



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

Case reference: MAN/00BW/LBC/2023/0022

Property: Apartment 16, 229 Wigan Road,
Standish, Wigan, WN1 2RF

Applicant: Ancer Investments Limited

**Applicant's
Representative:** Peter Schickhoff-Brown

Respondent: David Cunningham

Type of Application: Determination under section 168(4) of
the Commonhold and Leasehold Reform
Act 2002

Tribunal Members: Judge J.M.Going
N.Swain MRICS

**Date of
Hearing:** 4 December 2024

Date of Decision: 13 December 2024

DECISION

The Decision

The Tribunal has determined that a breach of the covenant contained in clause 3.20 of the Lease occurred when Mr Cunningham, by his own admission, sublet apartment 16 on the first floor of 229 Wigan Road separately from its storage cupboard/room on the sub-basement floor. This was the sole breach found.

Preliminary and background

1. By an Application dated 9 October 2023 (“the Application”) the Applicant, Ancer Investments Ltd (“Ancer”) together with Wigan Road Management Company Ltd (“the Management Company”) applied to the First-Tier Tribunal Property Chamber (Residential Property) (“the Tribunal”) under Section 168(4) of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) for a determination as to whether a breach or breaches of covenants contained in a lease of the property have occurred.
2. The Tribunal issued Directions on 18 March 2024, setting out a timetable for the submission of statements, relevant documents, correspondence and legal submissions.
3. Ancer’s papers included copies of the Respondent (“Mr Cunningham”)’s Lease, a Deed of Covenant, a lease of Common Parts, registered titles, letters, emails, an advice sheet from Gov.uk, printouts from Companies House, together with its submissions.
4. Mr Cunningham’s papers included submissions, responses and copies of emails and letters.
5. The hearing was set down for 4 December 2024.

The Property

6. The property forms part of 229 Wigan Road, Standish, a purpose-built development of 21 flats constructed in or around 2004. The Tribunal has not inspected it but has been assisted by the external photographs and satellite images that are available on Google Street view. 229 Wigan Road is on a sloping site with 3 floors at the front and 5 at the back. Ancer’s representative, Mr Schickhoff-Brown, who is also one of its two directors, stated at the hearing that expert surveyors specifically employed to measure the various elevations have confirmed that all are less than 11 metres high.

Facts and chronology

7. The following matters are evident from the papers or in the public domain. The existence and contents of the documents that are referred to have not been disputed. What is in dispute is how events should be interpreted.

On 6 May 2005	By a lease ("the Common Parts Lease") made between Ancer Homes Ltd, Ancer's predecessor in title to the freehold of 229 Wigan Road, and the Management Company all external walls floors foundations and roofs and other the common parts of 229 Wigan Road as therein defined were leased to the Management Company for a term of 800 years computed from 1 January 2005. The attestation clause shows that it was signed, as a deed, by Ancer Homes Ltd as the Landlord, by Lynn Stringfellow and Mr Schickhoff-Brown as "Director and Secretary" and by the Management Company as the Tenant, also by Mrs Stringfellow and Mr Schickhoff-Brown as "Director and Secretary". Companies House shows that at that time Mr Schickhoff-Brown and his wife were the sole 2 directors of both Ancer Homes Ltd and the Management Company, and Mr Schickhoff-Brown was the company secretary of both companies.
On 28 September 2006	By a lease ("the Lease") made between Ancer Homes Ltd, as landlord, of the first part, the Management Company of the second part, and Mr Cunningham and Ms Phipson, as tenants, of the third part the property was leased to Mr Cunningham and Ms Phipson for a term of 888 years computed from 1 January 2005. The property is referred to in the Lease as "the Premises" and defined in the First Schedule as "All Those premises known as Apartment 16 : 229 Wigan Road Standish Wigan situate on the first floor of the Building shown edged red on the plan Together with the storage cupboard situate on the sub-basement floor of the Building shown edged red on the plan...".
Also on, or soon after, 28 September 2006	It is understood, but without the actual copy being produced, that the same parties to the Lease completed a Deed of Covenant relating to the maintenance of 229 Wigan Road on the terms set out in the Common Parts Lease.
On 3 October 2006	Mr Cunningham sent an email to Mrs Stringfellow of Ancer Homes Ltd with a snagging list concluding with the words "Having had chance to view the basement storage area again, would it be possible for a lock to be fitted to the door from the main corridor? My storage room is the only one accessible from this anteroom so this is additional space that could be used. I appreciate that I would have to pay the cost of fitting the lock."
On 23 October 2006	Ms Kinane from Ancer Homes Ltd replied confirming (inter alia) "the joiner is hoping to fit the lock and replace the handle some point today, most certainly by the end of the week."

