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

Case Reference : LON/00AP/LBC/2015/0102

Property : Flat LG-01, Northwood Hall,
Hornsey Lane, N6 5PE

Applicant : Triplark Limited

Representative : Mr S Gallagher (Counsel)
instructed by Payne Hicks Beach
Solicitors

Respondents : Charlotte Abigail Reiner (1) &
David Wismayer (2)

Representative : Mr E Johnson QC (Counsel)
instructed by Hamlins LLP
Solicitors

Type of Application : Declaration as to of breach of
covenant – s.168(4) Commonhold
and Leasehold Reform Act 2002

Tribunal : Mr M Martynski (Tribunal Judge)
Mr C Piarroux JP CQSW

Dates of Hearing : 21 & 22 January 2016

DECISION

Decision summary

1. The Tribunal determines that the First Respondent has breached clause 3(8)(ii) of her lease in that she has parted with possession of Flat LG-1, Northwood Hall to the Second Respondent without obtaining the Applicant's previous written consent.
2. The Respondents' application for an order pursuant to 20C of the Landlord and Tenant Act 1985 is adjourned.

The application and the procedural background

4. Flat LG-01 Northwood Hall ('the Flat') is contained within a large purpose-built 1930's block ('the Block') containing 194 flats in total.
5. The Applicant holds the head leasehold interest in the Block. The Applicant also holds the leasehold interest in 30 individual flats in the Block.
6. The First Respondent is the Registered Proprietor of the leasehold interest in the Flat. The lease for the Flat ('the Lease') is dated 19 January 1977 and is for a period of 125 years from 29 September 1976.
7. The relationship therefore between the Applicant and First Defendant in respect of the Flat is one of Landlord and Tenant.
8. The Block is managed by Northwood Hall RTM Company Limited ('the RTM'). Canonbury Managing Agents ('Canonbury') are employed by the RTM to carry out the day-to-day management functions.
9. The Applicant's application is dated 25 September 2015 and in it the Applicant seeks a declaration that the First Respondent is in breach of clause 3(8)(ii) of the Lease. The alleged breach is set out in the application as being;

By reason of having executed and delivered a Transfer dated 29 July 2015 that purported to assign the Lease to David Wismayer ("DW") and having delivered up vacant possession of the Flat to DW on, or about, that date, all without the lessors' prior written consent

10. The Application goes on to state;

The Applicant, as landlord, has not received notice from the RTM company of any proposed grant of an approval to the assignment. Had notice been given the Applicant would have objected.

11. Following an application by Mr David Wismayer, an order was made by this tribunal on 15 October 2015 adding him to the proceedings as a Second Respondent on the grounds that he was likely to be significantly affected by the application.

12. From thereon, the Respondents were jointly represented by Solicitors and Counsel on the basis that there was no conflict of interest between them.
13. The application was heard on 21 & 22 January 2016. The following made witness statements and gave oral evidence at the hearing (in the order that they were called):-
 - Mr Roger McElroy (Managing Agent – Canonbury Management)
 - Mr Sidney Rex Ormonde (Self employed administrator for the Applicant)
 - Mr Robert Henry Saunders (Director of the RTM and leaseholder at Northwood Hall)
 - Ms Abigail Reiner (First Respondent)
 - Mr David Lewis Wismayer (Second Respondent)

The factual background

14. It is necessary to set out considerable background detail before dealing with the parties' submissions and the reasons for our decision.
15. The First Respondent acquired the Lease to the Flat in 2006.
16. The Lease includes the following terms at clause 3(8)(i) & (ii) respectively:-

Not at any time assign or sublet or part with possession of part only of the flat or permit or suffer the same to be done or permit or suffer the whole or any part of the flat to be sublet on a furnished basis for longer than six months in any one year and any under-lease so granted shall incorporate the regulations in the said First Schedule hereto [i]

Not at any time assign sublet or part with possession of the whole of the flat or suffer the same to be done without the previous written consent of the Lessors such consent not to be unreasonably withheld [ii]
17. 12 January 2011: The RTM Company assumes the Right to Manage the Block. Prior to taking the Right to Manage, the RTM had entered into a contract with Investment Technology Limited, trading as Canonbury Management to retain that company as Managing Agents for the Block.
18. RTM Nominees Directors Limited, an associated company of Canonbury, is then appointed as a nominee director of the RTM.
19. One of the statutory consequences of the RTM taking the Right to Manage is that the function of the Landlord in relation to the grant of approvals under the leases with the leaseholders become functions of the RTM [s.98(2) Commonhold and Leasehold Reform Act 2002 ('the 2002 Act')].

