



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case reference : **LON/00AD/LBC/2021/0083 P**

Property : **Flat 15, Pointer Close, Crossway, North
Thameshead, London, SE28 8PN**

Applicant : **Eastpoint Block A RTM Company
Limited**

Representative : **Lazarev Cleaver LLP**

Respondent : **Akehinde Olufunlola Otubaga**

Type of application : **Determination of an alleged breach of
covenant**

**Tribunal
member(s)** : **Judge Sheftel**

Date of decision : **28 March 2022**

DECISION ON JURISDICTION

Decision

1. **For the reasons set out below, it is determined that the tribunal has no jurisdiction to hear the application and accordingly it is struck out pursuant to rule 9(3)(e) of the 2013 Rules.**

The application

2. By application dated 25 October 2021 the Applicant seeks a determination under subsection 168(4) of the Commonhold and Leasehold Reform Act 2002 (the “2002 Act”) that the Respondent, tenant is in breach of two covenants contained in the lease.

3. In particular, the Applicant asserts that the Respondent has allowed her subtenant to use the premises to conduct a business, which the lease prohibits. The Applicant also asserts that the subtenant regularly barbeques on the premises for prolonged periods of time, causing a nuisance to other tenants and occupiers.

The issue on jurisdiction

4. The Applicant is a right to manage company which is said to have acquired the right to manage the premises.
5. Directions for the progress of the application were issued by the tribunal on 17 January 2022.
6. However, by email to the parties dated 18 February 2022, the tribunal expressed a preliminary view that the provisions of the 2002 Act do not allow for an RTM company (as opposed to a landlord) to make an application for a declaration under section 168 of the 2002 Act. If correct, the tribunal would consequently, have no jurisdiction to determine the application. The email invited the Applicant to respond by 3 March 2022 after which date the application would be reconsidered, including whether to strike out the case under rule 9((2)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.
7. No response has been received to the tribunal's communication.
8. For the avoidance of doubt, rule 9(3)(e) provides that The tribunal may strike out the whole or part of the proceedings or case where "*the tribunal considers there is no reasonable prospect of the applicant's proceedings or case, or part of it, succeeding*".

Discussion

9. The relevant statutory provisions are set out in the Appendix to this Decision.
10. Pursuant to section 168(4) of the 2002 Act, an application under section 168 of the 2002 Act may be made by 'a landlord'.
11. Although section 96 of the 2002 Act provides that management functions of a landlord under leases are transferred to the RTM company upon

acquisition of the right to manage, this does not make the RTM company the 'landlord'. There does not appear to be anything in section 112 (Definitions) to suggest that the reference to 'landlord' in section 168 is to or includes the RTM company. Moreover, Schedule 7 to the 2002 Act, which sets out numerous statutory provisions where reference to landlord or lessor should be construed as reference to the RTM company, does not include reference to section 168 of the 2002 Act.

12. Further, section 96(6) of the 2002 Act confirms that management functions acquired by the RTM does not apply in relation to "functions relating to re-entry or forfeiture".
13. There is perhaps some uncertainty caused by section 100 of the 2002 Act. Section 100 applies to enforcement of 'untransferred' tenant covenants, i.e. a covenant falling to be complied with by a tenant under the lease which, apart from this section, would not be enforceable by the RTM company (section 100(4)). Section 100(2) provides that untransferred tenant covenants are enforceable by the RTM company, as well as by any other person by whom they are enforceable apart from this section, in the same manner as they are enforceable by any other such person. This would suggest that the covenants in question in the present case, would be enforceable by the RTM company. However, section 100(3) of the 2002 Act provides that "... *the RTM company may not exercise any function of re-entry or forfeiture*".
14. The issue is therefore whether bringing an application under section 168(4) of the 2002 Act amounts to (i) enforcement of a covenant (which arguably can be done by an RTM company under section 100(2)) or (ii) is part of the exercise of a function of re-entry or forfeiture (which cannot by virtue of section 100(3)).
15. In my view, an application under section 168(4) of the 2002 Act falls into the latter category: it does not seek to *enforce* the covenant (for example by way of injunction), but instead merely provides for the making of a declaration that a breach of covenant occurred, which by virtue of section 168(1) of the 2002 Act is a necessary pre-condition to the service of a

notice under section 146 of the Law of Property Act 1925, itself a pre-condition to forfeiture.

