

432



Residential  
Property  
TRIBUNAL SERVICE

**LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT  
ASSESSMENT PANEL**

**Section 168(4) Commonhold and Leasehold Reform Act 2002**

**LON/00AP/LBC/2012/0042**

**Applicant:** Raj Properties Ltd  
**Represented by:** Ajay Arora Solicitors  
**Respondent:** A.A. Ehrenzweig and S.Ehrenzweig  
**Property:** First & Second Floor Flat 60a West  
Green Road London N15 5NE

**Leasehold Valuation Tribunal:** Dr Helen Carr  
Mr N Maloney FRICS

**Date of Decision** 14<sup>th</sup> June 2012

## Decision

The Tribunal determines that the following breach of covenant has occurred:

- Breach of clause 1(8) of the lease.

**Bac  
kgr  
oun  
d**

1. The Applicant, Raj Properties Limited, is the freeholder of 60 West Green Road N15 5NR which is a three storey building the ground floor of which is commercial premises.
2. The Respondents, Mr Anthony Ehrenzweig and Ms Susan Ehrenzweig, are the lessees of the 2 storey flat known as 60a West Green Road which forms the first and second floor of 60 West Green Road.
3. The Applicant seeks a determination, under section 168(4) of the Commonhold and Leasehold Reform Act 2002 (the Act) that the Respondents are in breach of various covenants contained in the lease.
4. The Tribunal issued Directions on 29<sup>th</sup> March 2012. It determined that the matter be dealt with by way of written representations unless either party requested a hearing. No such hearing having been requested the matter is being determined on the basis of the statements and documents submitted by the parties.

## The Determination

5. The determination of this application took place on 13<sup>th</sup> June 2012. The documents before the Tribunal comprise two bundles provided by the parties including a statement of case from the Applicant, a response from the Respondent and a brief further statement from the Applicant. These documents are referred to below as necessary.
6. The Tribunal determined that the alleged breaches before it relate to the subletting of the property and more particularly:
  - a. The failure of the Respondent to comply with the residential use term of the lease – clauses 1(16) and (17)
  - b. The failure of the Respondent to prevent nuisance - clauses 1(16) and (17) of the lease
  - c. The carrying on by the Respondent of a trade or business in breach of clauses 1(16) and (17) of the lease
  - d. The failure of the Respondent to obtain written consent for alterations to the property -clauses 1(8) of the lease

- e. The failure of the Respondent to provide notice of permitted subletting
- f. The failure of the Respondent to comply with Acts and illegal use -- clauses 1(9) and (10) of the lease.

## DETERMINATION

### Alleged breaches of clause 1(16)

7. Clauses 1(16) of the lease provides as follows:

(16) Not to carry on or permit or suffer to be carried on in or upon the demised premises or any part thereof any profession trade or business but to use the demised premises for residential purposes only

- 7. The Applicant argues that because the Respondent is subletting the flat on a room by room basis it is therefore being used as a business. The Applicant argues that similar covenants in *Barton v Keeble* [1928] All ER Rep 198 and *Barton v Reed* [1932] 1 Ch 362 were interpreted to this effect.
- 8. The Respondents argue that the user clauses in *Barton v Reed* and *Barton v Keeble* are quite distinct. In this particular instance the property is not part of the freeholder's estate, nor is the area a residential housing estate. They further argue that it is incorrect to interpret the clause preventing the user of the premises for profession trade or business to include subletting or the granting of licences to occupy.
- 9. The Tribunal determines that the clause does not prevent subletting or the granting of residential licences and therefore the activity of subletting or the granting of residential licences is not per se a breach of the lease.
- 10. The reasons for the decision of the Tribunal are that it agrees with the Respondent that the user clauses in *Barton v Reed* and *Barton v Keeble* are distinct from the case before it and that the Applicant has failed to demonstrate that the user clause includes the banning of subletting or the granting of licences.
- 11. The normal way of preventing subletting or the granting of residential licences would be through a specific clause. The Tribunal notes that there is no such clause and indeed a clause that the Applicant relies on, clause 13, requiring that notice is given of subletting, presupposes that subletting is allowed under the terms of the lease.

### Alleged breach of Clause 1(17)

12. Clause 1(17) of the lease provides as follows:

(17) Not to do or permit or suffer anything in or upon the demised premises or any part thereof which may be or become a nuisance annoyance or cause damage to the Lessor or occupiers of other property in the Building or the neighbourhood and to indemnify the Lessor against all claims liabilities actions and demands whatsoever in respect thereof

13. The Applicant argues that the property's current use in a multiple occupancy manner, arranged to provide up to 5 bedrooms in a location not suitable for that may be or become a nuisance, annoyance or cause damage. They further argue that the view is supported by the policy of the local authority which requires multiple occupancy use of flats to be licensed and regulated.
14. The Respondents say that as the property does not require registration, as it is occupied by only 4 occupants, it is not logical to argue that the requirement of registration means that the property has the potential to become a nuisance or cause damage.
15. The Respondent also argues that a covenant against any act leading to annoyance nuisance or damage is breached by anything which disturbs the reasonable peace of mind of an adjoining occupier and that no evidence has been provided by the Applicant of such a disturbance.
16. The Tribunal determines that there has been no breach of clause 1(17) of the lease.
17. The reasons for the Tribunal's determination are that it agrees with the argument of the Respondent and finds no evidence to support the Applicant's allegation of breach of covenant. It does not accept the argument that the mere fact of a multiply occupied house is a potential nuisance, annoyance or causes damage.