20. By virtue of s.98(4) of the 2002 Act the RTM must not grant an approval by virtue of subsection 98(2) without first having given the landlord 30 days notice.
21. December 2013: The RTM enters into a contract to replace the communal heating system at the Block. The work was to have been commenced in January 2014 and completed in November of that year. As matters stand, the work has not been completed.
22. December 2014: The Second Respondent is introduced to the RTM by former directors of the RTM as a consultant with experience in dealing with residential block management.
23. 16 December 2014: Mr McElroy, a Director of Canonbury, files notice at Companies House of the termination of RTM Nominees Directors Limited as a Director of the RTM. The date of termination was given as 17 July 2014.
24. March 2015: The First Respondent has her offer on a house accepted and agents introduce a purchaser for the Flat.
25. 13 March 2015: The Second Respondent is appointed as a Director of the RTM.
26. 19 March 2015: The then Directors of the RTM produce a report. The report criticises the way in which the heating system in the Block is being installed and criticises the way in which Canonbury have managed the Block and the heating system installation. The report tells leaseholders that the Directors intend to end Canonbury's appointment as Managing Agents, suspend the implementation of the heating system, appoint a new manager and redesign the proposed heating system. The report introduces the Second Respondent, with whom the Directors had been in contact since late December 2014, and inform leaseholders that he has been appointed as a Director and consultant.
27. 27 March 2015: Canonbury email a response to the Directors' report to all leaseholders refuting the allegations made regarding itself and the heating system and raising concerns regarding the Second Respondent and his business dealings. The response suggests the replacement of the current Directors with new Directors.
28. 3 April 2015: Splits between leaseholders become apparent when a leaseholder, Ms Field-Foster, emails Mr Haggis, the author of the Director's report referred to above, setting out her disagreement with the Directors' approach and plans. Other leaseholders then express concerns in line with Ms Field-Foster as to the manner in which matters are developing. Some leaseholders are clearly unhappy with a suggestion from the Directors that they pay their Service Charges into a new account operated by the RTM rather than Canonbury.

29. 8 April 2015: The Directors send out a lengthy reply to Canonbury's response authored by the Second Respondent.
30. 20 April 2015: Evidence can be seen that there are two clear factions amongst leaseholders forming in an email from another leaseholder, Mr Saunders. He refers to himself as 'a member of the alternative solution team' and proposes the appointment of additional directors. He is not supportive of Canonbury but is opposed to the Second Respondent's involvement in the Block.
31. 21 April 2015: The Applicant lodges applications for membership of the RTM in respect of each of its 30 flats (i.e. applications for 30 memberships). Those memberships will of course entitle the Applicant to 30 votes at meetings of the RTM.
32. 22 April 2015: An email from Mr Saunders to some other leaseholders (including Ms Field-Foster) shows that Mr Saunders had been in contact with Canonbury and the Applicant's agents and that there were discussions regarding concerns about the Second Respondent.
33. 24 April 2015: The directors of the RTM present a report to the leaseholders. The report's author appears to be, in part or in whole, the Second Respondent. The report is again highly critical of the management of the Block and the RTM and in particular of Canonbury's role as Managing Agent. The report recommends the, then existing, scheme for the heating system be changed (back to how it had originally been envisaged).
34. 29 April 2015: There is a General Meeting of the RTM. That meeting rejects the Directors' proposals to; (a) change the way in which the heating system was being rolled out, and, (b) to terminate Canonbury's appointment and to engaging the Second Respondent as consultant.
35. 11 May 2015: In an email from Mr Saunders to Ms Field-Foster and some other leaseholders, he writes about the need to propose new Directors and refers to an offer from the Applicant, via their agents OCK, to pay legal expenses for advice on the possibility of removing the Second Respondent as Director.
36. 13 May 2015: A letter from Canonbury to leaseholders states that the expectation is that the Directors will resign. It notes that if all Directors refuse to resign the necessary resolutions to force them out will need to be tabled and that Canonbury would be happy to advise on the process.
37. 20 May 2015: In an email to various leaseholders, Mr Saunders refers to the fact that he has met with Mr Ormonde 'of Triplark' (the Applicant). He goes on to refer to the Applicant being happy to fund legal expenses up to £5000 in the fight against the Second Respondent. He states the Applicant's reasons for opposing the Second Respondent were that they did not agree to his proposals to drop the current plan for the heating system and were unhappy about the Second Defendant's

