FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	MAN/00BY/LBC/2023/0020
Property	Basement 40-42 Sydenham Avenue Liverpool L17 3X
Applicant	Helpfavour Limited
Representative	Benjamin Hammond, Compton Group
Respondent	Thomas James Tolcher and Caroline Jennings
Representative	Mr Neil Kelly, MSB Solicitors
Type of Application	Application for a Determination that a Breach of Covenant has occurred - Section 168(4) Commonhold and Leasehold Reform Act 2002
Tribunal Members	Judge R Watkin Mr Ian James MRICS
Date and Venue of Hearing	10 October 2024
Date of Decision	5 December 2024

DECISION

Decision

The Tribunal determines that it has jurisdiction, and that the Respondent has not breached the covenants of the Lease. Therefore, the application dated 1 September 2023 is dismissed.

The Parties

1. The Applicant, Helpfavour Limited, has been the registered proprietor of the freehold property known as 40 and 42 is Sydenham Ave, Liverpool L17 3X (the "**Property**") registered under title number MS326414 at HM Land Registry since 3 August 2020.

2. The Respondents are Mr Thomas James Tolcher and Ms Caroline Jennings, the registered proprietors of the leasehold of the Basement flat, 40-42 Sydenham Avenue Liverpool L17 3X (the "**Basement**") registered under title number MS674386 at HM Land Registry on 18 September 2019 (the "**Lease**").

Application

3. The Application dated 1 September 2023 is brought under section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("**s.168(4)**"). However, the Applicant first contends that the Tribunal should decline to deal with the Application on the basis that it has no jurisdiction.

4. S.168(4) states:

> *(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 (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)*
>
> *(4) ..*
>
> *(5) 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. The Applicant contends that the Tribunal will not have jurisdiction if the Basement is not a dwelling for the purposes of s.168(4). Pursuant to s.167(5) Commonhold and Leasehold Reform Act 2002, "dwelling", for the purposes of s.168(4) is defined in s.38 Landlord and Tenant Act 1985 ("**s.38**") which states:

> *"a dwelling" means a building or part of a building occupied or intended to be occupied as a separate dwelling together with any yard garden, out houses and appurtenances belonging to it or usually enjoyed with it."*

6. If the Basement is not a dwelling, the Applicant is not required to comply with s.168(1) and can serve a s.146 notice without first obtaining a determination that a breach has occurred.

7. If the Tribunal concludes that the Basement is a dwelling, then the Applicant seeks a determination under s.168(4) that there has been a breach of the Lease.

Issues

8. There are two issues to be determined:
   a) Does the Tribunal have jurisdiction under s.168(4); and
   b) If so, has there been a breach of the Lease.

Documents

9. The Tribunal had the opportunity to consider a bundle and a supplementary bundle. The Tribunal also had an opportunity to view the Basement and the exterior of the Property at a site inspection (the "Site Inspection).

10. Where there are references to page numbers within this decision, they are references to the pages of the bundle and supplemental bundle that are numbered sequentially up to page 195.

Background

11. The Respondents purchased the Lease of the Basement on 10 July 2019 from the Applicant's predecessor in title, Cornelius Enterprises Limited (the "**Previous Owner**"). The Lease is for a term of 125 years from 25 December 2017. A premium of £45,000 was paid and the rent was £190 per annum, reviewable every 10 years.

12. At the same time as purchasing the Lease, the Respondents entered into a licence dated 10 July 20219 (the "**Licence**") with the Previous Owner. Within the Licence, clause 1.2 states:

> *"References to the **Landlord** include a reference to the person entitled for the time being to the immediate reversion to the lease. References to the tenant include a reference to its successors in title and assigns."*

13. The Applicant purchased the freehold of the Property on 16 July 2020.

14. At the time of purchasing the freehold, it is agreed that the Basement was a "shell" – with the walls stripped back to brick - and in the same condition as it was at the site inspection attended by the Tribunal on the day of the hearing.

15. The Property is a four-storey red brick building in its own grounds. It was originally two semi-detached properties which have been combined to create a residential apartment block. The office copies of the Land Registry title show 8 subleases registered against the freehold.

16. Whilst not part of the present application, by separate proceedings, the Applicants are understood to be claiming possession of a garage (the "**Garage**"), originally part of the same freehold title as the Property. The Respondents purchased the Garage for the price of £30,000. The Applicants state that the transfer of the Garage to the Respondents is not binding on them as they purchased the freehold prior to the transfer of the Garage being registered. There is a dispute in relation to whether the Respondents were in actual occupation of the Garage at the time of registration of the freehold to the Applicants. This is not before the Tribunal for the purposes of these proceedings.

