second witness statement Mr Addrison appears satisfied that the issue of insurance has now been resolved, so the tribunal makes no finding about that.

20. That leaves only the issue whether, contrary to clause 2(xvi), the lessee is guilty of permitting waste. According to *Dowding & Reynolds*[1] there are two forms of waste : voluntary and permissive. The learned authors define them thus :

> Voluntary (or commissive) waste means the deliberate or negligent

[1] *Dilapidations : The Modern Law and Practice (6th ed – 2017, Sweet & Maxwell)*

commission of an act which damages the demised premises. However, an act will not generally constitute voluntary waste unless it results in damage to the landlord's reversion. It follows that minor or trivial damage will generally not amount to waste. An omission, as opposed to a positive act, can hardly ever, and perhaps never, constitute voluntary waste.[2]

Voluntary waste is commissive, i.e. it involves the doing of an act which damages or otherwise alters the premises. By contrast, permissive waste means allowing damage to occur at the premises through failure to act. In *Davies v Davies*,[3] Kekewich J defined permissive waste as:

> "Allowing waste which has not come about by [the tenant's] own acts, but comes about by a revolution or by wear and tear, or by the action of the elements, or in any other way not being his own act."

Permissive waste includes allowing buildings to deteriorate by failure to repair. There are therefore obvious similarities between permissive waste and the liability imposed by the tenant's repairing covenant there is, however, the important difference that the obligation not to commit permissive waste appears to be limited to the doing of that which is necessary to preserve the premises in the condition they were in at the date of the lease, whereas a covenant to repair may well require the carrying out of works which put the premises into a better condition than they were in when demised.[4]

21. The tribunal is not satisfied that being a victim of fly-tipping of the nature alleged here amounts to damage to the premises or to the landlord's reversion. What is alleged is that permitting rubbish (colloquially "waste") to build up is a breach of covenant, but that is not "waste" as understood in the law of landlord and tenant. Even if that were so, the applicant can produce no evidence to counter that of the respondent that the latter has attempted periodically to clear what it says is a persistent problem in the Luton town centre area, and that the lessee of the upper flat and part of the area subject to littering has not even done that. This alleged breach has not been proved.

Dated 25th June 2018

Graham Sinclair

Graham Sinclair
Tribunal Judge

2 *Op cit*, at 21–12

3 (1888) 38 Ch D 499

4 At 21-19