proposed fees (in excess of £200,000 per annum) for his consultancy. He reports that Canonbury would not have been the Applicant's choice of agents but that they had no one else to suggest.

38. 20 May 2015: The first Respondent is trying to proceed with her sale of the Flat. Her solicitors send her an email asking for details of the Residents Association as they have not received a response to their correspondence. They refer to the fact that they need to supply a leasehold pack to the buyer and that the landlord must grant a licence to assign to the new buyer.
39. 1 June 2015: The First Respondent's solicitors email the RTM asking for a leasehold information pack and enclose the standard form of leasehold enquiries.
40. 2 June 2015: The Second Respondent, on behalf of the RTM responds to the First Respondent's solicitor asking them to identify the flat in question. The solicitors confirm the flat and the Second Respondent says that the leasehold enquiries will be dealt with shortly.
41. 5 June 2015: Notice is given by Mr Saunders to convene a General Meeting of the RTM for the purpose of considering resolutions to remove the Second Respondent and the other directors and to replace them with Mr Saunders, Mr Fyvie, Mr Kaufman and Ms East ('the New Directors').
42. 5 June 2015: The Second Respondent contacts the First Respondent direct by email asking to discuss the replies to leasehold enquiries as; *'The replies to the enquiries are not straightforward and may prompt concerns on the part of the buyer'*.
43. 8 June 2015: The existing leaseholder Directors of the RTM resign leaving the Second Respondent as the sole Director.
44. 8 June 2015: It is clear from an email sent by the First to the Second Respondent that they had had a discussion and that the Second Respondent had offered to buy the Flat.
45. 9 June 2015: In an email to the First Respondent, the Second Respondent says; *"We will provide the 'licence to assign' at no cost to you"*.
46. 12 June 2015: The sales information pack is sent out to the First Respondent's solicitors by Canonbury. The pack includes a statement to the effect that if the Block is managed by an RTM Company any consent required by the Lease can only be provided after 30 days notice to the landlord; the solicitors comment to the First Respondent that the information pack does not appear to refer to the current disputes at the Block.