Evidence

17. Although neither party had provided the Tribunal with witness statements prior to the hearing, the Tribunal considered that it would be helpful to hear witness evidence. As Mr Tolcher was present, and neither party objected, he gave evidence in relation to his understanding of the situation.

18. Mr Tolcher came across as pleasant and open with the Tribunal while also clearly being nervous and concerned. He confirmed that he and the Previous Owners understood that the Basement would be let to him for the purposes of development into, and use as, a residential dwelling or dwellings. As this was apparent from the documents before the Tribunal, this was accepted by the Tribunal.

19. Mr Tolcher stated that he was not aware that planning permission had to be obtained by any particular date and that if there was an implied date for the works to be done by, he did not consider that any such date had passed.

20. Mr Tolcher accepted that he had purchased shortly prior to the pandemic lockdown. The Tribunal notes that the covid lockdown and business disruption did not commence until March 2020 and the Lease was granted in July 2019. However, the Tribunal accepts that delays may have occurred at the Council following the submission of the planning application due to issues arising from the pandemic. Again, no evidence to the contrary was provided.

SUBMISSIONS AND ANALYSIS

21. At the hearing, the Applicant was represented by Mr Hammond and the Respondent by Mr Kelly, both oral and written submissions were received from both.

22. Both parties agreed that the starting point in relation to whether the Tribunal has jurisdiction is whether the Basement falls within the definition at s.38 which is:

> *""dwelling" means a building or part of a building occupied or intended to be occupied as a separate dwelling together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it"*

23. The parties do not dispute that the Basement is part of a building as it is the basement of the two larger houses. Both parties also agree that the Basement is not presently occupied as a dwelling.

24. The Applicant relies on a decision of this Tribunal (***Tapestart Limited v Afzal and Akhtar (12 March 2019***)) ("***Tapestart")***. This is a first instance decision which considered a property was not a dwelling as "*no significant part of the former dwelling remains*". Tapestart Limited is understood to be a company within the same group (the Compton Group) as the Applicant. The decision is not binding on this Tribunal, and, in event, it has limited bearing on the present case as:

    a) the Basement is not understood to have previously been a separate dwelling, only part of a dwelling, as a basement of the original house.

    b) the intention of the parties in relation to the property in Tapestart is not stated and, therefore, the Tribunal cannot consider or compare the parties' intention (see the definition at s.38).

25. The Applicant also contends that the Basement is to be used as two dwellings and not one. Therefore, that it cannot satisfy the definition of a dwelling. The Applicant refers to the case of ***Buckley and Bowerbeck Properties [2009]*** **01 EG 78,** in relation to the question of whether the proposed dwellings will be separate dwellings.

26. Both parties also referred to a number of other cases in relation to the meaning of "*dwelling*", but most do not relate to the definition in s.38 and do not offer the Tribunal any guidance in interpreting the words "*intended to be occupied*". These are considered further below but, in the interests of brevity, are not set out in full.

27. The Applicant also suggests that there cannot be any real intention of the Basement being used as a separate dwelling as the Respondent will not be able to implement any planning permission. The Applicant contends that as the Applicant's consent for structural works and works outside the demise will not be provided, the Respondent will not be able

to carry out the conversion works or provide a bin store (which is likely to be a condition of the planning permission).

28. In the event that the Tribunal does have jurisdiction, the Applicant contends that the following covenants within the Lease have been breached:

    a) paragraph 10.1 of Schedule 4 to the Lease which reads:

    "To keep the Property in good and substantial repair and condition through the term…" and

    b) paragraph one of schedule 5 which reads:

    "Not to use the Property for any purposes other than for Permitted Use…"

29. The Permitted Use as defined by the Lease is:

    "Permitted Use: as a single private dwelling save that once the additional apartment pursuant to 9.1 of Schedule 4 has been created the Permitted Use shall extend to that additional apartment so that the permitted use shall extend to use as two single dwellings."

30. The Applicant contends that the Respondent is in breach of the aforementioned covenants as the basement is in an unfinished state and, therefore, not in good repair and condition, and is not being used as a dwelling but used for the storage of materials.

31. In relation to the repairing covenant, the Applicant relies on the well-known case of ***Proudfoot v Hart (1890) [1890] 25 QBD 42*** in which it was held that "*to keep*" has the same meaning as "*to put*" to support their contention that the Respondent is obliged to place the Basement in *"good and substantial repair and condition"*. The Applicant suggests that the Basement is not in such condition due to the fact that it should be implied or inferred that the works to convert the dwelling must have been carried out within a reasonable period and that any such period has now expired.

