FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/38UC/LBC/2023/0003**
Property	**:**	**30 Hubble Close, Headington, Oxford OX3 9BS**
Applicant	**:**	**GreenSquareAccord Limited**
Representative	**:**	**Mr Sam Phillips (Counsel)**
Respondent	**:**	**Mr Andrew James Smith**
Representative	**:**	**Unrepresented**
Type of application	**:**	**Determination of an alleged breach of covenant – Section 168(4) Commonhold & Leasehold Reform Act 2002**
Tribunal member	**:**	**Judge K. Saward**
Date of hearing	**:**	**29 February 2024**
Date of decision	**:**	**4 March 2024**

DECISION AND REASONS

Decisions of the Tribunal

(1) The Tribunal removes Mrs Liana Smith as a Respondent to the proceedings.

(2) The Tribunal corrects the company name of the Applicant on the record from Green Square Accord Ltd to GreenSquareAccord Ltd.

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

  (i) Parting with possession of the whole of the Property in breach of clause 3.14.1 of the lease.

  (ii) Use of the Property for a purpose other than a private residence in single occupation in breach of clause 3.23 of the lease.

(4) The Tribunal determines that the Respondent has not committed a breach of clause 3.25 of the lease.

REASONS

The Application

1. By an application dated 4 April 2023 the Applicant seeks a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that one or more breaches of covenant have occurred under the lease of the property at 30 Hubble Close, Headington, Oxford ("the Property").

2. The application form gave the name of Mr Andrew Smith as the Respondent leaseholder who it was claimed had sub-let the whole of the Property in breach of clauses 3.14.1, 3.14.2 and 3.14.3.3. Clause 3.14.3.3 concerns nominations and when the Tribunal queried its relevance, the Applicant confirmed it was an erroneous reference.

The Hearing

3. No objection was raised to a remote hearing. Accordingly, the hearing took place remotely using the CVP platform.

4. The start of the hearing was delayed by almost 25 minutes with Mr Smith experiencing technical difficulties. To resolve the issue Mr Smith joined by telephone. He confirmed that he could hear all participants. Mr Smith was uncertain if Mrs Smith intended to join the

hearing. When neither Respondent had been present at the appointed start time, the Tribunal Clerk had emailed both Mr and Mrs Smith to establish if they were attending. The reply from Mr Smith alerted the Tribunal to his attempts to log in. Mrs Smith did not respond.

5. To address imbalance between the parties due to the Applicant being legally represented, the Tribunal took a flexible approach to proceedings. It invited submissions from the parties on a step-by-step basis on each procedural matter and points of substance rather than formally hearing evidence. Mr David Luscombe-Russell is employed by the Applicant as a Home Ownership Officer and had made two witness statements. He attended the hearing and assisted the Tribunal by answering my questions as did Mr Smith.

6. Neither party requested an inspection, and the Tribunal did not consider that one was necessary for the resolution of the issues.

The Lease

7. The Property is a 2-bedroom terraced house. The lease was granted on 31 March 2004 by Oxford Citizens Housing Association Limited to Andrew Smith for a term of 99 years commencing 24 June 2003. Following amalgamation with two other Registered Societies and subsequent change of name from Accord Housing Association Limited, the Applicant became the registered proprietor of the freehold interest on 8 April 2021.

Procedural Matters

8. It was unclear from the application who Mr Smith had sub-let the Property to and whether the lease was in joint names with Mrs Smith to whom the Applicant, and its Solicitors, have communicated "over the years". In Directions given by the Tribunal on 20 October 2023, Mrs Liana Smith was joined to the proceedings as Second Respondent for the time being pending further explanation.

9. No bundle was produced by either Mr or Mrs Smith as required by the Directions to provide a statement in response and setting out any grounds they may have for opposing the application. The Applicant produced an indexed and paginated bundle of some 133 pages. A 'skeleton argument' was also received on the day of the hearing.

10. The Applicant clarified that it does not contend that Mrs Smith is, or ever has been, a leaseholder. It had erroneously believed Mrs Smith was a leaseholder until realising its mistake in March 2023. The lease had originally named 'Mr and Mrs Andrew James Smith' as leaseholder on two pages, but the words 'and Mrs' were struck out by hand and initialled 'AS'. Only Mr Smith signed the lease dated 31 March 2004.

The Applicant states that it has no knowledge of any assignment to Mrs Smith and the identity of the person/s to whom the Property has been sub-let is not known.

11. When an employee of the Applicant visited the Property in February 2023, the occupant who answered the door indicated that they rented the Property from Mrs Smith. Nevertheless, Mr Smith is the registered proprietor of the leasehold title as shown in the Official Copies from H M Land Registry. At the hearing, Mr Smith confirmed that whilst Mrs Smith and their children remained in occupation after he had vacated the property, he has remained the sole leaseholder. At no time was the lease assigned. The Tribunal is satisfied that only Mr Smith is committed to comply with the terms of the lease and bound by it as sole holder of the leasehold interest. Accordingly, Mrs Smith's name shall be removed from the record as a Respondent.