47. 17 June 2015: the First Respondent emails the Second Respondent (in his capacity as Director of the RTM) chasing a draft licence to assign.
48. 18 June 2015: Having looked at previous licences to assign issued by the RTM, the Second Respondent types up and sends to the First Respondent a draft licence. The assignee in that licence is named as David Wismayer (the Second Respondent).
49. 19 June 2015: In an email the First Respondent's solicitors, the original buyer's solicitors state that they cannot proceed to exchange without a licence to assign.
50. 19 June 2015: The First Respondent's solicitors send an email to Canonbury asking about a licence to assign.
51. 19 June 2015: Canonbury respond saying that the RTM is required to gain permission from the headlessor and that they have to be given 30 days notice. The email goes on to state that the headlessor requires various pieces of information on the question of the licence and sets out the information required, such as the details of the assignee and assignor. The email goes on to state that a fee of £600 is payable and that upon payment a draft licence to assign will be sent out.
52. 19 June 2015: In an email (which he makes clear is sent in his capacity as the sole Director of the RTM) to the First Respondent's solicitors, the Second Respondent says; *'Should it prove necessary, I confirm that the RTM company will provide an appropriately drawn Licence to facilitate a sale by your client to her alternative purchaser'*.
53. 26 June 2015: The First and Second Respondents exchange contracts for the sale of the Flat to the Second Respondent. The contract provides for vacant possession of the Flat to be given to the Second Respondent and omits the requirement to apply for consent to assign.
54. 29 June 2015: Mr McElroy of Canonbury emails Mr Saunders regarding the motion to remove the Second Respondent as a Director and the Second Respondent's request that Service Charge funds be handed over by Canonbury. He refers to stalling the request by various means. This email is copied to Ms Field-Foster and others by Mr Saunders. In his forwarding email, Mr Saunders refers to communications with the Applicant on the subject of what can be done to *'warn him (the Second Respondent) off'*.
55. 1 July 2015: The Second Respondent emails Mr Saunders and the New Directors telling them that he has bought a flat in the Block.
56. 3 July 2015: Mr McElroy for Canonbury writes to Mr Saunders setting out the formal procedure agreed (*'long ago'*) with the Applicant regarding licences to assign. He goes on; *'Without this due process having been followed, a flat may not be assigned to a new owner at all and so completion may not take place. If Wismayer (the Second*

Respondent) *purports to sign the assignment himself, he will find he had breached the 2002 Act.....It's not going to help in the longer term but it may be a stalling process*'. This email is forwarded by Mr Saunders to Ms Field-Foster and some other leaseholders.

57. 6 July 2015: Ms Field-Foster emails the First Respondent asking if she had managed to sell the Flat.
58. 13 July 2015: In an email to Ms Field-Foster Mr Saunders forwards an email from Mr Ormonde. It refers to funding of legal costs by the Applicant.
59. 16 July 2015: The First Respondent's solicitors write to the RTM enclosing a licence to assign signed by the First Respondent. This letter is sent to the RTM's new registered address at 2 Old Court Mews (the registered office was changed to this address by the Second Respondent).
60. 20 July 2015: The Second Respondent issues a Director's report dealing with the on-going disputes at the Block and in particular criticises Mr Saunders' plan for the heating system and again criticises Mr McElroy and Canonbury Management.
61. 23 July 2015: Mr Ormonde sends an email to the Second Respondent at the RTM email address. He says that it has come to the Applicant's attention that leases at the Block are being assigned without notice being given to the Applicant, he puts the RTM on notice that the Applicant objects to any assignment of a lease until the RTM has served notice upon the Applicant in accordance with the 2002 Act.
62. 24 July 2015: A general meeting of the RTM instigated by Mr Saunders takes place. Resolutions are passed for the removal of the Second Respondent as a Director and for the appointment of Mr Saunders and the New Directors.
63. 28 July 2015: A letter from Mr McElroy at Canonbury states that licences to assign can no longer be signed by RTM Nominee Directors Limited and that a Director of the RTM would now have to sign these.
64. 29 July 2015: Canonbury send a letter by email to the First Respondent's solicitors stating that following the change of Directors of the RTM, the Applicant has 'affirmed' that a new process must be undertaken for the grant of a licence to assign and that consequently there would be a delay whilst that new process is put in place. The letter states that during this time, *'you must not assign a property to a new owner'*. They add that any licences to assign purported to have been granted by the Second Respondent are not valid.
65. 29 July 2015: Completion takes place on the sale of the Flat between the First and Second Respondents inasmuch that the deed of transfer is executed and the purchase price paid.

66. 4 August 2015: The Applicant applies to the Land Registry for registration of a Restriction to prevent registration of the Second Defendant as Proprietor of the Flat.
67. 19 August 2015: The Second Defendant applies to be registered as the Proprietor of the leasehold interest in the Flat.
68. 9 September 2015: The Applicant's solicitors object to the registration.
69. 8 November 2015: The Second Respondent sends an email to another leaseholder in response to a complaint regarding the smell of tobacco smoke from the Flat, he refers to the person occupying the Flat as '*My tenant*'.

