FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BK/LBC/2022/0086**
Property	**:**	**Flat 28, Seymour Buildings, Seymour Place, London, W1H 4PP**
Applicant	**:**	**Seymour Housing Co-operative Ltd**
Representative	**:**	**David Lonsdale (Counsel)**
Respondents	**:**	**David Suter**
Representative	**:**	**No appearance**
Type of application	**:**	**Breach of Covenant**
Tribunal Members	**:**	**Judge Robert Latham** **Alison Flynn MRICS**
Date and Venue	**:**	**13 April 2023 at** **10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**17 April 2023**

DECISION

Decisions of the Tribunal

(1) The Tribunal determines that for the purposes of section 168(4) of the Commonhold and Leasehold Reform Act 2002, the following breaches have occurred (particulars of which are provided in our decision):

(i) For the past three years, the Respondent has sublet and parted with possession of his Flat in breach of clause 4(m) of his tenancy;

(ii) For the past three years, the Respondent has ceased to use the Flat as his only or principal place of residence in breach of clause 4(n) of his tenancy;

(2) The Tribunal determines that the Respondent shall pay the Applicant £300 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant.

The Application

1. By an application dated 7 December 2022, the Applicant landlord seeks an order that the Respondent has breached a term of his lease pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 (the "2002 Act"). On 29 December, the Tribunal emailed a copy of the application to the Respondent.

2. By an agreement dated 28 April 2010, the Applicant let a one bedroom flat at Flat 28, Seymour Buildings, 153-155 Seymour Place London W1H 4PP ("the Flat") to the Respondent tenant, Mr David Suter. The agreement purports to be a weekly periodic tenancy at a rent of £73.68 per week. However, clause 5 of the agreement restricts the circumstances in which the landlord is entitled to terminate the tenancy. As a result of these restrictions, the Applicant contends that the agreement is now a tenancy for 90 years by virtue of section 149(6) of the Law of Property Act 1925 (the "1925 Act"), subject to the landlord's right to determine on the tenant's death, and to the rights under clause 5. This is not the legal relationship which either party would have contemplated when the tenancy was granted. However, the law has now been clarified by the Supreme Court in *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52; [2012] 1 AC955 ("Mexfield").

3. In order to terminate the agreement with Mr D Suter, the landlord needs to rely on Clause 5 of the agreement (which is in effect a forfeiture clause). The Applicant contends that the Respondent has breached Clauses 4(m) and 4(n) of his lease and seeks an order from this Tribunal to this effect. The Applicant contends that the Respondent has not occupied the Flat as his only or principal residence and that he has sublet the Flat. The Applicant understands that the Respondent is living in Kenya. They have an email address through which it is able to correspond with him. He has not provided any postal address in Kenya.

4. On 18 January 2023, the Tribunal issued Directions. The Directions stated that the application would be heard at a face-to-face hearing on 17 April. The Tribunal advised the Respondent to seek independent legal advice as the proceedings may be a preliminary to court proceedings to determine the tenancy. On 19 January, the Tribunal served the Directions on the Respondent by email and by post.

5. Pursuant to the Directions, the Applicant has filed the Bundle of Documents upon which it seeks to rely. On 2 March 2023, it served the bundle on the Respondent by email and by hand delivering a copy of the bundle to the Flat.

6. By 23 March, the Respondent was directed to serve the bundle of documents upon which he seeks to rely in response to this application. The Respondent has taken no steps to defend this application.

7. On 27 March, the Tribunal served a letter on the Respondent seeking an explanation as to why he had failed to comply with the Directions. This was sent by email and posted to the Respondent at the Flat. The Respondent did not reply.

The Hearing

8. Mr David Lonsdale (Counsel) appeared on behalf of the Applicant. He was accompanied by Mr Christopher Bernard from his instructing solicitor, Housing and Property Law Partnership.

9. The Respondent did not appear. The Tribunal is satisfied that he had notice of the hearing and has made an informed decision not to engage with the proceedings.

10. Mr Lonsdale adduced evidence from:

(i) Ms Sharon Cadogan who is the Applicant's housing services manager. She works from an office an 20a Seymour Buildings, 153-155 Seymour Place.

(ii) Ms Jessica Thomas who is a member of the Applicant Co-operative and resides at Flat 115 Seymour Buildings. She has been a member of the Co-operative since 21 March 1981.

11. The Tribunal put a number of questions to both witnesses and has no hesitation in accepting their evidence. During the hearing, Mr Bernard provided a number of further email communications between the Applicant and the Respondent.