20 April 2007	Land Registry entries show that Ancer purchased the freehold of 229 Wigan Road. Companies House shows that Mr Schickhoff-Brown was then the Company Secretary and that he and his wife have been its 2 sole Directors since its incorporation on 26 November 2003.
3 February 2010	Land Registry entries show the registration of Mr Cunningham as the sole owner of the property.
29 November 2018	Companies House confirms that Ancer Homes Limited was dissolved.
On 17 October 2019	Mr Schickhoff-Brown wrote to Mr Cunningham stating "I hope you are keeping well and gather that the management company has been in touch with you over the lock to the door to the anti-space to the cellar store room. That small area falls within the leased area granted to the Management Company under the Lease of Common Parts and is therefore under their control and management. Therefore your and your tenant should not have put a lock on the corridor door and the anti-space should not be used for storage. With that in mind I should be grateful if you would arrange for the lock to be removed and ensure the space is kept free from storage and goods. The technicalities of your Lease put you in Breach of Lease by those actions but I am sure we will not need to engage along those lines and that you will address the problem as soon as possible...".
On 21 October 2019	Mr Cunningham replied by email stating (inter alia) " I would like to confirm that I have undertaken no works to the basement area save for upkeep, maintenance and general cleaning since I purchased the apartment in 2006....The works that you refer to, namely the fitting of a lock to the outside door fronting on to the basement 2 corridor were undertaken by/on behalf of Ancer Homes Ltd/the developer prior to the legal completion.... at your behest.... I do not see how I can be in breach of my lease given that it was you/your staff/subcontractor who undertook the work prior to the purchase of the property...I am happy to negotiate an outcome satisfactory to all parties but would first like you to acknowledge that the lock was fitted by the developer/landlord prior to me purchasing the apartment in 2006."
On 21 October 2019	Mr Schickhoff-Brown replied "Thank you for your response and if what you say is correct then I can only say two wrongs don't make it right. There is nothing on record that indicates that any authority was given to the site manager to provide a lock to the anti-room door..... the anti-room area as I have advised you is within the Commons parts lease. You will therefore understand

	that you have no authority to have control over the anti-room door off the main corridor or indeed the anti-room area itself other than for access purposes. Therefore by keeping the anti-room door locked this puts you in Breach of Lease whether by default or otherwise and if you are not prepared to relinquish the keys to the Management Company and keep the door permanently unlocked then I will instruct the Management Company to engage a locksmith to access the anti-room area and remove the lock and blank this off to ensure permanent free access to the anti-room area. I look forward to your co-operation and assistance...”.
On 22 October 2019	Mr Cunningham replied “You seem intent on creating an argument over nothing, I have known you for c 15 years and am sorry to see you act in this way. Could I ask what you are trying to achieve other than throw your weight around? If it is simply for me to leave the lock that you fitted unlocked then you could simply ask in a non threatening manner....I will unlock the anteroom door this evening and will continue to liaise in a fully cooperative manner with the management company.
23 January 2023	The Fire safety (England) Regulations 2022 (“the 2022 Regulations”) came into force.
On 12 September 2023	Mr Schickhoff-Brown wrote to Mr Cunningham referring to the “history of correspondence”, stating that he was in breach of the lease and with notice that failure to remedy the breaches within 7 days would result in an application to the Tribunal.
On 8 November 2023	A meeting was held between Mr Cunningham, two directors of the Management Company Mr Schickhoff-Brown , and Mrs Stringfellow.
On 20 May 2024	Ancer and the Management Company submitted the Application to the Tribunal.
Thereafter	and following Mr Cunningham’s reply and Ancer’s response there was further correspondence and offers made by each party setting out what each would agree to but without full agreement reached as to the conditions.

Ancer’s submissions

8. Ancer stated in the Application“On acquiring the Lease in 2006 the Lessee came to an arrangement with the Manager on site for a lock to be fitted to the ante space door off the communal corridor and has since taken the view that this space is exclusive to him.