32. The Respondent's approach was on a more practical level and invited the Tribunal to consider the Lease, together with the Licence and to conclude that the Respondent had acted throughout in accordance with the actual agreement with the Previous Owner and that, in so far as there was an obligation for the conversion of the Basement into dwellings within a reasonable time, that the reasonable time had not yet expired. It was noted that time had not been made of the essence by either party.

33. The Respondents contend that it would be unconscionable for the Applicant to deny the terms of the Licence. Thereby, seeming to refer to a constructive trust or proprietary estoppel type approach. The Respondent was not asked at the hearing whether he would have

proceeded with the purchase if he had been aware that the landlord would be entitled to immediately forfeit the Basement. However, in response, the Applicant, through Mr Hammond at the hearing, did acknowledge that it would not have been appropriate for the Basement to have been forfeited immediately and, therefore, that there was an implied term providing that the works should have been completed within a reasonable period.

34. The Respondent also considers that the Licence is binding on the Applicant. The Respondent states that the intention of the parties was for it to be binding, the Applicant was aware of the Respondent's occupation of the Basement and was provided a copy of the Licence prior to purchase. The Respondent contends that the definition of "landlord" within the Licence would result in the Licence being binding on the Applicant.

DECISION

Jurisdiction

35. The Tribunal will not have jurisdiction if the Basement is not a dwelling for the purposes of s.168(4), as defined in s.38.

36. The Basement is not occupied. This is accepted by both parties. Therefore, the Tribunal has no need to consider any of the authorities relating to whether it is occupied. The Tribunal will, therefore, focus on the second limb of the definition. That is, whether the Basement is "*intended to be occupied as a separate dwelling …"*

37. The parties have each provided numerous authorities and cases that relate to whether properties are dwellings in a variety of circumstances. However, the majority of these do not concern the definition of a dwelling for the purposes of s.168(4) and s.38. Therefore, whilst each one has been considered, as none have any impact on this decision, the Tribunal has not referred to them individually within this decision.

38. For example, the definition set out at paragraph 18 of the Schedule 4ZA of the Finance Act 2003 does not contain comparable provisions. It defines a dwelling for its purposes as follows:

> *"A building or part of a building counts as a dwelling if—*
>
> *(a) it is used or suitable for use as a single dwelling, or*
>
> *(b) it is in the process of being constructed or adapted for such use."*

39. The Tribunal does not consider the case of ***Buckley and Bowerbeck Properties [2009]*** 01 EG 78 which does relate to a dwelling under s.38, to be of significance as it relates to a property in which consulting rooms which were connected internally to a residential maisonette and, therefore, the rooms could not be classed as a separate dwelling or dwellings.

40. The plans on page 191 show that the intention is for the two apartments to be created within the Basement to have separate accesses with no common areas. The Tribunal, therefore, accepts that the two dwellings proposed are to be two separate dwellings.

41. In relation to the issue of whether the use of the Basement for two dwellings would prevent the use "as a separate dwelling", section 6 of the Interpretation Act 1978 provides:

> *"In any Act, unless the contrary intention appears…words in the singular include the plural and words in the plural include the singular".*

42. Therefore, it is immaterial whether the Basement is intended to be occupied as a separate dwelling or as separate dwellings. **Oakfern Properties Ltd v Ruddy [2006] EWCA Civ 1389 ("Oakfern")** is authority for the premise that a tenant can be a tenant of a separate dwelling even though he may also own the whole building (paragraph 73, Parker LJ). Therefore, it is not necessary for an owner of a separate dwelling to only own that unit and no other part of the building in which it is situated.

43. In the present case, the Tribunal accepts that the parties to the Lease, including the Respondent, intended the Basement to be occupied as a dwelling or dwellings in the future. This is evident from the Lease, the Licence, the premium paid, the nature of the Property and the circumstances. Therefore, based on the ordinary English meaning of the words "*intended to be occupied*", the Tribunal considers that the Basement was, at the time of the Lease, intended to be occupied (at some point in the future) as a dwelling following the wording in s.38.

44. The Tribunal notes that Parliament has chosen to use the words "*intended to be occupied*" for the purposes of s.168/s.38) and this is likely to be due to the different meaning provided by each definition. Therefore, it is important that the Tribunal recognises the distinction. The word "suitable" would seem to relate to the present condition of any dwelling, whereas the word "*intended*" suggests something that may occur in the future.

