



**FIRST-TIER TRIBUNAL  
PROPERTY CHAMBER  
(RESIDENTIAL PROPERTY)**

**Case Reference** : **LON/00BJ/LBC/2019/0038**

**Property** : **49 Rossiter Road Balham London  
SW12 9RY**

**Applicant** : **Mr Kevin McEneaney**

**Representative** : **In person**

**Respondents** : **James Waterworth and Miren De  
Frutos**

**Representative** : **Written submissions**

**Type of Application** : **Section 168(4) of the Commonhold  
and Leasehold Reform Act 2002**

**Tribunal Members** : **Mr Anthony Harris LLM FRICS  
FCI Arb (Valuer Chair)  
Ms S Coughlin MCIEH**

**Date and venue of  
Hearing** : **22 July 2019  
10 Alfred Place, London WC1E 7LR**

**Date of Decision** : **23 July 2019**

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**DECISION**

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## **Decisions of the Tribunal**

- (a) The Tribunal determines that it has no jurisdiction to hear the case as the applicant is not the sole freeholder and is either a joint tenant or tenant in common with the respondents.**
- (b) The application under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act') is dismissed.**
- (c) In the event that the tribunal does have jurisdiction it would have determined that there has been a breach of clause 1 of the first schedule in that the property is not occupied by one family as a private dwelling.**
- (d) The tribunal would also have determined that by entering into an arrangement to compensate the leaseholder of the upper flat for loss of rent during building works the applicant has waived the breach.**

## **The background and the application**

1. The freehold of 49 Rossiter Road London SW 12 is jointly owned by Kevin Leo McEaney, (applicant) James Waterworth and Miren Edurne de Frutos. (respondents) under title number LN201743. It is not known if the property is held as joint tenants or tenants in common.
2. The applicant is also the leaseholder of the lower flat at the property and the respondents are the leaseholders of the upper flat.
3. Under section 112 (5) of the Commonhold and Leasehold Reform Act 2002 *"Where two or more persons jointly constitute either the landlord or the tenant or qualifying tenant in relation to a lease of a flat, any reference in this chapter to the landlord or to the tenant or qualifying tenant is (unless the context otherwise requires) a reference to both or all of the persons who jointly constitute the landlord or the tenant or qualifying tenant, as the case may require."*
4. The applicant seeks a determination pursuant to section 168(4) of the 2002 Act that there have been breaches of covenants or conditions in the respondent's lease. The respondents as joint freeholders as well as leaseholders of the upper flat oppose the application.
5. The issue of jurisdiction had been raised at a case management conference attended by the applicant only. In response to a question

from the tribunal the applicant acknowledged the validity of the point but did not present any legal argument.

### **The lease**

6. The lease of the upper maisonette was made on 14 March 1988 and is for a term of 99 years from 25 December 1987. The initial ground rent is £50 for the first 33 years, £100 for the next 33 years and £150 for the final 33 years.
7. Clause 1 of the first schedule reads "*not to use the maisonette nor permit the same to be used for any purpose whatsoever other than as a private dwelling in the occupation of one family only nor for any purpose from which a nuisance can arise to the owners lessees and occupiers of the lower of maisonette or in the neighbourhood nor for any illegal or immoral purpose*"
8. It is common ground the maisonette has three bedrooms and that it is occupied by three persons who have individual tenancies of each of the room.

### **The inspection**

9. The Tribunal did not consider an inspection was necessary or proportionate to the issue.

### **The hearing**

10. At the hearing the applicant appeared in person. The respondent had sent an email stating that due to a family bereavement they would not be able to attend but had sent written submissions.
11. The Tribunal was supplied with two bundles of documents; one from each party which were commendably brief.
12. At the start of the hearing, the Tribunal spent some time clarifying the issues. The application seeks a declaration that clause 1 of the first schedule to the lease has been breached by the respondents by subletting.
13. The case has come about because the applicant has carried out building works to his flat including enlarging the basement. A licence for alterations has apparently been agreed but this was not in evidence or issue before the tribunal. One of the provisions of the licence is that the applicant would compensate the occupants of the upper maisonette for disturbance during the building works to incentivise them to remain in occupation. The applicant stated a payment has been made to the

respondents. The applicant stated this payment had not been handed over to the occupants but had been retained by the respondents to compensate them for the loss of rent from one of the rooms becoming vacant.

### **The Tribunal's decision**

14. The applicant acting on his own is not the freeholder as defined in section 112 (5) of the 2002 Act.
15. The section 168(4) application is dismissed.

### **Reasons for the Tribunal's decision**

16. There is a single freehold and the reference to the freeholder in section 168 (4). Under section 112 (5) a reference to the freeholder is a reference to all of the persons who jointly own the freehold. As all of the joint freeholders are not the applicants in this case the application is not validly made.

### **Alternative reasons**

17. In case it is wrong on this point, the tribunal considered whether the covenant at clause 1 of schedule one had been breached. The tribunal was satisfied on the evidence presented that the flat is let otherwise than as a private dwelling in the occupation of one family only.
18. However, the applicant explained the circumstances of the licence to alter and the payments made to the respondents to incentivise their tenants to remain and to compensate for any potential loss of rent. In the view of the tribunal the breach has been waived by this action. The application is also dismissed on this ground.

**Name:**        **A P Harris LLM**  
                  **FRICS FCI Arb**

**Date:**        **23 July 2019**

## **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.

## **Appendix of relevant legislation**

### **Law of Property Act 1925**

#### **Section 146 Restriction on and relief from forfeiture of lease and underlease**

- (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice -
  - (a) specifying the particular breach complained of; and
  - (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
  - (c) in any case, requiring the lessee to make compensation in money for the breach;

and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

### **Commonhold and Leasehold Reform Act 2002**

#### **Section 168 No forfeiture notice before determination of breach**

- (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 the appropriate 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.
- (6) For the purposes of subsection (4), “appropriate tribunal” means –
- (a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and
  - (b) in relation to a dwelling in Wales, a leasehold valuation tribunal.

### **Section 112 Definitions**

- (5) Where two or more persons jointly constitute either the landlord or the tenant or qualifying tenant in relation to a lease of a flat, any reference in this Chapter to the landlord or to the tenant or qualifying tenant is (unless the context otherwise requires) a reference to both or all of the persons who jointly constitute the landlord or the tenant or qualifying tenant, as the case may require.