The Lessee and his Tenant store goods and occupy the area of the Building, referred to as the ante space... which is not within the ...area contained in the Premises leased to the Lessee.

The occupation by the Lessee and his Tenant is to the exclusion of the Management Company who are the Lessees of this space, which forms part of the Common Parts to the Building under the Deed of Common Parts Lease. The Management Company require the Lessee to cease occupation of the ante space and leave the door to the communal corridor unlocked or provide the Management Company with a key so that they can have access to the space. Access is required by the Management Company to the ante space in order to maintain the communal light and smoke detector in the space and also to undertake regular inspection of the space and fire door to the communal corridor to ensure compliance with Fire Regulations.

The ante space is an integral part of the design of the Building being a requirement for fire compartmentation under the Building Regulations where there is a communal corridor, as can be seen on the plan where storerooms are located off the communal corridors.

Therefore, the area should not be used for any purpose other than a separation area and not for any other use or the storage of any goods, to avoid the risk of spread of fire....

The Lessee is considered in Breach of Covenants in permitting the Tenant to store goods and excluding the Management Company access to this space, having regard to the above and supported by the following Clauses contained in the Lease and the standard Deed of Covenant/Maintenance.....

Clause 3.15 ...

‘Not to do in or near the Premises any act or thing by reason of which the Landlord or the Company may under any statute incur have imposed upon him or it or become liable to pay any penalty damages compensation costs charges or expenses’...

Clause 3.18 ...

“Not to use or bring or allow to remain upon the Premises any thing that may be or become or cause a nuisance annoyance disturbance or inconvenience injury or damage to the Landlord and the Company or the owners or occupiers of other flats in the Building or adjacent or neighbouring premise”...

Clause 3.19 ...

“To observe the Rules and Regulations together with any further rules and regulations that the Company may from time to time in its reasonable discretion impose” ... with specific reference to Clause 2.1 of the Fourth Schedule ... “The Common parts are for the sole use and enjoyment of the authorised users” ...

Clause 3.20 ...

“Not to assign underlet or part with possession part only of the Premises”...

Clause 5.1:2 ...

“The Tenant and the Company.....shall not by any act or omission cause the Landlord’s insurance to be rendered void or voidable”...

Clause 3.4 of the Deed of Covenant/Maintenance)...

“To observe and perform the covenant on the part of the Tenant contained in the Lease”

9. Ancer made further submissions stating (inter alia) “The ante space is ... an integral part of the design of the Building and should be maintained as a

fire separation area and kept free from the storage of goods.....The use by the Lessee of this space for the storage of goods is not compliant with Fire Regulations and therefore constitute the various Breaches of Covenant under the Lease referred to above..... Keeping the door to the ante space locked by the Lessee and his Tenant is in itself not an issue provided that the Management Company can have a key to access the ante space for the purpose of routine fire inspection and maintenance of the communal light and communal smoke detector therein.

The Management Company also has a statutory duty under the Fire...Regulations... to undertake an annual inspection of the fire door to the ante room which is immediately off the communal door and is unable to so do without have access to the ante space and therefore this door must be kept unlocked or a key provided to the Management Company accordingly...

Mr Cunningham's response

10. Mr Cunningham submitted that the Management Company of which he was a former director, was “fully aware of the situation vis a vis the anteroom”, that Mr Schickhoff-Brown’s version of events “keeps changing”, that various relevant documents and meetings had not been disclosed to the Tribunal, and referred to what he described as “the ongoing attempts by the freeholder to bully and intimidate including the threat to block the sale of the apartment”.

11. He said that “in September 2006... my principal point of contact was Mr Schickhoff-Brown. The purchase/sale negotiations were handled personally by Mr Schickhoff-Brown. I was his former bank manager and provided the funding whilst at NatWest Bank for the development at 229 Wigan Road. Mr Schickhoff-Brown advised on the likely rental income and introduced me to letting agents...”.

12. He emphasised that “13 years passed with no incident” with no objections to the anteroom being locked or he being solely responsible for its maintenance and upkeep. He recalled the Management Company and freeholder contacting him to advise him that “the owner of the apartment opposite the store room was keen to purchase both the store room and the anteroom” but that he had confirmed to them that he did not wish to sell.