The evidence

Mr McElroy – Managing Agent, Canonbury Management

70. Mr McElroy gave evidence regarding the protocol agreed with the RTM and the Applicant regarding the granting of licences to assign. This protocol had been agreed some years previously.
71. He said that the usual process was for the leaseholder to contact Canonbury to request a licence to assign. Canonbury held the agreed forms of licence which were pre-printed bearing the signature of Mr McElroy on behalf of the RTM. Canonbury charged a fee of £600 for the licence to assign. According to Mr McElroy, the licence, although pre-signed by him, was not granted until such time as it was dated.
72. The Applicant is named as a party on the licence agreements but there is no provision for it to sign the agreements. This was, said Mr McElroy, agreed with the Applicant when the process of licences to assign was set up.
73. Mr McElroy went on to describe that the protocol agreed required the Applicant to be provided with the names of the assignor and assignee. If the assignee were a Company, the names of the Company Directors would be supplied to the Applicant. There would then be a check that the assignor was up to date with Ground Rent and Service Charge and thereafter the Applicant would be asked whether it granted consent. Mr McElroy stated that the process of the supply of information and the decision on the assignment had a turnaround of approximately seven days. He could not recall the Applicant previously having refused consent to an assignment. He said that, when the protocol was being negotiated at the outset, the Applicant was very particular on the information that it wished to have provided to it; on other developments that he managed, landlords did not require such information.

74. Mr McElroy identified an email from the First Respondent's solicitors dated 22 June 2015 as being the last that he had heard regarding the licence. That email raised a number of queries, the last of those read as follows:-

5. Please obtain specific confirmation from the management company that only Licence to Assign is required in this matter in accordance with the terms of the registered lease.

75. The reply to this email was sent in an email from Canonbury dated 23 June 2015. That email started with the sentence "*Thank you for your request for a licence to assign*". The email went on to seek information regarding the licence including the name of the tenant and the proposed assignee.

76. Mr McElroy agreed that, as RTM Nominees Directors Limited had resigned as a Director of the RTM in 2014, he was not entitled to sign licences to assign on behalf of the RTM in 2015. He said that the fact that his pre-printed signature continued to appear on the licences in 2015 was an oversight and that the protocol originally set up with the Applicant and the RTM regarding the issue of licences was still in place and that Canonbury were obliged as managing agent to continue to provide to the RTM the service of dealing with licences to assign. No-one had asked him to change the procedure.

77. As to the Second Respondent's purchase of the Flat, Mr McElroy said that prior to the Second Respondent actually taking possession and being seen at the Flat, he was only aware of rumour that he was purchasing a flat in the Block.

78. Reference was made to a letter dated 3 July 2015 from Mr McElroy to Mr Saunders in which Mr McElroy sets out the detail of the protocol for the granting of licences agreed with the Applicant. In that letter Mr McElroy says;

If Wismayer purports to sign the licence himself, he will find he has breached the 2002 Act which requires express written consent from Triplark.....

It's not going to help in the longer term but it may be a stalling process.

In answer to the question 'Was there a plot to stop Mr Wismayer becoming a tenant?' Mr McElroy answered that they did not care who became a tenant but that no-one wanted to deal with the Second Respondent.

79. Reference was made to other correspondence between Mr McElroy and Mr Saunders in which the Second Respondent was discussed and reference was made to the involvement of the Applicant in these discussions. An email dated 29 June 2015 to Mr Saunders, Mr McElroy writes;

He [the Second Respondent] has asked us for the funds to be handed over within 7 days.

That request came on Friday of last week. We will acknowledge receipt tomorrow and advise that we will get back to them at the end of this week. My plan is then to ask solicitors for their letter of authority as they are not the normal solicitors used by NWH RTM Company. I'm hoping this will allow the stalling by 7 days of our next letter which will be asking for a copy of the resolution signed by directors, appointing Wismayer as we have no formal record of him ever having been appointed by directors. If he is unable to show a signed resolution showing a majority of directors having voted him in office then we have better grounds for resisting his requests.

