FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AW/LBC/2021/0005**
HMCTS code (paper, video, audio)	**:**	**V - Video**
Property	**:**	**First, second and third floor flat, 120 Kensington Park Road, London W11 2PW**
Applicants	**:**	**Mr. Meghdad Farrokhzad**
Representative	**:**	**Mr. Majid Mostafavi**
Respondent	**:**	**Mr. Henry Rollo Gabb**
Representative	**:**	**Mr. M. Walsh of counsel instructed by Forsters LLP**
Type of Application	**:**	**For the determination of alleged breaches of covenant**
Tribunal Members	**:**	**Tribunal Judge Stuart Walker (Chairman)** **Ms. Sarah Phillips MRICS**
Date and venue of Hearing	**:**	**12 April 2021 – video hearing**
Date of Decision	**:**	**30 April 2021**

DECISION

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: Video Remote. 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 set out below, the contents of which were noted. The Tribunal's determination is set out below.

(1) The Tribunal determines that the Respondent has not breached any of the covenants contained in clauses 3(7), 3(13), 3(20) or 3(33) of the lease.

(2) The Tribunal directs that any application for costs by the Respondent shall be made in writing within 14 days of the date on which this decision is sent to the parties. Any response by the Applicant is to be made in writing to the Tribunal within 14 days thereafter with any reply by the Respondent to be made 7 days thereafter. The Tribunal will consider any such application on the papers alone.

Reasons

The Application

1. The Applicant seeks a number of determinations pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("section 168") that breaches of covenant have occurred.

2. The application was made on 18 January 2021. In this application the Applicant identified five different covenants in the lease each of which they alleged had been breached by the Respondent. The particulars of each alleged breach are set out in what follows, and they are considered in the order in which they appear in the application.

3. Directions were issued on 11 February 2021. They provided for a remote video hearing. This was not objected to by either party. Under the directions both parties were required to provide a digital indexed and paginated bundle of documents. Bundles from both parties were before the Tribunal. That of the Applicant comprised 105 pages and that of the Respondent 69 pages. Page numbers in what follows are to the Applicant's bundle unless prefixed by the letter "R", in which case they are to the Respondent's bundle. References are to the numbers printed on the pages in the bundle which, in the case of the Respondent's bundle means the numbers appearing in the middle of the bottom of each page.

4. The Tribunal was also provided with a skeleton argument consisting of 5 pages from Mr. Walsh together with a bundle of authorities.

5. The relevant legal provisions are set out in the Appendix to this decision. The Tribunal bore in mind throughout its deliberations that

the burden was on the Applicant to show that breaches of covenant had occurred on the balance of probabilities, though to the extent that the Respondent alleged that the terms of any covenant had been waived by the Applicant the burden was on them to show this to the same standard. The Tribunal bore in mind that, when deciding whether a covenant has been waived or not, the test is whether on the facts of each case the conduct or omissions of the landlord have put him in such an altered position as to the tenant as to make it unjust for him to continue to be able to rely on the terms of the covenant. In other words, whether or not the landlord has represented that the covenant is no longer enforceable.

The Hearing

6. The Applicant's representative Mr. Mostafavi attended the hearing, though he did so by telephone rather than by video. The Respondent attended and was represented by Mr. Walsh of counsel.

7. 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.

The Background

8. The property which is the subject of this application is a 3-bedroom flat located over 3 floors situated above commercial premises.

The Lease

9. The freehold of the building in which the property is situated was acquired by the Applicant on 15 September 2020 (page 55).

10. Prior to December 2007 the property was let under the terms of a lease dated 2 September 1991 made between Mr. Paul Kelvin George on the one part and Jean Paul Michel Villa and Monique Jeanne Gilbert Villa of the other part for a term of 99 years from 24 June 1991. The Respondent acquired this leasehold interest and then exercised his rights under the Leasehold Reform Housing and Urban Development Act 1993 ("the 1993 Act") to obtain a new lease (see the recitals at page 21). He thereby obtained a lease under section 56 of that Act dated 4 December 2007 for a term of 189 years from 24 June 1991. Proof of his title is at pages 60-61.

11. Other than the specific clauses which the Applicant alleged had been breached, there were no issues as to the substance or contents of the lease. The specific clauses in issue are set out in what follows.