13. He referred to the unminuted meeting in November 2023 at which he said he “made several suggestions to resolve the matter; all which have been ignored.”

14. He confirmed that he had never denied the management company or managing agents request to inspect to comply with fire safety matters and this had most recently been witnessed firsthand by director of the Management Company.

15. He also said as regards under letting that “the tenant living in apartment 16 has no access to either the storeroom or the anteroom so this allegation is completely without merit”.

The Law

16. A prerequisite for the forfeiture of a lease (otherwise than for a breach of covenant to pay rent) is the service of a notice under section 146(1) of the Law of Property Act 1925.

17. Section 168(1) of the 2002 Act provides that 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 unless subsection (2) of section 168 of the 2002 Act is satisfied.

18. Section 168(2) states that the section 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.

19. Section 168(4) of the 2002 Act states that a landlord under a long lease of the dwelling may make an application to the first-tier Tribunal for determination that a breach of a covenant or condition in the lease has occurred.

The Hearing

20. The hearing took place using CVP (the common video platform). Mr Schickhoff-Brown, Mrs Stringfellow, his secretary, Mr Banks and Mrs Celso, Directors of the Management Company all attended from same location. Mr Cunningham also attended from a separate location.

21. The parties were thanked for the papers which had been studied carefully. It was noted that Google's Street view and information which is publicly available from Companies House had helped clarify some of the matters referred to.

22. The operative parts of section 168 were read out, and the limits of the Tribunal's jurisdiction explained. It was noted that an application can only be made in respect of a long lease of a dwelling and (as confirmed by the Upper Tribunal in the case of *Eastpoint Block A RTM Co Ltd v Otubaga* [2022] UKUT 319 (LC) at para 16) "only a landlord may make an application under section 168(4)". It was clear that the Management Company is the *tenant* under the Common Parts lease, and not a landlord, and noted that it is difficult to see how the common parts, of themselves, could be properly construed as being a dwelling. It was also clear that the Deed of Covenant is not a lease. Consequently, the Tribunal decided that the Management Company must be removed as an applicant. The logic of this decision was acknowledged by those present, without objection.

23. The Tribunal confirmed, notwithstanding this decision, that it was pleased that Mr Banks and Mrs Celso, as 2 of the Management Company's current directors, were on hand to be able to assist as witnesses.
24. Thereafter the events referred to in the timeline and the written submissions were discussed and amplified.
25. Because the written submissions are on record there is no need, and it would be superfluous, for the Tribunal to attempt to refer to every submission and response in this decision. It also believes that that would be counterproductive because of some entrenched positions.
26. The Tribunal has instead highlighted those matters which it found particularly relevant to, or that help explain, its decision-making.
27. The following matters were particularly noted: –
28. Mrs Stringfellow readily agreed after having reviewed the October 2006 emails that it was Ancer Holdings Ltd who had then installed the lock on the anteroom door and given Mr Cunningham the key. However, because of the passage of time, she did not now specifically remember the incident. Mr Schickhoff-Brown said that he had had no recollection that it was Ancer Holdings Ltd who had installed the lock when writing his 17 October 2019 email and may well have had his attention on other matters in October 2006. He now accepted that Ancer Holdings Ltd had installed the lock but maintained that the lock was not the issue rather that the Management Company required unfettered access to the anteroom.
29. Mrs Stringfellow confirmed that she had never been a director or company secretary of either Ancer Holdings Ltd or the Management company. The Tribunal questioned the correctness of the execution of the Lease noting that at the time it would have required signatures from two directors or a director and the company secretary. Mr Schickhoff-Brown confirmed that the matter had been raised before by others but had been catered for by use of an authority within the respective companies' articles and whereby Mrs Stringfellow was for administrative convenience authorised to sign on behalf of his wife who was a director.
30. When discussing the multiple definitions within the documents of what might be classed as the common parts, it was noted that the plan to the Common Parts lease (included within Ancer's bundle, but not with the copy attached to the Application) was clearly incorrect, and seemingly copied from the Lease plan. Mr Schickhoff-Brown agreed that the plan in question had been mistakenly and inadvertently included.
31. It was agreed that the coloured copy of the Lease plan was more instructive when trying to answer the question as to whether the anteroom was part of the common parts.
32. There was discussion as to the exact nature of the 2022 Regulations. Mr Banks confirmed the detailed regime operated through the Management

Company's managing agents for the regular checking of the fire doors and alarms. He confirmed no knowledge, or evidence, of the door to the anteroom as ever having been identified as substandard, or of Mr Cunningham having denied access for any of the required inspections. Mr Cunningham confirmed that he had always facilitated the process, and that he was quite content for the managing agents to have a key for the purpose of its inspections. He disputed Ancer's assertion that the anteroom was the necessary separation space, pointing to the various storerooms of other flats which were immediately next to the lifts.