Mr Saunders then forwards this email on to Ms Field-Foster and other leaseholders saying:

I have already communicated with Triplark and also with our lawyers WLG. I have asked what they suggest we might do to warn him [the Second Respondent] off and I am reasonably confident that Triplark will consider the possibility of injunctions given what they had said previously. I believe Roger when he will try and delay along the lines proposed.

80. It was put to Mr McElroy that he was part of a 'cabal' which included the Applicant and the New Directors, the aim of which was to oppose and stall the Second Respondent. Mr McElroy responded to the effect that they did not want the Second Respondent to remain as a Director and so he worked with people to ensure 'sensible management'.
81. Mr McElroy stated that as far as he was aware, no fee for a licence to assign the Flat had ever been paid as there had been no reply to the letter from Canonbury to the Second Respondent's solicitors dated 19 June 2015 (referred to above) seeking the information as to the assignee and assignor.

Mr Ormonde – self employed Administrator for the Applicant

82. Mr Ormonde stated that the Applicant Company did not have an office. He worked in an office which was used by approximately 15 companies, one of them being the Applicant. Mr Ormonde was engaged in the day-to-day affairs of the Applicant. The Applicant was one of the smaller companies which used the office and which employed his services.
83. In his witness statement, Mr Ormonde confirmed on behalf of the Applicant that it, as landlord, did not receive notice in accordance with the 2002 Act or otherwise from the RTM or anyone else, of any proposed grant of a licence to assign the Lease of the Flat to the Second Respondent.
84. In oral evidence Mr Ormonde confirmed that he had made enquiries of the Applicant's agents, OCK and their solicitors, Bude Nathan Iwanier and that both had confirmed that they had not received anything regarding a request to assign the Flat other than an email from the First Respondent's solicitors asking for a Service Charge statement.

85. Mr Ormonde agreed that a letter dated 16 July 2015 from the First Respondent's solicitors to the RTM at Old Court Mews enclosing a licence to assign signed by the First Respondent had subsequently come to the Applicant's attention, but that the letter had not been previously addressed to or copied to the Applicant.
86. Mr Ormonde stated that he first became aware of a transfer of the Flat to the Second Respondent when he got an email from Mr Saunders stating that the First Respondent had moved out and that the Second Respondent had been seen apparently in possession of the Flat.
87. He went on to say that, as far as he recalled, he was aware that the Second Respondent was trying to acquire a flat in the Block, he was not aware of which particular flat this was.
88. The contents of an email from Mr Saunders to other leaseholders dated 13 July 2015 were put to Mr Ormonde. In that email Mr Saunders referred to an email from Mr Ormonde to himself and also referred to some information supplied by Mr Ormonde. Mr Ormonde's reaction to this was that the Applicant was concerned generally about the way in which licences to assign were being issued by the RTM but that he had no specific knowledge about the assignment of the Flat to the Second Respondent prior to it taking place.
89. Mr Ormonde confirmed that the Applicant had funded some legal advice for Mr Saunders and the New Directors regarding the dispute at the Block and the Second Respondent because the Applicant was concerned to protect its investment at the Block.
90. Mr Ormonde could not recall the Applicant having refused a licence to assign a lease at the Block in the past and he confirmed that the Applicant would have objected to an assignment of the Flat to the Second Respondent had it received or been asked about the licence to assign.

Mr Saunders – Director of the RTM and leaseholder

91. Mr Saunders is currently a Director of the RTM having been appointed on 25 July 2015. In his witness statement he said that there was no documentation or evidence in the RTM files to show that any consent to the assignment of the Flat was ever sought by the First Respondent.
92. In oral evidence Mr Saunders confirmed that he was now aware that a letter dated 16 July 2015 had been sent by the First Respondent's solicitors to the RTM at the address established by the Second Respondent and that it had been date stamped as being received on 20 July. That letter enclosed the licence to assign the Flat signed by the First Respondent.
93. Mr Saunders stated that the assignment of the Flat had not come to his attention until the sale had been completed. He agreed that he had

wanted to prevent the Second Respondent from obtaining a flat at the Block.

