FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	**CHI/00HG/LBC/2021/0020**
Property:	**Flat 1, 128 Alexandra Road Plymouth PL4 7EQ**
Applicant:	**128 Alexandra Road Mutley Company Ltd (in place of Adam Fay)**
Representative:	**Fursdon Knapper solicitors**
Respondent:	**Mr Joshua Harrison Playle**
Representative:	**Christopher Davidson solicitors**
Type of Application:	**Section 168 Commonhold and Leasehold Reform Act 2002 (Breach of Covenant)**
Tribunal Member:	**Judge A Cresswell**
Venue of Hearing:	**On the papers**
Date of Decision:	**5 January 2022**

DECISION

The Application

1. On 13 August 2021, the Applicant, the owner of the freehold interest in Flat 1, 128 Alexandra Road, Plymouth, Devon, PL4 7EQ, made an application to the Tribunal claiming breach by the Respondent of various covenants in his Lease. The Tribunal has considered only the breaches claimed by the Applicant in the application to have occurred.

Summary Decision

2. The Tribunal has determined that the landlord has demonstrated that there has been a breach of covenant, specifically clause 3(k)(i). Details follow.

Preliminary Issues

3. The Respondent pointed out that the Applicant introduced a further claimed breach of the lease, a breach of clause 3 (g), as late as its response to the Respondent's statement, meaning that he had no opportunity to challenge that fresh assertion.
4. The Tribunal finds that to be the case and, accordingly, makes no decision regarding that alleged breach of the lease.
5. The Applicant knew that it required permission to rely upon further breaches having already so applied in respect of clause 3(w).
6. The Tribunal further finds that is rather late in the day for the Respondent to suggest that he was not served with the application when making his response to the Applicant's statement of case.
7. Nor is it acceptable for the Respondent to merely state that he would have sought an oral hearing when he could still have done so, but did not do so and to aver that he has suffered prejudice. In the absence of such an application, when represented by solicitors, the Tribunal can only conclude that he did not want to make such an application.
8. Nor is a response to an Applicant's statement of case the place to ask questions of the Tribunal's administration. The Tribunal notes a reference in the Respondent's own statement to the Tribunal case being sent to him and reference to "*an application for a tribunal about a breach of lease*" in an email he sent to the Applicant dated 24 September 2021. Further evidence that the Respondent was aware of the application in September 2021 is

provided by the following in his statement: *it proves that the actions to remove the problematic tenants were taken well before the tribunal was even made aware to me which was the 22nd of September.*

9. It is inconceivable that a solicitor would not, when instructed, look first at the application and inconceivable too that the solicitor would first mention the absence of the application in its response to the Applicant's statement of case.

Inspection and Description of Property

10. The Tribunal did not inspect the property.
11. The property in question appears to comprise a 3 bedroom flat in a converted building consisting of 2 flats, being the lower ground floor and ground floor of the building.

Directions

12. Directions were issued on various dates. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration. This determination is made in the light of the documentation submitted in response to those directions.
13. Neither party objected to a determination on the papers within the time provided.

The Law

14. The relevant law in relation to breach of covenant is set out in section 168 Commonhold and Leasehold Reform Act 2002.
15. A covenant is usually regarded as being a promise that something shall or shall not be done or that a certain state of facts exists. Section 168(1) and (2) Commonhold and Leasehold Reform Act 2002 provide that a landlord may not serve a notice under Section 146 Law of Property Act 1925 in respect of a breach by a tenant of a covenant or condition in the lease unless it has been finally determined, on an application to the Tribunal under Section 168(4) of the 2002 Act that the breach has occurred.
16. The Tribunal assesses whether there has been a breach on the balance of probabilities (**Vanezis and another v Ozkoc and others** [2018] All ER(D) 52).

17. A determination under Section 168(4) does not require the Tribunal to consider any issue relating to the forfeiture other than the question of whether a breach has occurred. The Tribunal's jurisdiction is limited to that question and cannot encompass claims outside that question, nor can it encompass a counterclaim by the Respondent; an application under Section 168(4) can be made only by a landlord.

18. The issue of whether there is a breach of a covenant in a lease does not require personal fault unless the lease says so: **Kensington & Chelsea v Simmonds** (1997) 29 HLR 507. The extent of the tenant's personal blame, however, is a relevant consideration in determining whether or not it is reasonable to make an order for possession: **Portsmouth City Council v Bryant** (2000) 32 H.L.R. 906 CA, but that would be a matter for the Court.

