FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/OOAK/LBC/2017/0089**
Property	:	**Flat 9 Danube Close Edmonton London N9 0GX**
Applicant	:	**Arhag Housing Association Limited**
Representatives	:	**Joanna Brownhill of Counsel**
Respondents	:	**Ramprakash Shamsunder Sonee**
Representative	:	**Elizabeth England 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** **Mr Michael Cartwright FRICS**
Date and venue of Hearing	:	**29th November 2017 at 10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**12 December 2017**

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 decision 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 **Flat 9 Danube Close Edmonton London N9 0GX** ("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. The applicant is the registered proprietor of the land and buildings on the North East side of Zambezi Drive London being a registered freehold under title number AGL 180377. This property is stated in the charges register to be subject to several leases one of which is the subject property. The respondent is the registered proprietor of the leasehold property at 9 Danube Close London. He holds the property on a lease dated 10 December 2009 for a term of 99 years commencing on 10 December 2009. The respondent was so registered in January 2010 under title number AGL209964 and is the original lessee.

4. The application before the Tribunal was issued by the applicant on or about 18th September 2017. The applicant alleges in its application one breach of the lease covenants. In particular and in detail the applicant says there is a breach of lease clause 3(15) (a) and (b, (not to underlet). In support of the allegation of a covenant breach the applicant states that the tenant is letting the property to a Ms Marta Zielinska and such letting has been granted by the respondent without the consent of the landlord/applicant and is therefore a clear breach of the lease covenants.

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 in the lease and as listed in paragraph 4 above.

The hearing

6. The Tribunal had before it a bundle of papers prepared by the applicant in the form of a lever arch file containing copies of documentation and registered title copies and a copy of the lease as well as copy correspondence. Another bundle was also submitted by the respondent containing a witness statement, copies of documentation and correspondence. The applicant at the hearing also provided for the tribunal authorities regarding legal submissions as did Counsel for the respondent.

7. The submission of the bundle made by the respondent did not comply with the time frame set out in directions made by Judge Korn on 18th October 2017. Consequently the applicant at the start of the hearing made an application that this evidence be disallowed. Notwithstanding this the Tribunal decided that there was no immediate and evident prejudice caused by this and so the Tribunal decided to allow this late submission especially given the terms of Rule 3 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 2013 No. 1169 (L. 8) the details of which are set out below with the most relevant elements highlighted in bold:-

Overriding objective and parties' obligation to co-operate with the Tribunal

3.—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—
(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;
(b) avoiding unnecessary formality and seeking flexibility in the proceedings;
(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
(d) using any special expertise of the Tribunal effectively; and
(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—
(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.

(4) Parties must—
(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally.

8. 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.

9. The first person to give oral evidence was Mr G. B. Lambert who is employed by the applicant as their tenancy fraud investigation officer. He confirmed his job was to investigate and deal with allegations of lease and tenancy fraud having been suspected of being committed by the applicant's tenants and lessees across the applicant's some 950 properties of mixed tenure that are located within 14 London Boroughs.

10. Following complaints about car parking problems he confirmed that on 15 August 2017 he visited the property and met Ms Marta Zielinska who told him she had rented the property and had been there from 24 November 2016 and the rent for the property was £1600 per month. He then obtained a copy of the tenancy agreement and produced a copy to the Tribunal. This confirmed the letting as being made by the respondent with Ms Zielinska.

11. The final person to give evidence was the respondent. Mr Sonee confirmed his 30% part ownership with the applicant. He also confirmed that he became the freeholder of a property in Enfield in October 2016 which he then moved to. Thereafter he decided to sublet the property "because I thought I could". The tenant Ms Zielinska moved in to the property in November 2016 paying he says rent of £1450 per month. Thus in oral and written evidence he readily admitted the subletting.

12. However he went on to assert that by accepting his direct debit payments the applicant had waived the breach by acceptance of rent and other payments in the knowledge of the existence of the breach. This assertion became the basis for legal submissions following the oral evidence.

The issues and the decision

13. 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 Respondent and having considered all of the documents provided, the Tribunal determines the issues as follows.

14. This matter concerns a breach of covenant for subletting a social housing shared ownership leasehold property. The respondent has a 30% share is alleged to be subletting the property for £1600 per month. The applicant asserts a breach of clause 3(15)(a) and (b). This states that the tenant of the property is

> *"not to assign underlet charge mortgage or part with possession of part only of the premises" and "not to underlet the whole of the premises".*

15. The applicant says that this has been breached by the alleged letting to Ms Marta Zielinska. The respondent readily admitted the existence of the subletting and also confirmed that he had let the property because he thought he could but as soon as he realised this was not the case he served a notice on the tenant and said to the Tribunal that he believed that he would regain possession very shortly. In these circumstances the Tribunal is of the view that there is a clear and admitted breach of covenant 3 15 (a) and (b) of the lease.

16. The Tribunal must now consider the question of waiver raised by the respondent in his witness statement. The respondent asserted strongly that there had been a clear act of waiver by the acceptance of payments by the applicant in full knowledge of the breach. The applicant said the problem with this approach was that the respondent had conflated

three different forms of waiver when what was needed was to consider each in turn. This was because the applicant said there was a clear difference between waiver of the covenant and waiver of the right to forfeit. This was especially so as waiver to forfeit was beyond the jurisdiction of this Tribunal.

17. The Tribunal must decide whether the relevant covenant was suspended by reason of a waiver or estoppel or whether the covenant was or was not suspended. On the facts it seems to the Tribunal that there has been no waiver at all with regard to the several forms of waiver. The case of *Swanston Grange Management v Langley-Essen* [2008] L&TR 20 affords assistance in this regard to the Tribunals decision. This confirms the position as express in the previous paragraph of this decision.

18. The Tribunal needs to consider therefore if the covenant has been waived. In our view it has not. There was no knowledge of the breach prior to the investigations carried out by Mr Lambert. Furthermore whether the sub-tenant has vacated is not of concern for the Tribunal as it simply has to decide whether a breach has in fact occurred and not whether any breach has been remedied. This is for another court or tribunal to consider. Thus following the discovery of the "once and for all breach" the applicant made the application to this tribunal for a determination in accordance with s.168.

19. In relation to a waiver of the breach this would need to be supported by an inference of consent to the breach. The Tribunal could find no evidence to support this contention. As to waiver of the right of forfeiture the tribunal confirms this is not a matter for it to consider as it is beyond the jurisdiction of this Tribunal.

20. In the case of *GHM (Trustees) Limited v Glass (2008)* LRX/153/2007 which is a decision of the Lands Tribunal about a lease clause breach in similar terms to the breach of covenant of this lease. the President George Bartlett QC wrote that *"The jurisdiction to determine whether a breach of covenant has occurred is that of the LVT. The question whether the breach has been remedied....is a question for the court in an action for forfeiture or damages for breach of covenant.... The breach of covenant has not ceased to exist by reason of the fact that the landlords now know of the assignment and the names of the assignees".*

21. The effect of the Lands Tribunal decision is clear. This Tribunal need only determine whether a breach has occurred. The tribunal is satisfied that in the light of the evidence set out above that a breach has occurred and as such this 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

22. Rights of appeal available to the parties are set out in the annex to this decision.

Name: Prof Robert M. Abbey **Date:** 12 December 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.