12. The Directions required a statement of case from the Applicant explaining what it claims clause 3.14.1 means as it is not clearly drafted in respect of a subletting of the whole Property. As there appeared to be other breaches, it was suggested that the Applicant may like to consider the basis of their application afresh. That was not an invitation to add new matters but to reflect on the clauses within the lease being relied upon in light of other matters already raised in the application.

13. The Applicant's statement of case sought leave to amend the application by adding further breaches. Aside from elaborating on its original case with reference to other clauses in the lease, new issues were raised following an inspection conducted on 7 November 2023.

14. Those issues included building materials deposited in a visitor parking bay, vehicles parked in neighbours' and visitor spaces, waste materials in the garden, a broken air brick (possibly providing an entry point for rats) and a missing external light cover posing a fire risk. None of these matters stem from the same facts alleged in the application. This prompted a point of procedural fairness on which submissions would need to be invited. Rather than take that course, Counsel for the Applicant withdrew the application to amend (said to be made out of an abundance of caution) insofar as it related to new matters arising from the November 2023 site visit.

15. Given that concession, the Applicant's Counsel confirmed that reliance was placed solely on clauses 3.14.1, 3.23 and 3.24. Clause 3.14.1 had been raised at the outset. Clause 3.23 prohibits use for any purpose other than a private residence or creating or permitting a nuisance. Clause 3.24 is an extension of that clause also directed at a prohibition of nuisances or disturbance. Although neither clause was relied on in the application they are raised in the context of the use of the Property as a cannabis farm, which is firmly part of the case before the Tribunal. Mr Smith raised no objection to these clauses being included.

16. The Tribunal is satisfied that inclusion of alleged breaches contrary to clauses 3.24 and 3.25 of the lease does not cause prejudice to the Respondent who was already on notice of the facts relied upon. The clauses are also cited in the Applicant's statement. It is fair and just to allow the Applicant to amend its application, which shall proceed accordingly.

The Issues

17. The Tribunal is not concerned on this application with the seriousness of any breach, whether it has been remedied or whether any breach was waived by the Applicant. These would all be matters for the county court if the Applicant makes a separate application for forfeiture of the Lease following service of a notice under section 146 of the Law of Property Act 1925 in reliance on any breaches found by the Tribunal.

18. The burden of proof is on the Applicant to establish the facts and that these constituted a breach of the leaseholder's covenants. The alleged breaches are in respect of the following obligations on the part of the leaseholder:

Under clause 3.14.1 the leaseholder covenanted: *"not to assign underlet mortgage charge or part with possession of part only of the Premises and not to dispose or part with possession of the whole of the Premises otherwise than in accordance with the provisions of sub-clauses 3.14.2 and 3.14.3 hereof."* Those sub-clauses are not set out herein as they contain no provision of relevance to the circumstances of this case.

Clause 3.23: "*Not to use the Premises nor permit the same to be used for any purpose whatever other than as a private residence in single occupation nor to create or permit a nuisance to arise to the owners or occupiers of the remainder of the property of which the Premises forms part or any adjoining or neighbouring premises and not to use the Premises for the purpose of any trade or business."*

Clause 3.24: *"Not to commit or allow the Leaseholder's guests lodgers sub-tenants or members of the Leaseholder's household to commit on the Premises or in the vicinity or neighbourhood of the Premises any acts which cause a nuisance or disturbance to any person or any acts of harassment (whether racial sexual or otherwise) of any person."*

The Law

19. The material provisions of section 168 of the 2002 Act state:

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.

The Applicant's case

20. The Applicant does not contend that Mr Smith received any money from sub-letting the Property. Nor does the Applicant claim that Mr Smith underlet the Property to Mrs Smith. To support the application, the Applicant highlights the Police raid carried out at the Property in December 2021 at which 60 cannabis plants were found, no-one was present at the time of the raid, and there were no signs of residential occupation. Photographs taken by the Police are appended to the first witness statement of Mr Luscombe-Russell.

21. Following the raid, Mrs Smith informed the Applicant that she had separated from the Respondent, who had no connection with the Property. Mrs Smith stated that she was not living at the Property but was living with a partner. The Applicant notes that Mrs Smith is expressly not a tenant under the lease. Mrs Smith stated that she was not aware of the locks having been changed or the use of the whole of the Property as a cannabis farm.

22. The Applicant's investigations show that Mr and Mrs Smith had not been on the electoral roll for the Property since 2011 and 2018, respectively. Mrs Smith had positive links to two other addresses. An occupant of the Property confirmed, as of 15 February 2023, that Mrs Smith was not living at the Property. Mr Smith had admitted to the Applicant's staff that he did not live at the Property.

23. Recent information obtained from a neighbour in November 2023 was that neither Mr nor Mrs Smith had been seen at the Property for years.

24. These facts, it is argued, are entirely inconsistent with someone being in possession. At the hearing Counsel submitted that in this context clause 3.14.1 should be given its ordinary meaning i.e., not using the Property as their own. Mr Smith had parted with possession and the use thereafter involved changing of the locks by the occupants. Clause 3.14.1 is, it is submitted, engaged on a plain text reading of the clause.