The Breaches - Breach No. 1

12. By clause 3(33) of the lease the Respondent covenanted to observe and perform the regulations set out in the Third Schedule of the lease (page 38). Paragraph 9 of the Third Schedule provides as follows;

> "*At all times to cover and to keep covered with carpet and felt underlay the floors of the demised premises other than those of the kitchen and bathrooms and at all times suitably and properly to cover and keep covered the floor the kitchen* [sic] *and bathrooms in the demised premises*" (page 46).

13. The Applicant's statement of case is at pages 64 to 66. His case was that the Respondent had covered parts of the property other than the kitchen and bathroom with either wood or stone flooring and that this amounted to a breach of this covenant in the lease.

14. There was no doubt that parts of the property other than the kitchen and bathrooms had coverings which were not consistent with the requirements of the lease. This is clearly shown in photographs at pages 76 to 78. The Respondent's case, as set out in his statement of case which appears at pages R1 to R8 was that before he purchased the property it had painted wooden floors throughout. Then in 2007 to 2008 he carried out refurbishment works at the property which included installation of new flooring for which he obtained consent from the Applicant's predecessor in title Mr. Paul George.

15. The Respondent relied on the sales particulars from when he purchased the property (pages R30 and R31) together with a letter dated 12 March 2007 from his contractors 23 Architecture to Mr. George (page R32). Further reliance was placed on the witness statement of Mr. Stuart Robertson from 23 Architecture (pages R62 to R63) – in particular paragraphs 5 and 6 of that statement where he states that he and the Respondent met Mr. George in March 2007 and explained the floor build-ups and finishes in each part of the flat and that Mr. George agreed these.

16. The Respondent's case was also that, in the context of the negotiations to acquire a new lease under the 1993 Act, Mr. George's solicitors wrote to the Respondent's then solicitors on 6 August 2007 suggesting that the floor plans supplied for the purposes of the alterations being undertaken by the Respondent should be incorporated into the new lease (page R34). These lease plans were indeed incorporated into the new lease. They make express reference to the floor coverings in the hall (hardwood) at page 50, the dining area (stone slabs) and a bedroom study (hardwood) at page 51, and the living area (hardwood) at page 52.

17. All this taken together, argued the Respondent, showed that the Applicant's predecessor in title had waived the covenant contained in paragraph 9 of the Third Schedule. In his skeleton argument Mr. Walsh referred the Tribunal to the decision in Faidi -v- Elliot Corporation [2012] L & TR 25 in which the Court of Appeal held that an express consent to the installation of a hard wood floor by a landlord was

inconsistent with a lease term which required the floor to be carpeted and had the effect of rendering that term unenforceable even though the express permission itself provided that the terms of the lease would continue to apply.

18. When asked about the claimed waiver the Applicant said that he had not spoken to the previous landlord about this and could no longer do so because he had died. He was not sure if there had been a waiver or not. He argued that, in any event, any such waiver was not transferable and that the wording of the lease was clear. He also argued that any indication on the lease plan as to the nature of the flooring was not binding and was in any event inconsistent with the clear and express terms of the lease.

19. The Tribunal was satisfied that the lease plans did no more than identify the extent of the demised premises. However, it was also clear that the Applicant's predecessor in title had suggested that those plans, which made express reference to the floor coverings, should be included in the new lease. This was strong evidence that Mr. George was not only well aware of the works done by the Respondent but that he also consented to them. This is also corroborated by the witness statement of Mr. Robertson.

20. Taking all the evidence together the Tribunal was satisfied that in or about 2007 the Applicant's successor in title had acted in such a way as to make it clear to the Respondent that he would no longer rely on or enforce paragraph 9 of the Third Schedule of the lease. It was satisfied that he had expressly consented to the alteration of the flooring in the property. Although the new lease that was granted in 2007 continued to include paragraph 9, this provision was inconsistent with the consent given and, following the approach of the Court of Appeal in Faidi, the Tribunal concluded that that provision was no longer enforceable. The Tribunal was satisfied that the relevant covenant had been waived.

