FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**MAN/00BY/LBC/2023/0026**
Property	**:**	**14 Jamieson Road, Liverpool, L15 3JD**
Applicant	**:**	**Fee Simple Investments Limited**
Representative	**:**	**Mr H Adcock, Group Solicitor for the Applicant**
Respondents	**:**	**Condar Developments Limited**
Representative	**:**	**Quinn Barrow, Solicitors**
Type of application	**:**	**Commonhold and Leasehold Reform Act 2002 – section 168(4)**
Tribunal member	**:**	**Judge C Goodall**
Date and place of hearing	**:**	**Paper determination**
Date of decision		**22 April 2024**

DECISION

Background

1. On 15 November 2023, the Applicant made an application ("the Application") for an order, under section 168 of the Commonhold and Leasehold Reform Act 2002 that a breach of covenant or condition in the Respondents lease has occurred.

2. The property at 14 Jamieson Road, Liverpool, L15 3JD ("the Property") is demised by a lease dated 19 October 1984 and made between How Dergrange Limited (1) and Ivan Bennett and June Bennett (2) for a term of 999 years at a rent of £15.00 per annum ("the Lease")

3. Official copies of the leasehold title provided to the Tribunal show that the Lease is now vested in the Respondent.

4. Directions for the conduct of the Application were made by the Tribunal on 31 January 2024. Both parties were directed to provide statements of case. The Applicant did so in a response dated 20 February 2024. The Respondent did so on 12 March 2024. The Applicant provided a short reply dated 18 March 2024.

5. Neither party requested an oral hearing, and the Tribunal is content to determine the Application on the papers.

6. I have been appointed to determine the Application. My decision, and the reasons for it, are set out below.

The Lease

7. There is a short tenants covenant in the Lease that provides:

> "6 The Lessee hereby jointly and severally covenant with the Lessor as follows:-
>
> …
>
> (g) Not to assign underlet charge or part with possession of the said property without the previous consent in writing of the Lessor at the cost of the Lessee such consent not to be unreasonably withheld."

The alleged breach

8. The Applicant's case is that the Respondent has both charged the Property and entered into an underlease without its consent, both of these transactions being in breach of clause 6(g) of the Lease.

9. Evidence of the underletting is provided in the form of a copy of an Assured Shorthold Tenancy Agreement dated 15 February 2022 and made between the Respondent (1) and Sandra Gwizdz and Adrian Marcin Piechocki (2) leasing the Property for a term of 12 months, and thereafter from month to month for a rent of £650.00 per month.

10. The evidence of the charge is contained in official copies of the Respondents title. Entries numbered 2, 3, and 4 in the Charges Register of title number MS210877 show the registration of a charge dated 29 June 2022 in favour of Paragon Bank Plc.

The Applicant's submissions

11. In summary, the Applicants submissions simply draw attention to the documentation referred to above and submit that those documents establish breach of clause 6(g) of the Lease.

12. The submissions confirm that a retrospective application for consent to charge the Property to Paragon Bank plc was submitted in about September 2022. That application confirmed that the Property was let, but no application for consent to underlet is made in that application. The Applicant said it might well be willing to grant retrospective consent, but not until details of any underletting had been provided.

The Respondent's submissions

13. The Respondent's submission does not deny that the covenant has been breached.

14. The suggestion is that the Application is a tactic to force the Respondent to pay a grossly inflated price for the Property. There appear to be negotiations for the Respondent to purchase the freehold which are ongoing.

15. It is suggested that the Property has been let, without objection from the Applicant, for many years in the past. Without expressly using the word, this would appear to be a suggestion that failure to obtain consent to underlet had been waived in the past.

16. Objection is also made that the application for consent to charge has not been determined and the Tribunal's assistance is sought for the making of an order granting consent.

Law

17. Section 168 of the Commonhold and Leasehold Reform Act 2002 provides as follows:

> **"168 No forfeiture notice before determination of breach**
>
> (1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.
>
> (2) This subsection is satisfied if—

(a) it has been finally determined on an application under subsection (4) that the breach has occurred,

(b) the tenant has admitted the breach, or

(c) a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

(3) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(4) A landlord under a long lease of a dwelling may make an application to the appropriate tribunal for a determination that a breach of a covenant or condition in the lease has occurred.

(5) But a landlord may not make an application under subsection (4) in respect of a matter which—

(a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(b) has been the subject of determination by a court, or

(c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(6) For the purposes of subsection (4), "appropriate tribunal" means—

(a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) in relation to a dwelling in Wales, a leasehold valuation tribunal.

18. In *Kyriacou v Linden* [2021] UKUT 288 (LC), the Deputy Chamber President of the Upper Tribunal said, at paragraph 33:

"The allocation of functions between the FTT and the County Court in residential breach of covenant cases may sometimes be inconvenient but it is the policy of section 168(4) of the 2002 Act which the FTT is required to apply and which it should not seek to circumvent. It is clear on the face of the statute that the FTT's only task is to determine whether a breach of covenant has occurred. Whether any breach has been remedied, or the right to forfeit for that breach has been waived, are not questions which arises under this jurisdiction."

19. It is clear from this extract, and from other cases such as *Swanston Grange (Luton) Management Ltd v Langley-Essen* [2008] L & TR 20, *Triplerose Ltd v Patel* [2018] UKUT 374 (LC), and *Bedford v Paragon Asra Housing Association Ltd* [2021] UKUT 266 (LC), that the Tribunal's role in a s168(4) application is limited. It must merely answer the question of whether the covenant has been breached. It will be for the County Court to determine (if a forfeiture application is made) whether the breach has been waived or remedied, and what the consequence of that breach will be.

Discussion and determination

20. I can see no scope for making any other determination than that the Respondent has breached covenant 6(g) of the Lease by both underletting and charging the Property without the Applicant's consent. That conclusion is inevitable on the basis of the uncontested existence of both an underletting, in the form of the AST dated 15 February 2022, and a charge recorded on the Respondent's title to the Property.

21. The Tribunal has no jurisdiction to take previous lettings, even if they were permitted, into account. Nor does it have jurisdiction to require the Applicant to grant consent – that would appear to require an application to a court under the Landlord and Tenant Act 1988. If there is a dispute concerning the price for which the Respondent should pay for the freehold, there are statutory mechanisms to enable a price to be determined.

22. I therefore **determine** in accordance with section 168(4) of the Commonhold and Leasehold Reform Act 2002, that by underletting the Property and charging it, as identified above, the Respondent has breached clause 6(g) of the Lease.

Appeal

23. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
First-tier Tribunal (Property Chamber)