16. Such conclusion is arguably also consistent with section 101(2) of the 2002 Act, which provides that: “The RTM company must (a) keep under review whether the tenant covenants of leases of the whole any part of the premises are being complied with and (b) report to any person who is landlord under such a lease any failure to comply with any tenant covenant of the lease.”
17. As such, it is considered that the provisions of the 2002 Act relating to an application under section 168(4) of the 2002 Act, from which the tribunal derives its jurisdiction, do not allow for a claim under section 168 of the 2002 Act to be brought by an RTM company. It is recognised that such a conclusion is no doubt frustrating for a party in the position of the Applicant, although as noted above, section 100(3) of the 2002 Act would appear to indicate that the RTM company could bring proceedings to enforce such covenants.
18. Accordingly, for the reasons set out above, it is determined that the tribunal has no jurisdiction to hear the application and accordingly it is struck out pursuant to rule 9(3)(e) of the 2013 Rules.

Name: Judge Sheftel

Date: 28 March 2022

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).

Appendix – relevant provisions of the Commonhold and Leasehold Reform Act 2002

Section 168 No forfeiture 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

Section 96 Management functions under leases

(1) This section and section 97 apply in relation to management functions relating to the whole or any part of the premises.

(2) Management functions which a person who is landlord under a lease of the whole or any part of the premises has under the lease are instead functions of the RTM company.

(3) And where a person is party to a lease of the whole or any part of the premises otherwise than as landlord or tenant, management functions of his under the lease are also instead functions of the RTM company.

(4) Accordingly, any provisions of the lease making provision about the relationship of—

(a) a person who is landlord under the lease, and

(b) a person who is party to the lease otherwise than as landlord or tenant, in relation to such functions do not have effect.

(5) “Management functions” are functions with respect to services, repairs, maintenance, improvements, insurance and management.

(6) But this section does not apply in relation to—

(a) functions with respect to a matter concerning only a part of the premises consisting of a flat or other unit not held under a lease by a qualifying tenant, or

(b) functions relating to re-entry or forfeiture.

(7) An order amending subsection (5) or (6) may be made by the appropriate national authority.

Section 100 Enforcement of tenant covenants

(1) This section applies in relation to the enforcement of untransferred tenant covenants of a lease of the whole or any part of the premises.

(2) Untransferred tenant covenants are enforceable by the RTM company, as well as by any other person by whom they are enforceable apart from this section, in the same manner as they are enforceable by any other such person.

(3) But the RTM company may not exercise any function of re-entry or forfeiture.

(4) In this Chapter “*tenant covenant*”, in relation to a lease, means a covenant falling to be complied with by a tenant under the lease; and a tenant covenant is untransferred if, apart from this section, it would not be enforceable by the RTM company.

(5) Any power under a lease of a person who is—

(a) landlord under the lease, or

(b) party to the lease otherwise than as landlord or tenant,

to enter any part of the premises to determine whether a tenant is complying with any untransferred tenant covenant is exercisable by the RTM company (as well as by the landlord or party).

Section 101 Tenant covenants: monitoring and reporting

(1) This section applies in relation to failures to comply with tenant covenants of leases of the whole or any part of the premises.

(2) The RTM company must—

(a) keep under review whether tenant covenants of leases of the whole or any part of the premises are being complied with, and

(b) report to any person who is landlord under such a lease any failure to comply with any tenant covenant of the lease.

(3) The report must be made before the end of the period of three months beginning with the day on which the failure to comply comes to the attention of the RTM company.

(4) But the RTM company need not report to a landlord a failure to comply with a tenant covenant if—

(a) the failure has been remedied,

(b) reasonable compensation has been paid in respect of the failure, or

(c) the landlord has notified the RTM company that it need not report to him failures of the description of the failure concerned.

Section 112 Definitions

(1) In this Chapter—

[

“appropriate *tribunal*” means—

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

(b) in relation to premises in Wales, a leasehold valuation tribunal;

]

“appurtenant *property*”, in relation to a building or part of a building or a flat, means any garage, outhouse, garden, yard or appurtenances belonging to, or usually enjoyed with, the building or part or flat,

“*copy*”, in relation to a document in which information is recorded, means anything onto which the information has been copied by whatever means and whether directly or indirectly,

“document” means anything in which information is recorded,

“dwelling” means a building or part of a building occupied or intended to be occupied as a separate dwelling,

“*flat*” means a separate set of premises (whether or not on the same floor)—

(a) which forms part of a building,

(b) which is constructed or adapted for use for the purposes of a dwelling, and

(c) either the whole or a material part of which lies above or below some other part of the building,

“*relevant costs*” has the meaning given by section 18 of the 1985 Act,

“*service charge*” has the meaning given by that section, and

“*unit*” means—

(a) a flat,

(b) any other separate set of premises which is constructed or adapted for use for the purposes of a dwelling, or

(c) a separate set of premises let, or intended for letting, on a tenancy to which Part 2 of the Landlord and Tenant Act 1954 (c. 56) (business tenancies) applies.