19. In **Vine Housing Cooperative Ltd v Smith** (2015) UKUT 0501 (LC), HH Judge Gerald said this: *The question before the F-tT ..... was the straightforward question of whether or not there had been a breach of covenant. What happens subsequent to that determination is partly in the gift of the landlord, namely, whether or not a section 146 notice should be issued and then whether or not possession proceedings should be issued before the county court. It is also partly in the gift of the county court namely whether or not, if and when the application for possession comes before the judge, possession should be granted or the forfeiture relieved. These events are of no concern to, and indeed are pure conjection and speculation by, the F-tT. Indeed the motivations behind the making of applications, provided properly made in the sense that they raise the question of whether or not there had been a breach of covenant of a lease, are of no concern to the F-tT. The whole purpose of an application under section 168, however, is leave those matters to the landlord and then the county court, sure in the knowledge that the F-tT has determined that there has been breach.*

20. The Tribunal has jurisdiction to determine whether the landlord has waived the right to assert, or is estopped from asserting, that a breach has occurred (**Swanston Grange Management Limited v Langley- Essex** (LRX/12/2007) HHJ Huskinson: *"The LVT needs to decide (and must consequently have jurisdiction to decide) whether at the relevant date the covenant was suspended by reason of waiver or estoppel (in which case a breach will not have occurred)."*).

21. The Tribunal must consider whether the breach occurred, not whether there has been a waiver of any breach subsequently, as the latter is not a matter for the Tribunal, but is for a court.

22. "An estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption" per Lord Steyn in **Republic of India v India Steam Ship Co Limited ("the Indian Endurance and the Indian Grace)** [1998] AC 878 at p913-914.

Ownership

23. The Applicant is the owner of the freehold of the property. The Respondent is the owner of the leasehold interest in the flat.

The Lease

24. The lease before the Tribunal is a lease dated 27 March 2003, which was made between Peter Kevin Elliot as lessor and the Applicant company as "the Company" and Timothy John Brooks Jaggard as lessee. The Respondent purchased his flat on 9 October 2017.

25. Clause 3(k)(i) of the lease requires the tenant *not to assign underlet or part with possession of part only of the Premises*

26. Clause 3(i) requires the tenant *not to do or bring or allow to remain upon the Premises or the Estate anything that may be or become or cause a nuisance annoyance disturbance or inconvenience injury or damage to the Landlord and the Company or the owners or occupiers of other apartments or adjacent or neighbouring premises*

27. Clause 3(w) requires the tenant *not to do anything Or omit to do anything which may cause the insurance of the Building or the remainder of the Estate to be rendered void or voidable*

28. The construction of a lease is a matter of law and imposes no evidential burden on either party: (**(1) Redrow Regeneration (Barking) ltd (2) Barking Central Management Company (No2) ltd v (1) Ryan Edwards (2) Adewale Anibaba (3) Planimir Kostov Petkov (4)**

David Gill [2012] UKUT 373 (LC)).

29. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court in **Arnold v Britton and others** [2015] UKSC 36 Lord Neuberger:

> 15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30.

Consideration and Determination of Breach of Covenant

i) Clause 3(k)(i)

The Applicant

30. The Applicant asserted that the Respondent had breached this covenant.

31. It is apparent to the Applicant that the Respondent has been in breach of this clause since 2019 when he first allowed two individual women to sublet two of the rooms in the flat from him.

32. Although not himself living at the premises on a full- time basis, the Respondent kept bedroom 3 for himself.

33. The women moved out of the flat in March 2020, but the Respondent continued to be in breach of this clause by allowing two individual men to sublet the two rooms that had previously been used by the two women, from 1 July 2020.
34. The Respondent did not consult with the Applicant in respect of this and has continued to allow these two men to occupy the two rooms to this date. The Respondent has further breached the lease by allowing a further man to sublet the other room from him in April 2021.
35. Despite the Applicant's requests for the Respondent to remove the subtenants, the Respondent has failed to do so.
36. The Respondent has used a letting agent since 2019.
37. The suggestion that the subtenants do not enjoy exclusive possession of the room they are occupying is not sustainable.