33. Mrs Celso confirmed that some cardboard boxes had been seen in anteroom when the door was open and cleaners inside. She said the boxes included such as one might want to keep after the purchase of say a TV before deciding whether it might need to be returned.

34. The insurance covenant was also discussed. Mr Schickhoff-Brown confirmed that, by agreement, the Management Company, rather than Ancer, arranged and paid for 229 Wigan Road's insurance. He and the Management Company Directors confirmed that the insurance had never been vitiated, nor had they ever received any intimation from the insurers that the cover had been rendered void or voidable.

35. Mr Cunningham acknowledged that he had not, as he had stated in his written submissions, been a former director of Management Company. He explained, when pressed, that he had acted as such at the request of the appointed directors, but only in a shadow capacity. This was explained as being because of a prohibition in his employment contract.

36. Mr Cunningham said that he had never let anybody rent any part of the storage areas. The apartment was let separately.

37. He said that he was now "sick to death" of the whole process, had as a direct consequence decided to sell the property, had never sought to market it as including the anteroom, did not intend to proceed with claiming its ownership as he had been advised he could, and that he had put various settlement suggestions to the Management Company in recent months without a response. He complained of Mr Schickhoff-Brown making him out to be a liar and threatening to block the sale of the property and was clearly upset by what he labelled as bullying particularly in the summer of 2023 when his daughter was in hospital for a month being treated for a brain tumour.

38. Mr Schickhoff-Brown stated that he had acted professionally throughout and had never said that Mr Cunningham was a liar. He also denied the assertion that he had threatened to block a sale of the property, assuming this came from a misinterpretation of comments made, when looking to secure a negotiated settlement, pointing out that Ancer would be duty-bound to have to disclose any ongoing dispute as and when answering the standard enquiries which are a normal part of the conveyancing process.

The Tribunal's reasons and conclusions

39. The Tribunal has carefully considered all the written and oral evidence.

40. In addition to the facts identified in the timeline it has made the following further findings. Where factual matters might be in issue, it applied the standard of proof required in noncriminal proceedings, being the balance of probabilities.

- Ancer Holdings Ltd fitted the lock to the door of the anteroom in October 2006;
- it did so in full knowledge of, and to facilitate, Mr Cunningham's stated intention of being able to use the anteroom as additional space for storage;
- Mrs Stringfellow was ostensibly held out as (inter alia) a director or the company secretary of Ancer Holdings Ltd in the documentation, and Mr Cunningham was entitled to believe that she had full authority to act on behalf of, and to bind, Ancer Holdings Ltd;
- neither Ancer Holdings Ltd, nor Ancer as its successor to the freehold title, objected to Mr Cunningham having exclusive use of the anteroom at any time in the 13 years between October 2006 and October 2019;
- possibly more significantly, the Management Company did not object Mr Cunningham having exclusive use of the anteroom between 2006 and 2019 which must have been obvious to it;
- Mr Schickhoff-Brown's email of 17 October 2019 misrepresented who had fitted to lock in 2006;
- no payment has been made by Mr Cunningham to the Management Company for his use of the anteroom;
- the definition of the Common Parts in clause 1 of the Lease is not exactly the same as that in its Fourth Schedule setting out the rules and regulations and also different from that in the Common Parts Lease;
- the closest that the different definitions come to indicating the inclusion of the anteroom within the Common parts are the general references to ".....landings passages and storage cupboards....used in common";
- Ancer has not exhibited a copy of the Management Company's registered leasehold title or plan, assuming that its title to the Common Parts Lease has actually been registered at the Land Registry, as it should have been;
- surprisingly, there does not appear to be, as one would expect, any clear reference to the Common Parts Lease in the exhibited copy of Ancer's registered freehold title;
- the plan exhibited with the Common Parts Lease was clearly incorrect, as had to be acknowledged by Mr Schickhoff-Brown at the hearing;
- the plan annexed to the Lease appears to show the anteroom as part of a right-of-way to the property's storage cupboard/room. The same plan shows it as being crosshatched indicating, according to the plan's key, part of a "Managed/Common Area";
- Ancer has continued to demand rent for Apartment 16 and its store cupboard/room throughout, including from 2019 onwards. Such rent has been paid by Mr Cunningham and accepted by Ancer;
- Mr Cunningham has on occasions used the anteroom as an additional storage space, even if he does not now do so;