(2) In this Chapter “*lease*” and “*tenancy*” have the same meaning and both expressions include (where the context permits)—

- (a) a sub-lease or sub-tenancy, and
 - (b) an agreement for a lease or tenancy (or for a sub-lease or sub-tenancy),
- but do not include a tenancy at will or at sufferance.
- (3) The expressions “*landlord*” and “*tenant*”, and references to letting, to the grant of a lease or to covenants or the terms of a lease, shall be construed accordingly.
- (4) In this Chapter any reference (however expressed) to the lease held by the qualifying tenant of a flat is a reference to a lease held by him under which the demised premises consist of or include the flat (whether with or without one or more other flats).
- (5) Where two or more persons jointly constitute either the landlord or the tenant or qualifying tenant in relation to a lease of a flat, any reference in this Chapter to the landlord or to the tenant or qualifying tenant is (unless the context otherwise requires) a reference to both or all of the persons who jointly constitute the landlord or the tenant or qualifying tenant, as the case may require.
- (6) In the case of a lease which derives (in accordance with section 77(5)) from two or more separate leases, any reference in this Chapter to the date of the commencement of the term for which the lease was granted shall, if the terms of the separate leases commenced at different dates, have effect as references to the date of the commencement of the term of the lease with the earliest date of commencement.

Schedule 7 Right to Manage: statutory provisions

Covenants not to assign etc.

1 (1) Section 19 of the Landlord and Tenant Act 1927 (covenants not to assign without approval etc.) has effect with the modifications provided by this paragraph.

(2) Subsection (1) applies as if—

- (a) the reference to the landlord, and
- (b) the final reference to the lessor,

were to the RTM company.

(3) Subsection (2) applies as if the reference to the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or neighbouring premises belonging to the landlord were omitted.

(4) Subsection (3) applies as if—

- (a) the first and final references to the landlord were to the RTM company, and
- (b) the reference to the right of the landlord to require payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or neighbouring premises belonging to him were omitted.

Defective premises

2 (1) Section 4 of the Defective Premises Act 1972 (c. 35) (landlord’s duty of care by virtue of obligation or right to repair demised premises) has effect with the modifications provided by this paragraph.

(2) References to the landlord (apart from the first reference in subsections (1) and (4)) are to the RTM company.

(3) The reference to the material time is to the acquisition date.

3(1) The obligations imposed on a lessor by virtue of section 11 (repairing obligations in short leases) of the Landlord and Tenant Act 1985 (c. 70) (referred to in this Part as “the 1985 Act”) are, so far as relating to any lease of any flat or other unit contained in the premises, instead obligations of the RTM company.

(2) The RTM company owes to any person who is in occupation of a flat or other unit contained in the premises otherwise than under a lease the same obligations as would be imposed on it by virtue of section 11 if that person were a lessee under a lease of the flat or other unit.

(3) But sub-paragraphs (1) and (2) do not apply to an obligation to the extent that it relates to a matter concerning only the flat or other unit concerned.

(4) The obligations imposed on the RTM company by virtue of sub-paragraph (1) in relation to any lease are owed to the lessor (as well as to the lessee).

(5) Subsections (3A) to (5) of section 11 have effect with the modifications that are appropriate in consequence of sub-paragraphs (1) to (3).

(6) The references in subsection (6) of section 11 to the lessor include the RTM company; and a person who is in occupation of a flat or other unit contained in the premises otherwise than under a lease has, in relation to the flat or other unit, the same obligation as that imposed on a lessee by virtue of that subsection.

(7) The reference to the lessor in section 12(1)(a) of the 1985 Act (restriction on contracting out of section 11) includes the RTM company.

Service charges

4 (1) Sections 18 to 30 of the 1985 Act (service charges) have effect with the modifications provided by this paragraph.

(2) References to the landlord are to the RTM company.

(3) References to a tenant of a dwelling include a person who is landlord under a lease of the whole or any part of the premises (so that sums paid by him in pursuance of section 103 of this Act are service charges).

(4) Section 22(5) applies as if paragraph (a) were omitted and the person referred to in paragraph (b) were a person who receives service charges on behalf of the RTM company.

(5) Section 26 does not apply.

Right to request information on insurance

5 (1) Section 30A of, and the Schedule to, the 1985 Act (rights of tenants with respect to insurance) have effect with the modifications provided by this paragraph.

(2) References to the landlord are to the RTM company.

(3) References to a tenant include a person who is landlord under a lease of the whole or any part of the premises and has to make payments under section 103 of this Act.

(4) Paragraphs 2(3) and 3(3) of the Schedule apply as if paragraph (a) were omitted and the person referred to in paragraph (b) were a person who receives service charges on behalf of the RTM company.