12. Mr Lonsdale stated that the Applicant is seeking an order that the Respondent has breached clauses 4(m) and 4(n) of his tenancy agreement. The Applicant will then serve a Section 146 Notice, prior to issuing proceedings for possession.

The Law

13. Section 168 of the Commonhold and Leasehold Reform Act 2002 provides that:

> "(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.

14. In approaching this application, we have regard to guidance provided by Martin Rodger QC, the Deputy President, in *Marchitelli v 15 Westgate Terrace Ltd* [2020] UKUT 192 (LC); [2021] 1 P&CR 9 (at [49]):

> "The purpose of proceedings under s.168(4) of the 2002 Act, is to establish the facts on which steps to forfeit an extremely valuable lease will then be founded. Before forfeiture proceedings may be commenced the landlord is required by s.146(1) of the 1925 Act, to serve a notice "specifying the particular breach complained of" and if that breach is remedied and compensation is paid no forfeiture will occur. Before a s.146 notice may be served the FTT must determine that "the breach" has occurred (s.186(2)(a) of the 2002 Act). It follows, therefore, that the determination required of the FTT must be sufficiently specific to provide the basis of a s.146 notice."

The Tenancy Agreement

15. The Respondent occupies the Flat pursuant to a written tenancy agreement dated 28 April 2010. The Applicant landlord is a fully mutual housing co-operative. Clause 1 sets out the background to the agreement:

> (i) The Applicant Co-operative is an Industrial & Provident Society registered under the Industrial & Provident Societies Act 1965. The Applicant is also a Housing Association registered with the Tenants Services Authority as a fully mutual housing co-operative as defined in Section 5 of the Housing Association Act 1985 and Schedule 1 of the Housing Act 1988.
>
> (ii) The Respondent tenant a member of Seymour Housing Co-operative Ltd and shall continue to be a member throughout the tenancy.

16. By clause 2, the Applicant purports to grant a weekly periodic tenancy, initially at a rent of £73.68 per week. The Applicant may vary the rent. The current rent is £120.70 per week.

17. By clause 5(a), the tenant may determine the tenancy by giving four weeks written notice. By Clause 5(b), the landlord may also bring the tenancy to an end by four weeks' notice, but may only do so in specified circumstances.

18. By clause 5 (b) (ii), one of the circumstances that the landlord may determine the tenancy is that:

> "Any (sic) Tenant has committed a breach of this Agreement and, that breach is capable of rectification, the Co-operative has given the Tenant written notice of the breach and the Tenant has failed to remedy it within the period of time stated in the notice."

19. The Applicant contends that the Respondent has breached the following terms of his tenancy (emphasis added):

> (i) Clause 4(m): "Not to enter formally into a sub-letting agreement or to part with possession or occupation of the whole or any part of the premises. In the event of a Joint Tenant(s) ceasing to be a Tenant of the Property, the remaining Joint Tenant(s) may designate, by agreement between the remaining Joint Tenant, the Member and the Management Committee, an existing Member of the Co-operative to take the place of the leaving Tenant, subject to the compliance of that Member with the Co-operative's transfer policy on rent arrears. The Co-

operative shall transfer the tenancy in accordance with that designation.

(ii) Clause 4(n): "To use the premises as the Tenant's only or principal place of residence and not to use the premises to on trade or business unless the Co-operative has first given its permission. In such cases, the Tenant is responsible for obtaining any necessary statutory consents."

20. It is to be noted that clause 4(n) seeks to mirror the "tenant condition" which must be satisfied by a secure tenant under Part 4 of the Housing Act 1985. However, the Housing Act uses slightly different wording, namely that the tenant "occupies the dwelling-house as his only or principal home".

21. The effect of this type of agreement which has been used by a number of fully mutual housing co-operatives, was analysed by the Supreme Court in *Mexfield*. Applying this decision, the agreement must be construed as follows:

(i) In the absence of any indication to the contrary, the tenancy granted "from week to week" was a weekly tenancy which could be determined by either party giving four weeks written notice.

(ii) However, as a matter of contractual interpretation, which depended on the terms which the parties had agreed and the circumstances in which they had been agreed, the agreement between the landlord and the tenant could only be determined by the tenant under clause 5(a) or by the landlord under clause 5(b).

(iii) Such an agreement, being for an uncertain term, was not capable of taking effect as a tenancy in accordance with its terms.

(iv) Since the agreement would have given rise to a tenancy for life prior to 1926, the effect of section 149(6) of the 1925 Act was that the agreement was to be treated as a tenancy for a term of 90 years, determinable on the tenant's death or in accordance with clause 5.