- by his own admission, Mr Cunningham has also on occasions sublet Apartment 16 (under a shorthold tenancy as authorised under clause 3.21 of the Lease) without the storage cupboard/room.

41. The Tribunal is conscious that both parties may not always have fully appreciated the boundaries to its jurisdiction. Ancer appears to have been primarily concerned that Mr Cunningham should be required “to cease occupation of the anteroom and discontinue using this space for the storage of goods leaving the door to the communal corridor unlocked”. Mr Cunningham appears mostly concerned to rebut statements he considers to be false and where he feels he had been misrepresented as a liar.

42. However, the limited and specific question that section 168(4) of the 2002 Act tasks the Tribunal to determine, is whether a breach of covenant or a condition in the Lease has occurred.

43. The burden of proof in this case principally rests with Ancer as the applicant. The onus being on it to show whether any of the covenants in question have been breached. The Tribunal has therefore considered each of the alleged breaches from this perspective.

Clause 3.15 - ‘Not to do in or near the Premises any act or thing by reason of which the Landlord or the Company may under any statute incur have imposed upon him or it or become liable to pay any penalty damages compensation costs charges or expenses’

44. The Tribunal found no evidence of a breach under clause 3.15. Ancer alleged a breach of the 2022 Regulations, but the Tribunal found none.

45. Mr Schickhoff-Brown confirmed that that 229 Wigan Road does not exceed 11 metres in height. The majority of the 2022 Regulations only apply to buildings which are more than 11 metres high (Regulations 3–8, and 11). As correctly identified at the Hearing, those of the 2022 Regulations which apply to buildings under 11 metres (Regulations 9 and 10) relate to checks of the fire doors and the provision of information to residents as to their use.

46. There was no evidence whatsoever of the Management Company, despite regular inspections, having identified any problem with the door to the anteroom, or of Mr Cunningham having anyway obstructed such inspections taking place. On the contrary, the Tribunal found Mr Cunningham had been assiduous in facilitating any properly communicated request for access to the anteroom.

47. Ancer’s assertion that the anteroom was a necessary separation space was not found to be convincing. As Mr Cunningham noted the construction plans show there are 3 other storerooms (shown as belonging to Apartments 1, 11 and 13 respectively) on the same floor which directly abut the adjoining lift shaft without any separation space. It is also of note that Regulation 10(2) confirms that the required information to be given to residents includes in subparagraph (a) that “fire doors should be kept shut when not in use;”

Clause 3.18 - “Not to use or bring or allow to remain upon the Premises anything that may be or become or cause a nuisance annoyance disturbance or inconvenience injury or damage to the Landlord and the Company or the owners or occupiers of other flats in the Building or adjacent or neighbouring premise”

48. This clause is clearly restricted to the “Premises”. It is common ground that the definition of the Premises is that set out in the First Schedule to the Lease and does not include the anteroom. Neither Mr Schickhoff-Brown nor the Management Company have made any allegations of anything within the flat or the store cupboard/room as amounting at law to a nuisance or any of the other matters referred to in this clause. Unsurprisingly therefore, the Tribunal found no evidence of any breach of clause 3.18.

Clause 3.19 – “To observe the Rules and Regulations together with any further rules and regulations that the Company may from time to time in its reasonable discretion impose.”

49. Mr Schickhoff-Brown confirmed that the alleged breach related to paragraph 9 of the Rules and regulations set out in the Fourth Schedule to the Lease which states “Rubbish debris litter or discarded articles are not to be dumped or deposited in the Building or on the Estate except in bins approved by the Company”.