21. The Tribunal considered the Applicant's argument that any waiver was not transferable. It bore in mind that the Applicant when acquiring the freehold interest will have stepped into his predecessor's shoes and would be bound by any waivers already granted. Whilst there may be circumstances in which waiver of a covenant may fairly be regarded as being limited in duration, and whilst it may in some circumstances be possible to bring a waiver to an end, the Tribunal in this case concluded that the waiver was irrevocable. It would be manifestly unjust for the landlord now to seek to enforce the covenant after extensive works had been done with the agreement of the then landlord which were incompatible with that covenant.

22. The Tribunal therefore concluded that there was no breach of paragraph 9 of the Third Schedule.

Breach No. 2

23. Clause 3(33) of the lease is also relevant to the second alleged breach as this too relates to the regulations set out in the Third Schedule of the lease (page 38). Paragraph 11 of the Third Schedule provides as follows;

> "*To keep the windows of the demised premises properly curtained in a style appropriate to a high class private residence*" (page 46).

24. The Applicant's case was that the windows of parts of the property were not properly curtained. Reliance was placed on the photographs at pages 76 to 78. In the course of the hearing the Applicant made it clear that it was solely an absence of fabric curtains about which he was concerned. It was not suggested that what had been provided by the Respondent was not of a style appropriate to a high-class private residence.

25. The Respondent's case was similar to that in respect of the flooring and is set out at paragraph 19 of his statement of case (page R6). There was no dispute that many of the windows at the property were not, at least for some time, covered with curtains. (The Respondent has, since these proceedings were issued, provided curtains to a number of windows where they were not before). It was argued that at the time he purchased the flat there were blinds installed throughout and this was evidenced by the original sales particulars (pages R30 and R31). Then at the time of the 2007 refurbishment curtains were installed on the first floor and blinds and shutters were installed on the second and third floors for which invoices were provided (pages R35 and R36). The Respondent, in his statement of case, which is supported by a statement of truth, affirmed that in December 2008 his then landlord visited the premises and gave his oral consent to the blinds, curtains and shutters – para 19.4 at page R6.

26. The Respondent argued that the Applicant's predecessor in title had waived reliance on paragraph 11 of the Third Schedule of the lease.

27. The Tribunal invited the parties to make submissions as to what the correct interpretation of paragraph 11 was. Does the verb "to curtain" require the provision of fabric curtains which are pulled from the sides and meet in the middle, or does it simply mean to close off or to screen?

28. The Applicant argued that the clause requires the provision of curtains and that to provide blinds or shutters is not to curtain. The Respondent, on the other hand, argued the contrary. It was argued by Mr. Walsh that the Respondent was in substantial and effective compliance with the terms of the covenant.

29. The Tribunal concluded that the provision of blinds or shutters was consistent with the requirements of the lease. Blinds or shutters provide a screen and close off views of the interior from the outside and vice- versa. It noted that, unlike paragraph 9 which expressly requires the provision of a carpet, paragraph 11 does not say that the windows

must be covered with curtains but merely that they must be curtained. In its view the ordinary meaning of the verb "to curtain" is more extensive than simply providing curtains. It means to screen, to veil or to close off – as in the concept of a curtain wall. It follows, therefore, that the Tribunal was satisfied that the provision of blinds or shutters was consistent with the terms of paragraph 11 of the Third Schedule and, therefore, to the extent that the windows were covered with blinds or shutters there was no breach.

30. Nevertheless, the Tribunal went on to consider the question of waiver in any event. This was for two reasons. Firstly, because its interpretation of the lease may be wrong and, secondly, although little was made of this at the hearing, the photographs at pages 76 to 78 show that some windows – those which are curved – do not appear to be fitted with any kind of covering.

31. The Applicant's position as regards the existence or otherwise of a waiver was similar to that in the case of the flooring. He was unsure whether a waiver had been provided or not, and he certainly had no evidence to show that a waiver had not been granted.

32. The Tribunal reached the same conclusion as it had in respect of the flooring. It was satisfied on the basis of the Respondent's statement of case and in the absence of evidence to the contrary that the Applicant's predecessor in title had visited the property after the works referred to above had been carried out and gave consent for the windows to be covered (or not) as he found them at that time. It bore in mind that there was clear evidence that Mr. George was aware of, and had consented to, works to the floors as part of a project of ongoing improvements to the property and the Respondent's evidence was consistent with his being informed of and consenting to the overall scheme of works that was being undertaken. The Tribunal was satisfied that the Applicant's predecessor in title had acted in such a way as to make it clear that he would not seek to rely on compliance with paragraph 11 of the Third Schedule.