45. Whilst the Tribunal has not been referred to any authority in relation to the meaning of the word "*intended*", the word "*intends*" is used elsewhere in legislation. In particular, in s.30(1)(f) and (g) of the Landlord and Tenant Act 1954 which provides that a landlord may oppose the grant of a new lease where "*the landlord intends to demolish or reconstruct the premises*" (s.30(1)(f)) or "*the landlord intends to occupy the holding for the purposes … of a business*" (g) (s.30(1)(g)).

46. The approach to "*intends*" in the 1954 Act was considered in ***Macey v Pizza Express (Restaurants) Ltd*** where the High Court stated that the requisite intention had to be more than mere contemplation and had to be "*firm and settled*". However, the intention also had to be capable

of achievement (***Cunliffe v Goodman [1950] 2 K.B. 237*** considered).

47. Whilst s.38 does not stipulate which party should hold the intention for the property to be utilised as a dwelling, as it is only the Respondents who are in control of the Basement, the Tribunal considers that if the Respondents are able to prove that the Basement is more likely than not to be developed, if not forfeited, that would be sufficient.

48. On the evidence of the Respondents and the clear intention set out in the Lease, the Tribunal accepts that the Respondent to the Lease had a "*firm and settled*" intention for the Basement to be used as a dwelling or dwellings in the future. The reality may be that whilst the Previous Owner was clearly agreeable to the development of the Basement, it may not have been concerned whether the conversion proceeded or not. This may be the reason why no time period had been specified for the obtaining of planning permission.

49. In relation to whether the intention is capable of achievement, the Tribunal notes that some issues have been encountered in relation to the application for planning permission. For example, it is suggested that planning permission may be conditional on a bin store being provided and that this may not be within the Respondents power to provide. However, it is noted that there is a refuse area which is part of the common parts under the Lease which may suffice to satisfy and condition. There may also be other ways of dealing with refuse for the purposes of the planning authority. For example, it may be possible for the Garage or part of it to be used for bins if it falls within the Respondent's ownership. Alternatively, it may be possible for the condition to be varied if the planning authority is made aware of the issue.

50. The Applicant has also stated that the conversion of the Basement could not go ahead as the Respondents will require consent under the Lease from the Applicants. Pursuant to the Lease, consent for alternations to the Basement is not to be unreasonably withheld unless the alternations are structural. Whilst reference has been made to works that could be considered structural, no evidence was given in relation to whether the works can be carried out without any structural works. On the balance of probabilities, the Tribunal concludes that, even if it were the case that the existing plans require structural works, the conversion can take place without structural works being carried out. The Tribunal does not consider that the Applicants would, or would be able to, withhold consent for the conversion in the absence of structural works being necessary.

51. The Tribunal is mindful that s.168(4) only applies to a dwelling which is subject to a long lease in any event and, therefore, the likely types of buildings are limited. The Tribunal reflected on whether two units within a standard block of flats that had been stripped out and were not presently suitable for occupation as dwellings, would be subject to the

provisions of s.168. The Tribunal considered that the intention for the units to be used as dwellings in the future, in those circumstances, would result in the protection provided by s.168 continuing. The Basement in the present matter is akin to any other unit or units in an apartment block that may not yet be developed or be subject to a scheme of refurbishment. It cannot be appropriate that a leaseholder loses the protection simply due to having refurbishment works carried out.

52. On balance, the Tribunal is satisfied that the Respondent does have a firm and settled intention to use the Basement as a dwelling or dwellings and that such use is achievable. Therefore, whilst there is no provision within the Commonhold and Leasehold Reform Act 2002 that suggests that "*intention*" should be interpreted in accordance with the position in 1954, as the parties have not been able to put forward any alternative, the Tribunal considers that this approach is a reasonable and proper approach in the circumstances and accepts that it has jurisdiction.

Breach

53. On the basis that the Tribunal determines that it has jurisdiction, it is necessary to consider whether the Lease has been breached.

54. It is alleged that the Lease has been breached in two ways. Firstly, that the Respondent has failed to comply with the repairing covenant and secondly that the tenant has failed to comply with the user covenant.

