FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AU/LBC/2020/0001**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**Flat 6, 152 Goswell Road London EC1V 7DY**
Applicant	**:**	**Ground Rent Trading Limited**
Representative	**:**	**Mr Paul Simon: In-house Counsel**
Respondent	**:**	**Mr Beng Seng Chan and Ms Mok Lip Teresa-Mo Lizhi**
Representative	**:**	**Mr Stuart Armstrong: 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	**:**	**Judge H. Carr** **Mr S. Mason BSc FRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**6th October 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: SKYPEREMOTE . A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that the Tribunal was referred to are in 1 bundle from the Applicant comprising 315 pages, and one bundle from the Respondent comprising 125 pages, together with authorities. The Tribunal has noted the contents. The order made is described at the end of these reasons. The parties said this about the process: there were difficulties in logging on as the hearing code and the clerk email were incorrect.

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.

(3) The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 and under Paragraph 5A of Schedule 11 the Commonhold and Leasehold Reform Act 2002 that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge or administration charge.

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 Section 168(4) of the Commonhold and Leasehold Reform Act 2002. The application concerns alleged breaches carried out at **Flat 6, 152 Goswell Road London EC1V 7DY** ("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 comprising part of the ground, first, second, third and fourth floors being part of 150 to 164 (even) Goswell Road London EC1V 7DU being a registered leasehold under title number NGL 791463. This property is stated in the charges register to be subject to several leases one of which is the subject property listed at item 8 in the schedule of leases in the charges register.

4. The Respondents are the registered proprietor of the leasehold property at Flat 6, 152 Goswell Road London EC1V 7DY. They hold the property on a lease dated 18th January 2006 for a term of 125 years commencing on 1 November 2005. The respondent was so registered in 28th October 2014 under title number NGL 862459 and is not the original lessee.

5. The property which is the subject of this application is a one bedroom flat in a block of 8 flats within a larger residential and commercial scheme.

6. 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.

7. The Respondents have, at all relevant times for this application, demised the property to Portland Brown Limited by an agreement made on 4th April 2016. All of the admitted breaches and alleged breaches derive from that agreement.

8. The agreement was terminated in February 2020 by the Respondents following receipt of the Application to the Tribunal.

The hearing

9. The Applicant was represented by Mr Paul Simon inhouse counsel at the hearing and the Respondent was represented by Mr Stuart Armstrong of counsel. The Respondents attended the hearing.

The issues

10. 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.

11. Initially, via a letter dated 29th January 2020 from JPC Law, solicitors representing the Respondents, the Respondents admitted all the alleged breaches. Following advice from counsel, the blanket admission was retracted. The position at the commencement of the hearing is that the Respondents admit breaches of clauses 3(f) (i) (ii) and (iii) of the lease and a breach of 3(s). Accordingly, the Tribunal determines that there are breaches of these covenants by the Respondent.

12. At the start of the hearing the Applicant conceded that there had been no breach of clause 3 f(iv).

13. There are a further six alleged breaches for the Tribunal to consider. The relevant clauses of the lease are as follows:

    (i) 3(g) - Not at any time to use or occupy or permit the Demised Premises to be used or occupied except as a private residential flat or maisonette in the occupation of one household only.

    (ii) 3(h) - Not at any time to use or permit the use of the Demised Premises or any part therefor for business purposes

    (iii) 3(i) – Not to do or permit or suffer in or upon the Demised Premises or any part thereof any sale by auction or any illegal or immoral act or any act or thing which may be or become a nuisance or annoyance or cause damage to the Landlord or the

Flat Owners of the occupiers or any part of the Building or any adjoining or neighbouring premises

(iv) 3(j) – Not to do or permit to be done any act or thing which may render void or voidable any policy of insurance maintained in respect of the building or which may cause an increased premium to be payable in respect thereof nor to keep or permit to be kept any petrol or other inflammable substances in or about the Demised Premises

(v) 3(z) – Not to do or permit to be done or omit or permit to be omitted any act or thing which would or might cause the Landlord to be in breach of the Headlease and to indemnify and keep indemnified the Landlord against all actions costs claims liability proceedings and demands in respect of any breach or non-performance or non-observance thereof

(vi) Regulation 13 of the 4th Schedule to the lease – The Tenant shall not do or permit anything which may be or become a nuisance annoyance or inconvenience to the Landlord or the Flat Owners or occupiers of any adjoining or neighbouring premises and shall not create unnecessary or excessive noise or vibration

14. Having heard evidence and submissions from the parties and considered all of the documents provided, the Tribunal has made determinations on the various issues as follows.

Has the property been occupied or used for commercial purposes in breach of the requirement for private residential use?

15. The Applicant argues that by entering into an agreement with Portland Brown, a company that provides corporate housing, the Respondents have used the premises for commercial purposes. This it is alleged breaches clauses 3 (g) and 3(h) of the lease.