The Background

22. On 7 June 1999, the City of Westminster granted the Applicant a 125 year lease of land which comprises Flats 1 to 42 (inclusive) East Block and Flats 108 to 115 (inclusive) West Block at Seymour Buildings, Seymour Place, London, W1H 5TQ. There are a total of 48 flats. The Applicant has an office at 20A Seymour Buildings.

23. On 28 April 2010, the Applicant granted the Respondent a tenancy of Flat 28. This is a one-bedroom flat.

24. The Applicant has adopted a "Leave of Absence Policy" which provides that:

(i) The Co-op Member must reside in the flat at all times provided that the Member may vacate the flat for a continuous period of no more than four weeks at a time and no more than a total of twelve weeks in any year.

(ii) If the Member wishes to vacate the flat for continuous periods of between four and twelve weeks, he or she must notify a meeting of the Management Committee.

(iii) If the Member wishes to vacate the flat for periods longer than set out above, he or she may do so only with the express permission from the Management Committee.

25. Ms Cadogan states that she has only met the Respondent once. This was in 2019. He had been unemployed and was in receipt of housing benefit. He is of Kenyan descent.

26. In about 2019, members of the Co-operative realised that the Respondent was no longer residing in his flat. Strangers were occupying the flat. Rent continued to be paid by housing benefit. It seems that the Respondent had not informed Westminster of the change of his circumstances. The Respondent was paying the service charge element of his rent by standing order.

27. On 5 May 2020, Ms Cadogan sent the Respondent an email. She had been approached by someone who claimed to be a friend of the Respondent. He had requested a rent statement. He had stated that he was staying in the Flat while the Respondent was on holiday. There had also been a lot of maintenance DIY work in the flat over the previous weekend. Ms Cadogan complained that the Respondent had not notified the Applicant of this arrangement. The Respondent was asked to confirm the current situation.

28. On 6 May 2020, the Respondent replied. He stated that a friend had been staying in his flat who had now left. He had asked his partner to go in and clear out the rubbish. He was stuck outside the UK with no flights back because of the Covid-19 lockdown restrictions. On 23 March 2020, the first Covid lockdown restrictions had been imposed in the UK.

29. On 23 May 2021, Ms Helen Barnby sent the following email to the Applicant:

"Please be informed I have vacated Flat 28 Seymour Buildings as of today. Please could you remove my number from the doorbell entry system and contact David Suter for alternative arrangements.

I have left the flat clean and tidy, no food is in the flat, the cooker is switched off, the heating is switched off and all plug sockets are also switched off.

I have left the keys with Bobby in flat 25 and have cancelled the gas inspection which was due to take place on Monday.

Many thanks for allowing me to stay."

30. Ms Cadogan denied that the Applicant had given Ms Barnby permission to occupy the Flat. In 2019, the Applicant had installed a new entry phone system. This had been linked to the tenant's mobile telephone (or landline). It seems that Ms Barnby's mobile had been linked to the entry phone for the Flat. Thus, Ms Barnby would have been occupying the Flat for some months.

31. Ms Thomas describes how she became aware that Ms Barnby was occupying Flat 28. She was using the communal garden. She gave the impression that she was the Respondent's partner. However, it was apparent that the Respondent was not occupying the Flat. Ms Barnby wanted to become a member of the Co-operative, but she had been told that this was not possible. Ms Thomas did not believe that she was the Respondent's partner. She stayed in the Flat for some 12 months and suddenly left. Ms Thomas had the impression that she was a sub-tenant.

32. After Ms Barnby left, Ms Thomas met another man who claimed to be occupying the Flat. Members of the Co-operative were aware of a number of different people occupying the Flat. This became a topic of general conversation.

33. On 4 August 2021, Ms Cadogan sent a further email to the Respondent inquiring when he would be returning to the UK. It is apparent that by this date, Ms Cadogan had learnt that he was in Kenya.

34. On 5 August 2021, the Respondent replied. He stated that as a result of Covid restrictions, it would cost him some £3k to return. He could not afford this. For the first time, he stated that his parents had been murdered in Kenya. He had gone to Kenya for a court case and had got stuck there. He wanted to see justice done.

35. On 28 February 2022, the Chair of the Co-operative complained that there was another subletter staying in the Flat. The previous subtenant had left, taking all their furniture.