33. The Tribunal again considered the Applicant's argument that any waiver was not transferable. It concluded that it would be manifestly unjust for the landlord now to seek to enforce the covenant in respect of those windows for which blinds or shutters had been provided as extensive works had been done with the agreement of the then landlord which were incompatible with that covenant. The waiver was, in its view, irrevocable as regards such windows.

34. The Applicant's argument was stronger in respect of those windows which had no coverings. The Tribunal was again satisfied that the Applicant stood in the shoes of their predecessor and so, to that extent, the waiver was transferred. However, it did not necessarily follow that the waiver was irrevocable. The withdrawal of any waiver in respect of those windows which had no covering would cause considerably less prejudice to the Respondent than in respect of those with custom-made

coverings. But, even if the Tribunal were satisfied that the Applicant could bring the waiver to an end for such windows, any withdrawal of the waiver must be communicated to the Respondent and a reasonable time given to comply with the re-instated covenant.

35. In this case the Respondent was notified of the alleged breach on 24 December 2020 (page R19) and has already installed curtains on those curved windows which appeared not to have any coverings, as shown in the photographs at pages R37 to R57. It follows, therefore, that even if the covenant contained in paragraph 11 has been partially re-instated, there is nevertheless still no breach.

36. In all the circumstances, therefore, the Tribunal concluded that there had been no breach of paragraph 11 of the Third Schedule of the lease. This was because there had been no failure to curtain the windows or, to the extent that there had been any such failure, it had been waived by the Applicant's predecessor in title.

Breach No. 3

37. Clause 3(20) of the lease is in the following terms;
"*Not to underlet or agree to underlet the whole of the demised premises unless;*
(i) Prior to the grant of any underlease the undertenant shall have entered into a direct covenant with the Landlord (in such form as the Landlord may require) to observe and perform the covenants on the part of the tenant ....." (page 32)

38. The Applicant's case was that the Respondent had sublet the property without obtaining a deed of covenant between the undertenant and the landlord. The allegation related solely to subletting prior to the Applicant becoming the owner of the freehold, there was no suggestion that the property had been sublet since 15 September 2020. Reliance was placed on an agreement made between the Respondent and Edward and Claudia Clarke to let the property for a period of 2 years from 3 June 2019 (pages 87 to 103).

39. The Respondent's case as set out in his statement of case (para 20 at page R7) was that he admitted that subletting had taken place but that this was with the full knowledge of his then landlord who had visited on many occasions since 2012 with tenants in situ and did not raise any objection nor request a deed of covenant. The most recent subletting came to an end on 11 February 2020.

40. Mr. Walsh argued before the Tribunal firstly, that the Applicant had provided insufficient particulars of any breach. He also contended that, in any event, the Applicant's predecessor in title had waived the obligation to obtain a deed of covenant.

41. The Tribunal did not accept Mr. Walsh's argument that insufficient particulars of breach had been provided. Taking the documents as a

whole it was clear that the Applicant was relying on the letting to the Clarkes as an instance of subletting and his clear case was that no deed of covenant had been obtained. The Tribunal also noted that this subletting was admitted and there was no suggestion that a deed had ever been obtained. Whilst there was insufficient evidence to show that there had been any other sublettings, there was certainly enough before the Tribunal to establish a case as regards this particular letting.

42. Although the subletting was intended to be for a period of 2 years from 3 June 2019, the Tribunal was satisfied that it had, in fact, come to an end before the Applicant acquired the property. This is shown by a letter from the Respondent's letting agents which states that the subtenants exercised a break clause, that their lease came to an end on 11 February 2020, and that the property had not been marketed since (page R58).

43. Taking the evidence before it as a whole the Tribunal was satisfied, on the basis of the uncontradicted evidence of the Respondent, that the Applicant's predecessor had, by permitting subletting and not requiring a deed of covenant, acted in such a way as to make it clear to the Respondent that he would no longer rely on or enforce the requirement in clause 3(20) of the lease to obtain a covenant between the landlord and the subtenant. Whether that waiver was irrevocable or not is irrelevant as there has been no subletting since this one.