16. The Applicant's bundle, at pages 15 to 34 contains a copy of the agreement with Portland Brown Limited. The Applicant points to clause 5.10 of this agreement which states 'The Landlord specifically allows Portland Brown Ltd to use the property as corporate accommodation'.

17. The Applicant also refers to advertising on the Portland Brown Limited website. This is provided in the bundle. The advertising describes the property as a short term let apartment.

18. In essence the Applicant argues that the flat was used or occupied for the purpose of the Portland Brown Limited lease. That purpose was to provide corporate accommodation, and this breaches both 3(g) and 3(h) of the lease. The Applicant argues the flat was occupied for business purposes, the business of providing corporate accommodation.

19. The Respondents argue that the property was only ever used as a private residential apartment and that what is significant in determining whether or not there has been a breach is the actual use or occupation of the premises. Counsel draws the Tribunal's attention to the judgment of the Upper Tribunal in *Nemcova v Fairfield Rents Ltd* [2016]UKUT 303 to make the point that every case has to be determined on its own facts.

20. The Respondents make the following arguments:

    (i) Neither clause imposes any requirement on the Respondents to themselves use the flat so the mere fact that it was occupied by third parties is not in itself a breach.

    (ii) Clause 3 (g) does not require that the flat is used as a permanent 'residence' which has some connotation of permanence. What is required by the clause is that the flat is used as 'a residential flat'. The flat was used as a residential flat – people lived there. It was not used for any non-residential purpose. Counsel refers the Tribunal to *Westbrook Dolphin Square Ltd v Friends Life Ltd (No2)* arguing that the decision in that case, that in order for a flat to be occupied for 'residential purposes' it was not necessary for there to be any fixed or minimum period of occupation, is relevant. In particular it was held that serviced apartments were occupied for residential purposes, even though they were situated in a complex which had some features of a hotel.

    (iii) The argument that because the Portland Brown Limited agreement was for a particular use, corporate accommodation, prevents the use being 'residential' is not sustainable on the facts of the case. The provision of corporate accommodation is consistent with residential use. Counsel put it like this, 'the mere fact that the people who occupy the flat will be doing so in connection with their jobs clearly does not mean the use ceases to residential'.

(iv) Counsel also points to the actual use of the property - just four individuals have occupied the flat over the last two years. The durations were 3 months, 3 months, 15 months and 2 months. The final occupancy of 2 months was because that occupancy was terminated early because of the determination of the Portland Brown tenancy. In *Nemcova* the judge made it clear that the length of the agreement was a relevant factor to take into account, drawing a distinction between something occupied as a residence and something so transient that the occupier would not regard it as being his private residence.

(v) Counsel referred to the case of *Snarecroft Ltd v Quantum Securities Ltd* in which the High Court reiterated that, even if someone had more than one home and was staying for a short time he could still be occupying for a residential purpose. The judge drew a distinction between bedsits let on weekly or monthly tenancies or licences, which were for residential purposes, and hotels for short stay travellers, which were not.

(vi) In this case the flat was for the occupier's residence; it was not transient or overnight accommodation. It was therefore occupied for residential purposes at all material times.

(vii) The same arguments apply when determining where the property was used for business purposes in breach of clause 3 (h). Counsel for the Respondents submitted that the question was whether the use of the flat was residential or business. As explained above, it was clearly being used for residential purposes and not business purposes. Someone was living there, it was being used for accommodation, and not for business.

The Tribunal's decision

21. The Tribunal determines that there is no breach of clause 3(g) or 3 (h).

Reasons for the Tribunal's decision

22. The Tribunal agrees with the arguments of the Respondents. The facts of the case demonstrate that the property was used as residential accommodation and not for business purposes.

Has the use of the property been such as to constitute an act or thing which may be or become a nuisance or annoyance or cause damage to the Landlord?

23. The Applicant argues that, as it has had to contemplate forfeiture, that in itself comprises a nuisance and annoyance arising out of the breach and that therefore there has been a breach of 3(i) of the lease and a breach of Paragraph 3 of the 4th Schedule to the lease

24. The Respondents argue that the approach of the Applicant is misconceived. The wording of clause 3(i) makes it clear that it is intended to stop something occurring in the flat itself which causes some nuisance or annoyance to occupiers of the building in which the flat is located. Counsel points out that the clause refers to acts 'in or upon the Demised Premises' and suggests that it cannot be right that any breach of covenant which involves the flat itself or how it is used was intended to also give rise to an additional breach under clause 3 (i).

25. The Respondents argue that the wording of regulation 13 of the Fourth Schedule makes it even clearer that there is no breach. The references to nuisance/annoyance/inconvenience to adjoining or neighbouring premises and the reference to 'unnecessary or excessive noise' reinforce that the clause is intended to prevent disturbances arising out of the physical conditions of the flat or activities being carried on at the flat.

26. The Respondents also note that there is no evidence that the breach of the lease was either a nuisance or an annoyance to the Applicant. Instead it appears to have been treated as an opportunity.