36. On 1 March 2022, Ms Cadogan emailed the Respondent seeking clarification of the current situation. On 21 March, the Respondent stated that he was bed ridden with cerebral malaria. He subsequently provided a number of medical documents. reports. However, none of these was a medical report describing his medical condition, any treatment or prognosis. On 9 April, the Respondent stated that would provide a report. No report was provided.

37. On 19 April 2022, the Applicant wrote to the Respondent in these terms:

> "I am writing to you on behalf of Seymour Housing Co-op and refer to your occupation of the above premises granted to you under a tenancy agreement on 10th May 2010.
>
> You are in breach of the following covenants in the agreement:
>
> > 1. 5 b (ii) Not to enter formally into a sub-letting agreement or to part with possession or occupation of the whole or any part of the premises.
> >
> > 2. 4(n) To use the premises as the Tenant's only or principal place of residence.
>
> We say this because for the last 3 years you have allowed unauthorised individuals to occupy the property without the Co-op's permission whilst you have lived abroad. Before leaving the UK, you did not seek permission from the Co-op according to the "Leave of Absence Policy" which states the following:
>
> > 1. The Co-op Member must reside in the flat at all times provided that the Member may vacate the flat for a continuous period of no more than four weeks at a time and no more than a total of twelve weeks in any year.
> >
> > 2. If the Member wishes to vacate the flat for continuous periods of between four and twelve weeks, he or she must notify a meeting of the Management Committee.
> >
> > 3. If the Member wishes to vacate the flat for periods longer than set out above, he or she may do so only with the express permission from the Management Committee

> Seymour Housing Co-op hereby gives you four weeks Notice (from the date of this letter) under clause 5 b) (ii) of the Agreement to rectify these breaches outlined that you able to rectify."

38. On 17 May 2022, the Respondent sent three emails to Ms Cadogan: (i) (21.54): "Everything I own is in that 28 Seymour buildings"; (ii) (23.47): "I will be back as soon as I flight; and (iii) (23.49): "Wheelchair and fucked but will arrive".

39. On 1 June 2022, the Applicant received the last payment of housing benefit from Westminster. Ms Cadogan stated that there are currently arears of £4,522.

40. Mr William Cooper has been occupying the Flat for a number of months. Between September and November 2022, he paid rent of £3,234. On legal advice, the Applicant has returned this to Mr Cooper. On 4 February 2023, Mr Cooper sent an email to Ms Cadogan seeking one weeks' notice of any eviction so that he could put the Respondent's belongings into storage.

41. The Respondent has had ample opportunity to respond to this application. He has adduced no evidence to rebut the clear evidence that he has been subletting his flat. He has been absent from his flat for more than three years. The Respondent has adduced no evidence to suggest that he is still using the Flat as his only or principal place of residence. There is no evidence that he intends to return to the UK in the foreseeable future.

The Tribunal's Findings

42. In the light of the evidence that we have heard, the Tribunal is satisfied that the Respondent is in breach of the terms of his lease:

(i) For the past three years, the Respondent has both sublet and/or parted with possession of his Flat in breach of clause 4(m) of his tenancy. There has been a succession of at least three people who have occupied the Flat. They have brought their own furniture. They have treated the Flat as their own. The Tribunal considers it most unlikely that Ms Barnby was the Respondent's partner. She held herself out as his partner as she was seeking to regularise her unlawful status as an authorised tenant at the Flat. The terms under which these people have occupied the Flat is unclear. The Respondent did not notify the Applicant that he was going abroad and has provided no details of the persons whom he has permitted to occupy the Flat. It is probable that the Respondent has permitted them into possession of the Flat upon the payment of some periodic sum. The Respondent has thereby parted

with possession of the Flat. It is probable that these people have occupied the Flat as the Respondent's sub-tenants.

(ii) For the past three years, the Respondent has ceased to use the Flat as his only or principal place of residence in breach of clause 4(n) of his tenancy. He has rather resided in Kenya. The Respondent did not notify the Applicant that he was going abroad. He has not sought their permission for his prolonged absence. Had his absence abroad been longer than he had anticipated, he should have notified the Applicant of this. There is no evidence as to when or, indeed, whether he intends to return to the Flat. Having regard to the length of his absence, the only reasonable inference is that he has ceased to use the Flat as his only or principal place of residence

Refund of Fees

43. At the end of the hearing, the Applicant made an application for a refund of the fees that it has paid in respect of the application hearing pursuant to Rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Tribunal Rules"). The Applicant has paid a total of £300. Having regard to our findings, the Tribunal orders the Respondent to refund the tribunal fees of £300, which have been paid by the Applicant, within 28 days of the date of this decision.

Judge Robert Latham
17 April 2023

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).