44. The Tribunal was, therefore, satisfied that there had been no breach of clause 3(20) of the lease.

Breach No. 4

45. Clause 3(13) of the lease is a user clause under which the Respondent covenants not to use or permit the demised premises to be used or occupied otherwise than as a private residential flat (page 29).

46. The Applicant's case was that this covenant had been breached because the property had been the registered office of CCEM Entertainment Ltd. from 6 December 2019. Although no evidence of this registration was provided by the Applicant, the Respondent in his statement of case accepted that it had taken place (para 21 at page R7) but had since been changed (pages R59 to R61). The registration had been effected by his subtenants the Clarkes. There was no evidence to show any connection between the Respondent and CCEM Entertainment Ltd.

47. The Tribunal bore in mind that to establish a breach of clause 3(13) the Applicant must show either that the Respondent himself has used the premises in an unpermitted way or that he has permitted such use. To do the latter they must show that he had knowledge of the unpermitted use. One cannot permit something to happen if one has no knowledge of it.

48. In this case there was no evidence to show that the Respondent had any connection with the company – indeed the only evidence showed that it was his subtenants' company. It follows that there was insufficient evidence to show that the Respondent was himself using the property improperly. The Applicant was also unable to point to any evidence to show that the Respondent knew that his tenants had registered their company at the property or, indeed, any evidence at all to show that he knew what his tenants were doing. It follows, therefore, that he has not provided sufficient evidence to show that the Respondent knew that an unpermitted use was taking place.

49. In the light of this the Tribunal concluded that there was insufficient evidence to establish that there had been a breach of clause 3(13) of the lease.

Breach No. 5

50. The final alleged breach concerned clause 3(7) of the lease. The relevant parts of this clause are as follows;
"*To permit the landlord and his respective mortgagees (if any) and to those authorised thereby during normal business hours with or without workmen and all necessary tools and appliances after giving not less than two day's prior written notice (except in emergency) to the tenant to enter and remain upon the demised premises …* " (page 27)

51. The Applicant's case was that their surveyor had requested permission to enter the flat and had given "at least 2 days" written notice to do so (page 66). There was no suggestion that access had been needed because of any emergency.

52. The Respondent's case was that he had no recollection of any request and he stated that he put the Applicant to proof of this (para 22.2 at page R8).

53. Despite this, the Applicant provided no evidence of any request. There was no letter from his surveyor or any other evidence apart from what was contained in the Applicant's statement of case. The Tribunal noted that the Applicant had not only failed to provide any further evidence but had also failed even to state the date(s) on which it was alleged that notice had been given or the date(s) on which it was alleged that entry had been denied. Indeed, the use of the phrase "at least 2 days" in his statement of case suggested that he did not even know exactly how much notice had been given. In addition, the Tribunal noted the contents of an e-mail from Mr. Mostafavi dated 26 January 2021 (page R28). This was sent after these proceedings were commenced. It itemises the alleged breaches considered as numbers 1 to 4 above and then states as follows;
"*Furthermore if the landlord's surveyor is not permitted entry to the above property … clause 3(7) of the lease.*" This suggests that at the time the e-mail was sent no breach had in fact occurred.

54. Bearing all this in mind the Tribunal was not satisfied that the Applicant had shown that there had been a breach and so the Tribunal concluded that there had been no breach of clause 3(7) of the lease.

Further Applications

55. The Tribunal having heard submissions in respect of the alleged breaches, Mr. Walsh raised the question of costs and indicated that there would be an application under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and that he wished to raise issues as to the conduct of the Applicant.

56. The Tribunal considered that the appropriate course to take was to invite written submissions from the parties to be considered after it had made its determination. It therefore directed that the Respondent should submit any application to the Tribunal in writing within 14 days of the decision being sent to the parties. The Applicant should submit any response to any application made within 14 days thereafter with the Respondent having 7 days thereafter to reply. Any application will be considered by the Tribunal on the papers alone.

Name: Tribunal Judge S. J. Walker **Date:** 30 April 2021

ANNEX - RIGHTS OF APPEAL

- The Tribunal is required to set out rights of appeal against its decisions by virtue of the rule 36 (2)(c) of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 and these are set out below.

- If a party wishes to appeal against 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.

Appendix of relevant legislation

Commonhold and Leasehold Reform Act 2002

Section 168

(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.