The Respondent's case

25. The Respondent apologised for what had happened at the Property. Upon their separation, Mr Smith had left Mrs Smith and the children in the Property. Mr Smith said he had nothing or very little to do with the Property. He expressed outrage at the use of the Property as a cannabis farm (which had occurred after Mrs Smith left the Property).

Findings

26. Mr Smith was completely upfront at the hearing. He readily accepted being the sole leaseholder, and confirmed he left the Property around the time recorded in the electoral register i.e., October 2011. Mr Smith had not assigned the lease to Mrs Smith. Indeed, in his email to the Applicant's Solicitors on 16 April 2023, Mr Smith said he had not thought about providing Mrs Smith with the lease. It was the last thing on his mind.

27. In an email to the Applicant on 19 January 2022, Mrs Smith stated that around the time of the Covid-19 pandemic she was spending "most of the time" living elsewhere. She found "a lodger" to look after the house in her absence so that the Property was not empty.

28. According to Mrs Smith, it was only in the previous 3 months (i.e., before 19 January 2021) that she discovered that her key would not work in the lock. After recovering from Covid and returning to the Property on 2 January 2022 with a locksmith, the front door was found padlocked. Mrs Smith reports that she immediately contacted the Police on 2 January 2022 upon discovering illegal cannabis farming at the Property, which had been a "complete shock". She acknowledged that the Property looked dirty and vandalized.

29. The timeline given by Mrs Smith cannot be correct as the Police raid was December 2021. Searches undertaken by the Applicant reveal that Mrs Smith has not been on the electoral register at the Property since December 2018. I find it likely that this date, as an official documentary record, is more accurate than Mrs Smith's recollection. Other

individuals were registered at the Property from 2018 onwards up to the time of search around January 2021.

30. Photographs from the Police raid in December 2021 show the interior of parts of the Property. From these images, the Property appears incapable of use for residential purposes. The kitchen looks unusable for its intended purpose with multiple paraphernalia covering the floor and surfaces. Pots of cannabis plants were on the worktops. Sheets of plastic appear draped in the living room. The Applicant also refers to non-structural alterations in the installation of lighting, ventilation tubing and fans to facilitate cannabis cultivation. The evidence is consistent with the Applicant's assertion that the Property was not in residential use.

31. In his first witness statement, Mr Luscombe-Russell describes how aside from the 60 cannabis plants seized by Police, it was clear there were a lot more plants in situ that had already been harvested. He further states that there was no sign of occupation except for a mattress in one of the bedrooms. The raid is said to have followed concerns raised in the local community. None of this is contradicted by the Respondent.

The Tribunal's determination

32. The Tribunal must determine whether there has been a breach of covenant on the civil standard of proof. Where a serious allegation is made in a civil case, such as an allegation of criminal conduct, the standard of proof is still the civil standard of 'the balance of probabilities'. However, the civil standard is flexible in its application, and if a serious allegation is made, then more cogent evidence may be required to overcome any unlikelihood of what is alleged.

33. Clause 3.14.1 is not well worded. The first part of the clause concerns assigning, underletting, mortgaging, charging or parting with possession of part only of the Property. The second part of the clause is "*not to dispose or part with possession of the whole*" of the Property, without mention of underletting. The Applicant alleges that the Respondent parted with possession of the whole of the Property. Clause 3.14.1 is subject to the provisions of sub-clauses 3.14.2 and 3.14.3, which allow the Property to be assigned only in limited circumstances. There is no suggestion of an assignment in this case.

34. From the evidence neither Mr nor Mrs Smith have lived at the Property for some years. There can be no question that the Respondent was not be in possession by the time of the Police raid in December 2021 when the front door was padlocked, the Police found no-one present and there were no signs of residential occupation. Mrs Smith was not living there and was unaware of the locks having been changed. Mr Smith had long vacated the Property. The totality of factors leads me to conclude

that the Respondent had parted with possession of the whole of the Property and there has consequently been a breach of clause 3.14.1 by the leaseholder.

35. Out of the same circumstances involving the use of the Property for the cultivation of cannabis plants, there was a breach by the Respondent of the covenant in clause 3.23 not to use nor permit the use of the Property for any purpose whatever other than a private residence in single occupation.

36. Details are scant on how any adjoining or neighbouring premises were affected by the activity. For that reason, I do not have sufficient information to conclude that a nuisance also arose to neighbours. That does not negate the breach of clause 3.23 already found. Not all components must be met with the covenant drafted to encompass more than one way in which a breach may occur in the alternative.

37. Having found insufficient evidence of nuisance for clause 3.23, it similarly follows that the same conclusion is reached on clause 3.24. In addition, there is no suggestion or evidence that the cannabis operations were undertaken by "*the Leaseholder's guests lodgers sub-tenants or members of the Leaseholder's household*" for clause 3.24 to be breached.

38. On the basis of the evidence and findings as summarised above, the Tribunal determines that there has been a breach of covenant by the Respondent of clauses 3.14.1 and 3.23 of the lease.

39. No application for a refund of fees was made.

Name: Judge K. Saward Date: 4 March 2024

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).