

RESIDENTIAL PROPERTY TRIBUNAL SERVICE  
SOUTHERN RENT ASSESSMENT PANEL  
LEASEHOLD VALUATION TRIBUNAL



S.168 Commonhold & Leasehold Reform Act 2002

**DECISION**

**Case Number:** CHI/21UC/LBC/2009/0009

**Property:** Flat 1  
9 Granville Road  
Eastbourne  
East Sussex  
BN20 7EG

**Applicant:** Ms B Kelly & Mr N Connor (present)

**Represented by:** Mr J Waters of Stephen Rimmer LLP Solicitors

**Respondent:** Mr F W Taylor (present)

**Represented by:** Ms A Arnone of Counsel

**In attendance:** Mrs F W Taylor, Mr Arnell, Mr Adams and other lessees.

**Date of Application:** 9 April 2009

**Date of Hearing:** 5 August 2009

**Date of Decision:** 3 September 2009

**Tribunal Members:** Mr B H R Simms FRICS MCI Arb (Chairman)  
Ms J K Morris (Lay Member)

**DECISION**

1. At the Hearing on 5 August 2009, the Tribunal announced the Decision in this case as follows:
2. The first issue in respect of the transfer from Mr Taylor's son to himself without consent is dismissed as the Respondent shown in the application is incorrect for that matter.
3. The Tribunal determines that the Respondent is in breach of the covenant at Clause 2(12)(b) of the lease in that he had let the flat without first obtaining the Applicant's consent or ensuring that the sub-tenant entered into a direct covenant with the Applicant.

## **APPLICATION**

4. This is an application by Brenda Kelly and Neil Connor, as trustees of the freehold reversion to the subject property, for a determination under S.168(4) of the Commonhold & Leasehold Reform Act 2002 that the Respondent is in breach of covenant.
5. It is alleged that in breach of Clause 2(12)(b) that the Respondent has assigned, or alternatively sublet, or alternatively parted with possession of the flat or part of the flat without the Applicant's written consent, or entering into a direct covenant with the Applicant.

## **THE LAW**

6. The statutory provision relevant to this application is to be found at S.168 Commonhold & Leasehold Reform Act 2002. The Tribunal has, of course, had regard to the whole of the relevant section as set out in the Act when making its decision but here it sets out a sufficient extract or summary to assist the parties in reading this decision.
7. Subsection 1 provides that a landlord may not serve a Notice under S.146(1) of the Law of Property Act 1925 in respect of a breach of covenant unless subsection (2) is satisfied.
8. Subsection 2 is satisfied if:
  - a) It has been finally determined ... that the breach has occurred.
  - b) ....
  - c) ....
  - (3)...
  - (4) A landlord ... may make an application to a Leasehold Valuation Tribunal for a determination that a breach of covenant or condition in the lease has occurred.
  - (5) ...
9. The Leasehold Valuation Tribunal is not concerned with the ability of the party complained of to remedy a breach or offer some other defence as these are matters for the court. The Tribunal's duty is to determine whether such a breach has occurred.

## **THE LEASE**

10. The Tribunal was provided with a copy of the lease of Flat 1, 9 Granville Road, dated 31 July 1984 between Grovigate Investments Ltd and John Holder. There is also a Deed of Variation which was made available to the Tribunal and this is dated 21 March 2007.

11. The Respondent is the current tenant under the lease and the freehold reversion is held on trust by the Applicant for the benefit of all the leaseholders to that freehold interest.
12. By Clause 1 of the lease the Respondent covenants to perform and observe the covenant's conditions and agreements contained in the lease.
13. Clause 2(12)(b) provides that the Respondent covenants with the Applicant  
*"Not to assign underlet or part with possession of the whole of the demised premises ... without the consent in writing of the lessors first being obtained ... and then PROVIDED ALWAYS that the lessee will not at any time during the said term assign or transfer the demised premises without the assignment or transfer (as the case may be) containing a covenant by the assignee or transferee directly with the lessors to pay the rent ... to observe and perform the lessee's covenants and regulations and conditions ... and will not grant or create or suffer to be granted any underlease or tenancy ... without the underlease tenancy agreement or other instruments containing an express covenant by the under lessee ... to perform and observe all the covenants on the lessee's part ..."*

## **BACKGROUND**

14. Provisional directions were issued in this case dated 2 June 2009 and they became substantive at 5pm on Wednesday 17 June as no communication had been received from either party requesting a pre-trial review or amendment to the directions.
15. There were various specified times within the directions requiring the provision of statements and bundles of documents. Neither party complied with these directions.
16. The Applicant indicated to the Tribunal that it was hoped that an agreement might be reached to avoid the need for a hearing and therefore it was hoped to avoid the additional cost of preparing the documents.
17. The Respondent complained that the address contained within the application and used for the service of documents was incorrect and the correct address should have been well known to the Applicant. This delayed the Respondent's attention to the directions.
18. A bundle of documents was made available to the Tribunal by both the Applicant and the Respondent rather late in the proceedings and some on the day of the hearing.
19. The Tribunal adjourned to allow the parties to consider the documents presented and to decide whether these could be admitted without objection. During the course of discussions it appeared that there may be some common ground. The chairman suggested that the time could also be taken to see whether the parties could reach an agreement.
20. The parties considered the issues in private for approximately forty-five minutes and the hearing resumed.