50. Mr Schickhoff-Brown confirmed that he had not viewed the inside of the anteroom for many years and had no direct knowledge or evidence of an infringement. Mrs Celso said that she had seen some cardboard boxes when the door had been opened for cleaning, acknowledging that these were what one might deliberately keep after purchase of certain goods. She did not feel able to describe the items as rubbish. Mr Cunningham denied the allegation wholeheartedly. The Tribunal found it to have been overstated and unproven.

51. The Tribunal determined that no breach has been demonstrated.

Clause 3.20 - “Not to assign underlet or part with possession part only of the Premises”

52. Ancer’s allegation was stated in its grounds for the application as being because “The Lessee has retained the storeroom for his exclusive use and underlet by way of an Assured Shorthold Tenancy the Apartment and the ante-space (for his Tenant to use as a storage facility) and has therefore underlet *part only* of the “Premises.”

53. Mr Cunningham’s response was to state “The tenant living in apartment 16 has no access to either the storeroom or the ante room and so this allegation is completely without merit”. He reiterated that the apartment had been let separately at the hearing.

54. His statements are a clear admission that on occasions a part of the Premises (the apartment) has been sublet separately from the remainder (the storage cupboard/room).

55. Such acts constitute a breach of the covenant. Clause 3.20 requires that any underletting must be of the Premises as a whole.

Clause 5.1:2 - “The Tenant and the Company.....shall not by any act or omission cause the Landlord’s insurance to be rendered void or voidable

56. Not for the first time, the Tribunal found Ancer’s allegation of a particular breach to be tenuous, somewhat contrived, and misdirected.

57. No evidence was proffered nor any suggestion made of there ever having been a problem in obtaining insurance or of the insurers suggesting their cover was rendered void or voidable.

58. The Tribunal found that no breach of clause 5.1.2 had been demonstrated.

Conclusion

59. The sole breach of a covenant found by the Tribunal is as regards those occasions when Apartment 16 was let separately from its store cupboard/room 2 floors below. Both are together defined by the Lease as being the Premises. Ancer did not allege the breach when the Application was initially made but advanced it later. Indeed, there was no evidence proffered, nor any assertion made, that either Ancer or the Management Company had previously objected to this form of subletting. Nevertheless, on the strict wording of clause 3.20 any letting of one part of the Premises without the other constitutes a breach of that covenant.

60. The heading to section 168 of “No forfeiture notice before determination of breach” makes it clear that the jurisdiction conferred under subsection (4) is, first and foremost, to determine whether the necessary precondition for a landlord to be able to serve a forfeiture notice has been satisfied. In this case, there has been no other intimation of forfeiture being the reason for the Application. Indeed, Ancer’s decision to continue to accept the rent under the Lease appears to be a clear affirmation of its election to continue it.

61. Whilst the conclusions drawn by the Tribunal, and referred to in previous paragraphs, may well be significant in answering questions as to whether Ancer’s, and where relevant, the Management Company’s, conduct comes within legal doctrines of “waiver of the right to forfeiture”, “waiver of a breach of covenant”, “acquiescence” or “estoppel”, or whether the title to the anteroom may have passed as a consequence of “adverse possession”, such matters are outside this Tribunal’s jurisdiction.

62. Whatever the answer to those questions, the Tribunal is clear that Ancer is entitled to a determination that a breach of covenant contained in clause 3.20 of the Lease has occurred.



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Tribunal Members: Judge J.M.Going
N.Swain MRICS

**Date of
Decision:** 13 December 2024

**Date of this
Correction:** 16 January 2025

AMENDMENT AND CORRECTION TO THE DECISION

Correction and Amendment

63. It is now apprehended that due to an accidental slip the references in the 10th and 11th bullet points in paragraph 40 of the Decision are misleading insofar as they infer that the Common Parts Lease may not have been registered at the Land Registry.

64. In order to correct this mistake, and in pursuance of Rule 50 of the Tribunal Procedure (First-tier Tribunal) Property Chamber) Rules 2013, it is confirmed that the Decision shall be amended as follows.

65. **The Decision shall henceforth be read and construed as if the 10th and 11th bullet points in paragraph 40 of the Decision: –**

- **beginning with the words “Ancer has not...” and ending with the words “...Ancer’s registered freehold title”, had been deleted; and**
- **substituted by a new 10th bullet point which reads “Ancer has not exhibited a copy of the Management Company’s registered leasehold title plan.”**

Signed: Judge. J. M. Going

Date: 16 January 2025