The Respondent

38. The Respondent argues that, in law, this clause cannot be breached by the circumstances detailed.
39. No occupant has exclusive possession of the whole premises, rather there is a licence. Because there is no lease or sublease, there can be no underletting. "Possession" means legal possession; i.e. the right to enter and occupy the land to the exclusion of all others. None of the occupants had any such right and the Respondent therefore did not part with possession.
40. It is implied in any event that the landlord's consent will not be unreasonably withheld.
41. He left Plymouth in May 2018 and his premises had been sub let since then. Smeaton Homes Ltd act as his agent.
42. He has always had the understanding and permission of the Applicant to rent out rooms in his property. He confirmed this to the Applicant in correspondence at the time of his conveyancing. The Applicant raised no objection and was fully aware of the presence of tenants in the period September 2017 to May 2018 whilst the Respondent was living in his flat.
43. He told the Applicant that he was moving away and would continue to have tenants.
44. He did not tell the Applicant about the 2 men becoming tenants in 2020 because he did not see it as a change of circumstances.

45. The Applicant has waived his right to object or is estopped from objecting as a result of his actions.
46. There was a second director of the Applicant company until 1 September 2021.
47. The Applicant has also breached the lease.

The Tribunal

48. The Tribunal does not accept the Respondent's argument about there not being an underletting of part of the premises when clearly, on the Respondent's own case, his tenants were in residence under an assured shorthold tenancy in respect of the rooms they occupied.
49. Nor does the Tribunal accept the argument about a landlord's consent not being unreasonably withheld (Section 1(3) Landlord and Tenant Act 1988 and Section 19(1)(a) Landlord and Tenant Act 1927). That is because this is an absolute and not a qualified covenant.
50. The Tribunal next looked at the issue of waiver/estoppel. Despite being represented by a solicitor, no legal basis for this was argued by either party.
51. *Lord Cairns in **Hughes v Metropolitan Rly** (1877) 2 App Cas 439 in which it was said that if one party leads another "to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.*

52. The Tribunal finds that the Applicant is estopped from claiming that the subletting by the Respondent is in breach of Clause 3(k)(i) by subletting prior to his leaving the flat to live in Gloucestershire in May 2018 by reason of the clear wording of the email from his solicitor of 30 August 2017 and his own letter of 27 August 2017 detailing his intention to act as a resident/live-in landlord and the consequent decision by the Respondent to become party to the Lease and purchase the flat.
53. There is no evidence available to the Tribunal to the effect that the Respondent sought to regularize his position with the Applicant when he moved to Gloucestershire and ceased to be a resident landlord. This was a

significant change in status, because he was no longer present in the flat to regulate the behaviours of his tenants.

54. The Tribunal finds, however, that the Respondent was in breach of covenant certainly when he took in the 2 new male tenants in 2020. He says himself that he did not tell the Applicant about the change.

55. For the above reasons, on the basis of the evidence before it, the Tribunal finds that there has been a breach of Clause 3(k)(i) since the 2 men became tenants in July 2020.

ii) Clause 3 (i)

The Applicant

56. The Applicant asserted that the Respondents had breached this covenant.

57. It is apparent to the Applicant that the Respondent's subtenants were smoking cannabis in the property since February 2021 which is causing an annoyance and nuisance to the other people in the building due to the strong smell.

58. The Applicant has asked the Respondent to deal with the issue, but the subtenants continue to use cannabis in the property which is still causing a nuisance, annoyance and disturbance to others in the building.

59. Mr Adam Fay, sole director of the Applicant company and lessee of first floor Flat 2, specifically refers to cannabis use by the subtenants on 26 April 2021 and 24 June 2021. He has smelled cannabis around 3 times per week in June, July and August 2021. He can smell cannabis in his own flat and finds it unpleasant.

60. The Applicant does not believe that the Respondent has taken any action against the subtenants in respect of this and has asked the Respondent to provide evidence of such action, but the Respondent has failed to do so. The police have been called to the property on several occasions in respect of the drug issues, but the subtenants still continue to use cannabis.

The Respondent

61. The Respondent argues that there is no evidence of the Respondent doing, bringing or allowing anything to remain on the premises.

62. The evidence does not establish nuisance in law. Tobacco smell cannot constitute a nuisance, so how can the smell of an illegal substance?
63. The only evidence of cannabis use comes from the Applicant, who is not a reliable witness. He does not say who was actually smoking cannabis. How can a Tribunal find that cannabis was smoked without hearing evidence?
64. When the police attended, they reported to the Respondent that no arrests or cautions were made and that they found nothing of concern in the flat.
65. The Respondent has sought to evict the occupants at the first legal opportunity as the Applicant has accepted; this after issuing the tenants with a warning in relation to the first complaint. They were given notice on 4 October 2021 with 2 months to vacate.
66. The Applicant is aggressive and confrontational, as a portion of an email demonstrates.
67. It is not alleged that he did anything personally. He has not allowed the smoking of cannabis. He sought to remove the tenants as soon as possible, despite a lack of proof.