Repairing covenant

55. The Tribunal interprets the Lease in accordance with the basic principles of construction as set out by the Supreme Court in *Arnold v Britton* (2015) UKSC 36 where, at paragraph 15, Lord Neuberger said:

> *"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 Hoffman in Chartbrook Ltd v Persimmon Homes Ltd (2009) UKHL 38, (2009) 1 AC 1101, para 14. And it does so by focusing 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 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."*

56. Context is therefore very important. Lord Neuberger went on to emphasise at paragraph 17:

> *"the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g in Chartbrook (2009)* AC 1101, paras 16-26) *should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most likely to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language that they use in a contract. And again, save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision."*

57. The Tribunal is required to assess whether there has been a breach of the Lease on the balance of probabilities *(**Vanezis and another v Ozkoc and others (2018) All ER(D) 52**)*.

58. Following an analysis of the Lease, in light of the relevant case law as referred to above, the Tribunal considers that it cannot have been the intention of the parties at the date of the Lease for the Respondents to be immediately in breach of either the user covenant or the repairing covenant on purchase. So as to put it at immediate risk of forfeiture.

Repairing covenant

59. In relation to the repairing covenant, the Tribunal accepts the submission of the Applicant in relation to ***Proudfoot v Hart (1890) [1890] 25 QBD 42*** in which it was held that "to keep" has the same meaning as "to put".

60. The Tribunal has considered the approach at paragraph 9-32 of Dilapidations - The Modern Law and Practice 7th ed which states:

> *"There may be cases where it is implicit in the lease itself, or clear from the surrounding circumstances, that the standard of repair is not fixed at the date of the lease, but instead varies according to the nature of the premises from time to time. An example might be a lease of an old warehouse building which expressly entitles the tenant, if he so desires and is able to obtain the requisite permissions, to demolish the premises and erect a new office building on the site. The standard of repair relating to the office building, once built, is likely to be different to that which applied to the former warehouse. Similarly, in appropriate circumstances, it may be proper to infer from a licence to carry out alterations an intention to vary the standard of repair to that appropriate for the premises as so altered."*

61. Thus, the Tribunal must construe the terms of the Lease in accordance with the approach set out in ***Arnold v Britton***. Taking into account the background circumstances of the parties having intended that the Basement would be developed in the future, the Tribunal considers that the most appropriate interpretation of the repairing covenant is that the parties intended the covenant to apply in respect of the status of the Basement at any given time. Thus, whilst the Basement is a development site, it should be maintained as a development site and once it is a dwelling, it should be kept in repair as a dwelling. Therefore, the Tribunal does not consider that the repairing covenant has been breached.

User covenant

62. The user covenant would be construed in a similar way. Whilst the terms of the Licence may assist in relation to the interpretation (***Cherry Tree Investments Limited v Landmain Limited[2012]EWCA Civ 736***), even without considering the Licence, it is apparent (from the condition of the Basement) that it cannot have been intended that the Respondent was expected to immediately use the Basement as a dwelling or dwelling on completion of the Lease or that it should otherwise be in constant fear of forfeiture.

63. On balance, therefore, the Tribunal considers that the parties did intend the parties to use the Basement as a dwelling but, to use it as a dwelling, there had to be a period prior to work commencing during which plans would be drawn up and planning permission obtained. Both parties will have been aware of this and, as the Basement is not used for anything other than as a dwelling or the development of a dwelling, the Tribunal does not consider that the user covenant has been breached.

Reasonable time

64. Finally, the Tribunal has considered the Applicant's contention that terms should be implied or inferred to the effect that the works to convert the Basement should have been carried out within a reasonable time and that the time has now expired.

65. This contention is not accepted by the Tribunal as there is no obligation under the Lease that stipulates that the Respondent has to carry out the works of conversion, The Licence provides permission for the works only. Therefore, it would not be appropriate for any term to be implied obliging the Respondent to carry out those works within a certain period of time.

66. The question of whether the Licence is binding on the Applicant has not been considered as it has not been necessary for the purpose of reaching this decision. However, the Tribunal is satisfied that, in the circumstances of the Licence, together with all surrounding circumstances, on the balance of probabilities, the Applicant will be obliged to provide consent for the work (non-structural) necessary for the conversion - in so far as such consent has not already been provided.

Summary of the Decision

67. Following a detailed consideration of the evidence and the submissions of the parties, the Tribunal has determined that the Basement is a dwelling for the purposes of s.168(4) and that the covenant to keep the property in repair and the permitted user clause have not been breached.

Costs

68. Neither party made any application to the Tribunal in respect of costs.

Appeal

If either party is dissatisfied with this decision an application may be made to this Tribunal for permission to appeal to the Upper Tribunal, Property Chamber (Residential Property) on a point of law only. Any such application must be received within 28 days after these reasons have been sent to the parties under Rule 52 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013.

Judge R Watkin

Mr I James MRICS