Managing agents

6 Section 30B of the 1985 Act (recognised tenants’ associations to be consulted about landlord’s managing agents) has effect as if references to the landlord were to the RTM company (and as if subsection (6) were omitted).

Right of first refusal

7 Where section 5 of the 1987 Act (right of first refusal: requirement that landlord serve offer notice on tenant) requires the landlord to serve an offer notice on the qualifying tenants of the flats contained in the premises, he must serve a copy of the offer notice on the RTM company.

Appointment of manager

8 (1) Part 2 of the 1987 Act (appointment of manager by ... tribunal) has effect with the modifications provided by this paragraph.

(2) References to the landlord are to the RTM company.

(3) References to a tenant of a flat contained in the premises include a person who is landlord under a lease of the whole or any part of the premises.

(4) Section 21(3) (exception for premises where landlord is exempt or resident or where premises are functional land of a charity) does not apply.

(5) The references in paragraph (a)(i) of subsection (2) of section 24 to any obligation owed by the RTM company to the tenant under his tenancy include any obligations of the RTM company under this Act.

(6) And the circumstances in which the appropriate tribunal may make an order under paragraph (b) of that subsection include any in which the RTM company no longer wishes the right to manage the premises to be exercisable by it.

(7) The power in section 24 to make an order appointing a manager to carry out functions includes a power (in the circumstances specified in subsection (2) of that section) to make an order that the right to manage the premises is to cease to be exercisable by the RTM company.

(8) And such an order may include provision with respect to incidental and ancillary matters (including, in particular, provision about contracts to which the RTM company is a party and the prosecution of claims in respect of causes of action, whether tortious or contractual, accruing before or after the right to manage ceases to be exercisable).

Right to acquire landlord's interest

9 Part 3 of the 1987 Act (compulsory acquisition by tenants of landlord's interest) does not apply.

Variation of leases

10 Sections 35, 36, 38 and 39 of the 1987 Act (variation of long leases relating to flats) have effect as if references to a party to a long lease (apart from those in section 38(8)) included the RTM company.

Service charges to be held in trust

11(1) Sections 42 to 42B of the 1987 Act (service charge contributions to be held in trust and in designated account) have effect with the modifications provided by this paragraph.

(2) References to the payee are to the RTM company.

(3) The definition of "tenant" in section 42(1) does not apply.

(4) References to a tenant of a dwelling include a person who is landlord under a lease of the whole or any part of the premises.

(5) The reference in section 42(2) to sums paid to the payee by the contributing tenants by way of relevant service charges includes payments made to the RTM company under section 94 or 103 of this Act.

(6) Section 42A(5) applies as if paragraph (a) were omitted and the person referred to in paragraph (b) were a person who receives service charges on behalf of the RTM company.

Information to be furnished to tenants

12 (1) Sections 46 to 48 of the 1987 Act (information to be furnished to tenants) have effect with the modifications provided by this paragraph.

(2) References to the landlord include the RTM company.

(3) References to a tenant include a person who is landlord under a lease of the whole or any part of the premises; and in relation to such a person the reference in section 47(4) to sums payable to the landlord under the terms of the tenancy are to sums paid by him under section 103 of this Act.

Statutory duties relating to certain covenants

13(1) The Landlord and Tenant Act 1988 (c. 26) (statutory duties in connection with covenants against assigning etc.) has effect with the modifications provided by this paragraph.

(2) The reference in section 1(2)(b) to the covenant is to the covenant as it has effect subject to section 98 of this Act.

(3) References in section 3(2), (4) and (5) to the landlord are to the RTM company.

Tenants' right to management audit

14(1) Chapter 5 of Part 1 (tenants' right to management audit by landlord) of the Leasehold Reform, Housing and Urban Development Act 1993 (c. 28) (referred to in this Part as "the 1993 Act") has effect with the modifications provided by this paragraph.

(2) References to the landlord (other than the references in section 76(1) and (2) to "the same landlord") are to the RTM company.

(3) References to a tenant include a person who is landlord under a lease of the whole or any part of the premises and has to make payments under section 103 of this Act.

(4) Section 80(5) applies as if the reference to a person who receives rent were to a person who receives service charges.

Right to appoint surveyor

15(1) Section 84 of the Housing Act 1996 (c. 52) and Schedule 4 to that Act (apart from paragraph 7) (right of recognised tenants' association to appoint surveyor to advise on matters relating to service charges) have effect as if references to the landlord were to the RTM company.

(2) Section 84(5) and paragraph 4(5) of Schedule 4 apply as if the reference to a person who receives rent were to a person who receives service charges.