21. The parties were content that the documents could be dealt with at the hearing on that day. The Chairman of the Tribunal indicated that should any difficulties arise during the course of the hearing he was to be advised. This would allow the Tribunal to consider what action to take and to decide whether any additional time should be allowed for the consideration of the documents.
22. It had not been possible for the parties to reach agreement, although their representatives thought that further time might produce a conclusion.
23. The Tribunal therefore adjourned at 12.15pm to take lunch and to also allow time for further discussions between the parties. The hearing was to resume at 2pm.

### **INSPECTION**

24. The Tribunal members inspected the property prior to the hearing on 5 August 2009.
25. The property comprises the whole of the ground floor of the four storey, semi-detached house adjoining number 7 Granville Road, comprising four flats formed by conversion.
26. There are communal gardens at the rear and a vehicle entrance at the front from Granville Road with some off-street parking.
27. Nothing in the application turns on the condition or layout of the property

### **EVIDENCE**

#### The Applicant's Case

28. Brenda Kelly gave evidence by way of a witness statement and some oral evidence. The property was at one time owned by the Respondent's son, Henry Taylor, and on 5 November 2007 it was transferred to the Respondent. Neither the trustees of the freehold nor its agents were asked to give consent for the transfer and no consent was given. Notice of the transfer only became evident when Ms Kelly was informed of the transfer by her solicitor in July 2008.
29. There had been difficulty in making contact with the Respondent as his address was unclear as he did not reside at the property. Ms Kelly became aware that the flat had been sublet as other owners in the block had told her that they had seen tenants moving in.
30. Ms Kelly was concerned that the new occupiers had cats and a dog and these were fouling the communal garden areas although this issue was not before the Tribunal.
31. There was confusion regarding Henry Taylor's ownership of the flat as the Respondent informed those at any freeholders' committee meetings that he was acting as his son's nominee.

32. There has been no application for consent to transfer or sublet the flat and no consent has been given. The Respondent has not entered into any covenants with the freeholder and neither has any under-tenant.

### The Respondent's Case

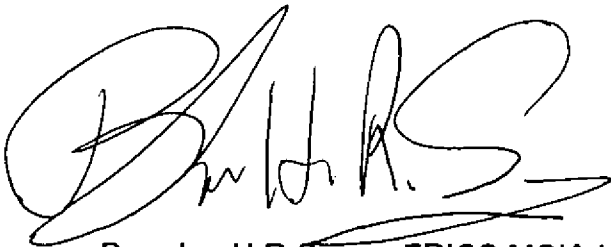
33. The Respondent gave evidence by way of a written statement supported by oral evidence and answers to questions.
34. The initial notice of the application and subsequent correspondence was not received in a timely manner as the correspondence address stated by the Applicant in the application was incorrect. The correct address was available to the Applicant but was not used until relatively recently.
35. The Respondent has been the registered proprietor of the flat since 5 November 2007 and he purchased the flat from his son. Notice of this transfer was given to the landlord's agents, CoSec Management Services Ltd, by letter dated 20 February 2008. Service charge demands had been issued to the Respondent subsequently.
36. A Deed of Covenant in favour of the landlord has been executed and is dated 16 July 2009.
37. The allegation that the landlord's consent was not given for the transfer from Mr Henry Taylor to the Respondent should not be heard. The correct Respondent for that issue would be the transferor, Henry Taylor, who is not a party to these proceedings.
38. Turning now to the subletting of the flat, there have been difficulties in the past with refusal on the part of the landlord to acknowledge that there is any right to sublet the flat at all. In the past there have been no replies to requests to the Applicant for information so the Respondent concluded that if an application for consent to sub-let was made, it was very likely to be refused. An application has been recently made for retrospective consent with supporting documents which were available to the Tribunal.
39. Even if there has been a breach of covenant, the landlord has been fully aware of it and has treated the tenancy as continuing, thereby waiving the forfeiture.
40. Any attempts made by the Respondent to discuss the position with any representatives of the freeholder have been blocked.

### **CONSIDERATION**

41. It was clear from the evidence presented both in writing and orally that communications between the parties had broken down.
42. It is accepted by the Respondent that he took a transfer of the flat from his son without entering into any direct covenants. As he was not responsible for the transfer, he could only assume that the proper consent was obtained, but of course he had no knowledge of it. His son, Henry Taylor, was not available at the hearing and in fact had not been entered as a Respondent.

43. The Tribunal could not, therefore, question Mr Taylor and this aspect of the application could not be properly tested.
44. Subsequently the Respondent has entered into the required Deed of Covenant.
45. With regard to the subletting of the flat, again the Respondent does not dispute the facts of the case and confirms that no application for consent was made and consequently no consent was given.
46. Whether or not the application would have been granted is not, in the Tribunal's view, a factor in a defence that the application was not made.
47. The only conclusion that can be reached is that there has been a breach of covenant and this is, in effect, admitted by the Respondent.
48. There may be matters which would be argued in court regarding relief from forfeiture should, in fact, an application be made under S.146 of the Law of Property Act 1925 but this is not an issue that the Tribunal can consider.
49. The Tribunal therefore made the determination set out at the beginning of these reasons and announced it at the hearing.

Dated 3 September 2009

A handwritten signature in black ink, appearing to read 'Brandon H R Simms', written in a cursive style.

Brandon H R Simms FRICS MCI Arb  
Chairman