The Tribunal

68. Even if it was satisfied that the Respondent's tenants were smoking cannabis, there is no evidence before the Tribunal to establish that the Respondent brought or allowed cannabis to remain on the premises etc.
69. It is not suggested that he brought cannabis on to the property.
70. The only evidence of there ever being cannabis on the property comes from Mr Fay. He does not say how he knows that the smell is cannabis; the police take no action and report to the Respondent that nothing untoward is found.
71. In any event, there is no evidence at all of the Respondent allowing cannabis to remain on the premises. He gave the tenants first a warning and then took steps to evict them.
72. For the above reasons, on the basis of the evidence before it, the Tribunal finds that there has not been a breach of Clause 3(i).

iii) Clause 3(w)

The Applicant

73. The Applicant asserted that the Respondents had breached this covenant.

74. The Applicant states that the Respondent has failed to provide the Applicant with the criminal record details of his subtenants which the Applicant claims is required under the terms of the insurance policy. Despite requests for this information, the Respondent does not believe he has to provide this information and has failed to do so.

75. In April 2021, the Applicant had to update the insurance to reflect that there were 3 subtenants in Flat 1. He sought details from the Respondent. The Respondent confirmed that the premises were an HMO.

76. The Respondent failed to provide details of the criminal records of his sub tenants despite the Applicant telling him that his insurance broker had advised that these were material facts to be disclosed.

77. At this time the policy currently states that there are no criminal records for the subtenants as the Applicant had to get the insurance policy put in place. This will be misleading information if it is found that the subtenants do have criminal records and it could result in the policy being void.

The Respondent

78. The Respondent argues that no evidence has been seen that establishes any act or omission of the Respondent which would allow the insurance to be lawfully rendered void or voidable.

79. No evidence has been produced to establish an insurance requirement for occupants to disclose criminal convictions and such would not be the norm.

80. The burden is on the Applicant to show how the Respondent would be able to lawfully compel the occupants to reveal criminal convictions in the light of rights of privacy, data protection and the Rehabilitation of Offenders Act and has not been discharged.

81. The insurance was purchased before any questions about criminal records was raised, as an email from the Applicant of 31 July 2021 demonstrates, questions about convictions not arising until 3 August 2021.

82. The documents provided by the Applicant do not show a requirement for criminal offences of tenants to be provided. The policy terms and conditions make no such requirement.

The Tribunal

83. The Applicant has provided no evidence to support his assertion that details of the criminal records of residents were required for the purpose of an application for insurance to the firm providing insurance for the property.

84. Nor was there evidence that a failure to provide such information might cause the insurance to be void or voidable.

85. If such information had been required before the issue of insurance cover, then the only conclusion the Tribunal could draw is that a dishonest application for insurance had been made by the Applicant, because such information was not provided to it. The Applicant does not suggest that this was the case.

86. The only evidence provided in relation to the requirement of such information is reference to the opinion of a broker and reference in documents to such information being required of the proposer or someone linked to the proposer.

87. For the above reasons, on the basis of the evidence before it, the Tribunal finds that there has not been a breach of Clause 3(w).

iv) Clause 3(s)(ii)

The Applicant

88. The Applicant asserted that the Respondent should be required to pay its costs.

89. Clause 3(s)(ii) reads as follows: *to pay to the Landlord and the Company on an indemnity basis all costs fees charges disbursements and expenses (including without prejudice to the generality of the above those payable to Counsel Solicitors and Surveyors) properly and reasonably incurred by the Landlord and the Company in relation to or incidental to:*
(ü) the preparation and service of a notice under the Law of Property Act 1925 Section 146 or incurred by reason of or in contemplation of proceedings under the Law of Property Act 1925 Section 146 or 147 notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court

100. Proceedings under Section 168(4) Commonhold and Leasehold Reform Act 2002 are in contemplation of proceedings under Section 146 Law of Property Act 1925.

The Respondent

101. The Respondent argues that he has not been served with an application for costs.

102. The application is under Section 168(4) Commonhold and Leasehold Reform Act 2002, and not in contemplation of proceedings under Section 146 or 147 Law of Property Act 1925.

The Tribunal

103. The Tribunal notes that this is an application in respect of breach of covenant. There is no application for costs under Rule 13. That being the case, the Tribunal declines to make any order for costs.

104. The Tribunal further notes that there has been no actual demand for the costs of the proceedings made of the Respondent and that such costs must be reasonably incurred.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.