**Alleged breach of clause 1(9) and 1(19) of the lease**

18. Clause 1(9) of the lease provides as follows:
  - a. At all times during the said term to do and execute or cause to be done and executed all such works and all such things as under or by virtue of any Act or Acts of Parliament now or hereafter to be passed and bye-laws rules and regulations thereunder are or shall be directed or necessary to be done or executed upon or in respect of the demised premises or any part thereof or in respect of the Lessee's use thereof by the owner lessee tenant or occupier thereof and at all times to save harmless and keep indemnified the Lessor and the Lessor's estate and effects against all claims demands expenses and liability in respect thereof And to pay all costs charges and expenses incurred by the Lessor in abating a nuisance and executing all such works as may be necessary for abating a nuisance or for remedying any other matter in connection with the demised premise in obedience to a notice served by a local authority.

19. Clause 1(19) of the lease provides as follows:

Not to hold or to permit or suffer to be held any sale by auction on the demised premises or to permit the same to be used for any illegal or immoral purpose

20. The Applicant argues that because the property is let as a dwelling in multiple occupancy it should be licensed. The Respondents have failed to do this which is a criminal offence and they are therefore in breach of covenant.
21. The Respondent says that as the property is occupied by only four occupants there is no requirement for it to be licensed.
22. The Tribunal determines that there is no breach of clause 1(9) or clause 1(19) of the lease.
23. The reasons for the determination of the Tribunal is that the Applicant has not provided evidence that the Respondent is in breach of the local authority HMO registration scheme.
24. The Applicant does refer to a conversation with Ms Carol Martin of Haringey's HMO team which indicates that in calculating the number of occupiers they would include partners or girlfriends reasonably expected to stay over temporarily and also the property was located in what is shortly to become an approved designated area so a licence would be required for HMOs occupied by 3 or more persons (instead of 5 or more persons).
25. The Tribunal determines that such generalised hearsay evidence is not sufficient to discharge the burden of proof of breach of covenant. At the lease what would be required is a signed letter referring to the specific property and its occupancy.

**Alleged breach of clause 1(8) of the lease**

26. Clause 1(8) of the lease provides as follows:

Not to make or maintain or to erect or suffer to be erected any other building upon the demised premises nor to make or maintain or suffer to be made or maintained upon the demised premises any alternation or external projection or additions to the demised premises or cut maim or injure or permit or suffer to cut maim or injure any of the walls partitions or timber thereof or make or suffer to be made any material change or addition whatsoever in or to the demised premise or any part thereof without obtaining the Lessor's previous written consent such consent not to be unreasonably withheld.

27. The Applicant argues that the scope of alternations covered is sufficiently wide to include additional internal walls, injure/alter existing internal walls

and material changes such as an increase in the number of rooms. Internal alterations to sub-divide rooms to create an additional room on each floor have been carried out without written consent so in breach of covenants.

28. The Respondents accept that two of the rooms have been subdivided. However they make two further arguments. (i) that the subdivision took place prior to the Respondents' purchase of the leasehold interest and that therefore the Applicant has waived the breach (ii) that the Respondent has a full repairing lease and that therefore clause 1(8) should be interpreted to refer to structural changes only.
29. The Applicant responds to this argument by stating that this does not change the requirement of the covenant to only make alterations with the landlord's previous written consent and that no written consent has been produced by the Respondent.
30. The Tribunal determines there has been a breach of clause 1(8) of the lease.
31. The reasons for the Tribunal decision is that it does not consider that there is an inconsistency between full repairing obligations and the requirement for written agreement for non-structural as well as structural alterations. The nature of the full repairing obligations may go to the question of reasonableness of consent, but that is not at issue in this application. Moreover any arguments about waiver should be dealt with by the County Court and such arguments do not affect the determination of breach.

#### **Alleged breach of clause 1(13) of the lease**

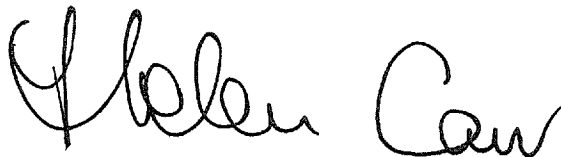
32. Clause 1(13) of the lease provides as follows:

Within one month after every assignment or underlease or charge of the demised premises or any part thereof to give notice thereof in writing with particulars thereof to the Lessor's solicitor for the time being and to produce such assignment underlease or charge or other disposition affecting the demised premises (including probates and letters of administration ) to the solicitor and to deliver for retention a certified copy of each such document and pay a reasonable fee for each such registration (but not less than £10.00).

33. The Applicants argue that they have received no notices of subletting and therefore there has been a breach of this term of the lease. They provide a witness statement from a surveyor, Mr Peter F Gunby stating that there were locks on the doors to each of the rooms.
34. The Respondents reply that the four occupiers of the property were occupied by licencees under licences to occupy. The Respondents attach a copy of the licence agreement which states that the occupier has no exclusive possession of the property. They state that they informed the surveyor that the occupiers were occupying under licence agreements.

35. The Tribunal determines that there is no breach of clause 1(13).
36. The reasons for the Tribunal's determination is that whilst the form of the occupation agreement is not determinative of its legal status – ie an agreement which is labelled a licence may indeed be a lease – the Applicants have provided no evidence that there is sub-letting within the flats. The statement from the surveyor is contradicted by the Respondents. Moreover it provides no evidence of exclusive occupation as individual locks on doors are not necessarily indicative of exclusive occupation without for instance evidence that the landlord has no right of access to the rooms. Without further evidence substantiating exclusive occupation the Tribunal cannot conclude that the occupancies are tenancies.
37. For the avoidance of doubt the Respondents have raised counter-allegations of breaches of its lease. These are not the subject of this determination which is restricted to the application under s.168 (4) Commonhold and Leasehold Reform Act 2002.

Signed

A handwritten signature in black ink, appearing to read 'Helen Carr', written in a cursive style.

Helen Carr

Dated

14<sup>th</sup> June 2012