The Tribunal's decision

27. The Tribunal determines that there is no breach of clause 3(i) or of the fourth Schedule, regulation 13.

Reasons for the Tribunal's decision

28. The Tribunal agrees with the Respondents' argument that the clauses are constrained by their wording and refers to activities etc that are related to the use of the premises. It also agrees that it cannot be right that any breach of covenant which involves the flat or how it is used was intended to give rise to an additional breach under clause 3(i) or regulation 13 of the fourth Schedule.

Has the use of the property been such as to constitute an act or thing which may render void or voidable any policy of insurance maintained in respect of the Building or which may cause an increase premium to be payable?

29. The relevant clause of the lease is clause 3(j).

30. The Applicant argues that the wording of the AXA and Angel Policy Schedule currently in place at the property together with the email dated 7th November 2019 from the Underwriter at AXA provides evidence that the use of the property may prejudice the cover that is provided.

31. The relevant email is exhibited at exhibit 5 in the Applicant's bundle.

32. The Respondents' main response is that there is no evidence to support allegations of a breach. The email relied on from Elain Pollitt does not prove a breach for two reasons. Firstly, the email does not address the corporate lets such as the Portland Brown agreement or the type of occupation agreements which were entered into by Portland Brown. The email expressly refers to Airbnb and makes no reference to short lets or corporate accommodation.

33. Secondly the email only says that such lets could prejudice the cover. That does not satisfy the burden of proof.

34. Counsel referred to the email which relates to specifically to AirBnB lettings. He argues that the Portland Brown agreement is a very different agreement

35. The Applicant argued that Airbnb is a generic reference to short term lettings which are commercial in nature and which may render the insurance void or voidable. The Applicant stressed the wording of the clause and suggested that the use of the word may was critical.

The Tribunal's decision

36. The Tribunal determines that there has not been a breach of clause 3(j)

Reasons for the tribunal's decision

37. The evidence provided by the Applicant does not substantiate a breach by the Respondents.

Has there been a breach of clause 3 (z)?

38. The purpose of clause 3(z) is to regulate the conduct of the lessee to prevent the Applicant being in breach of the Headlease.

39. The Applicant argues that the action of the Respondents in entering into the agreement with Portland Brown Limited breaches Clause 3 Paragraph 7 of the Head lease which relates to the registration of

dealings as notice of the agreement should have been served on the freeholder

40. The Respondents argue that the clause of the Headlease relates to transactions by the Applicant and it is not intended to apply to transactions by persons other than the Applicant such as the Respondents.

41. As the Applicant was not required to give notice of any sub-tenancy granted by the Respondents it was not in breach of clause 3 (7) of the Headlease. The Respondents have not therefore committed a breach of clause 3(z) of the Lease.

The Tribunal's decision

42. The Tribunal determines that there has been no breach of clause 3(z).

Reasons for the Tribunal's decision

43. The Tribunal accepts the argument of the Respondents that the relevant clause of the Head Lease refers to transactions by the Applicant.

Application under s.20C and Paragraph 5 A of Schedule 11 of the Commonhold and Leasehold Reform Act

44. In the statement of case and at the hearing, the Respondents applied for an order under section 20C of the 1985 Act.

45. The Respondent argued that the application was premature as there was no attempt to contact the Respondents and ask whether they admitted a breach prior to its issue. The behaviour of the Respondents since receiving app application demonstrates their reasonableness and willingness to settle the matter.

46. Further the Applicant's decision to proceed with the disputed breaches which, in substance, add nothing to the admitted breaches and serve no further purpose, indicates their unnecessarily aggressive and unreasonable approach.

47. The Applicant resisted the s.20C application on the grounds that it was appropriate for it to seek determinations on all possible breaches of the lease prior to any forfeiture proceedings. He suggested that the Respondents were cavalier in their attitude to the terms of the lease. He also argued that making an order was inappropriate because no costs could be claimed under the service charge provisions.

48. The Tribunal suggested that, in the light of the Applicant's argument that costs are not chargeable under the service charge provisions, the Respondents should make an application under Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002. Counsel for the Respondents did so, on the same basis as his application under section 20C.

49. The Applicant's representative objected to the Application on the basis that the Tribunal was inappropriately assisting Counsel in suggesting the Application.

50. Having considered the Applicant's submission, the Tribunal determined to accept the application under Paragraph 5 A. If it had not done so, the Respondents would have been able to make the application at a later date. By accepting the application at this point the Tribunal was avoiding further costs.

51. Having heard the submissions from the parties and taking into account the determinations above, the Tribunal determines (i) although the landlord indicated that no costs would be passed through the service charge, for the avoidance of doubt, the tribunal nonetheless determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the Applicant may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge and (ii) that it is just and equitable in the circumstances for an order to be made under paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

Name: Judge H Carr **Date:** 6th October 2020

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 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 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).