94. Mr Saunders agreed that he and other leaseholders were concerned about the Second Respondent and that they approached Canonbury to find out what was going on. He was aware that votes at RTM general meetings were going to be important and that the 30 votes that the Applicant would acquire after it had applied for memberships of the RTM in respect of the various flats that it owned would be useful in any vote at a meeting of the RTM's members.
95. When asked why, in an email dated 22 April 2015 sent to some other leaseholders, he asked that information about the Applicant's involvement in matters be kept confidential, he replied that this was because the RTM had been formed as the Applicant's management of the Block had '*not been good*', the Applicant was not seen therefore as being '*user friendly*'.
96. Mr Saunders confirmed that the notices, to convene a general meeting of the RTM to consider resolutions to remove the Second Respondent and other directors and to appoint himself and the New Directors, were prepared with the benefit of legal advice paid for by the Applicant and that he had sought the approval of Mr Ormonde for this expenditure.
97. However, Mr Saunders denied that he had obtained such paid advice in respect of the consent to an assignment, he relied on Canonbury for that advice.

The First Respondent – Ms Reiner

98. In her witness statement Ms Reiner gives a lengthy account of events at the Block. She sets the scene by stating that she had bought the Flat in October 2006. She goes on to say; '*with the arrival of a newborn and all the things that we needed to care for the baby (prams, cribs and the like) we realised that the Flat was going to be too small for us, and we wanted to find a larger family home.*'
99. As to her evidence specifically on the assignment of the Lease, she says as follows.
100. On 1 May 2015 she emailed Mr Saunders saying that she was trying to sell the Flat but that everything had '*blown up about the disputes in the building*'.
101. On 24 April 2015 her original buyer's solicitors raised a number of questions about the sale and one of these was to ask for a draft licence to assign. She was not aware of this at the time.
102. On 20 May 2015 her solicitors emailed her and stated that the landlord must grant licence to assign to the new buyer. She replied to this giving

the solicitors the name of one of the then directors and with an email address for the RTM.

103. On 2 June 2015 the Second Respondent, acting in his capacity as Director of the RTM, made contact regarding the leasehold enquiries raised by her buyers.
104. On 5 June 2015 the Second Respondent contacted her again to discuss the replies to leasehold enquiries because, he said, he was going to have to say things in relation to the major works at the Block that may deter purchasers.
105. On 8 June 2015 she emailed Ms Field-Foster (another leaseholder) regarding what she had been told by the Second Respondent. Ms Field-Foster was not able to help and suggested contacting Canonbury.
106. She then spoke again to the Second Respondent. He told her that he would be interested in buying the Flat.
107. In an email dated 9 June 2015 sent by the Second Respondent to the First Respondent the Second Respondent said as follows;

I'm not the solicitor so cannot advise all the details.

But, for example, we do not need a 'sales information pack' nor do we need a copy of the buildings insurance policy.

We will provide the 'licence to assign' to you.

We will undertake the relevant searches as quickly as may be practicable.

Please confirm that you have accepted my offer to buy your flat in the amount of £445,000.

108. The First Respondent goes on to say that she wanted to run with both potential purchasers (that is the ones that she already had and the Second Respondent) in order to maximise her chances of selling the Flat.
109. Bearing this in mind, she did not feel it appropriate to ask the Second Respondent to provide leasehold information for the other purchaser's solicitors and she emailed Canonbury for a sales information pack. Canonbury replied saying that a Solicitor had to make this request.
110. Her solicitors sought the pack from Canonbury who replied on 11 & 12 June. Canonbury required a payment of £450 before sending the information pack. The fee was paid and the pack was sent out.
111. She then decided to proceed with the sale to the Second Respondent. Her solicitors sent the Second Respondent's solicitors the title documentation and the information pack received from Canonbury.

112. The First Respondent's mother then speaks to the Second Respondent. Her mother's account to her of that conversation included the Second Respondent saying that the licence to assign needed to be sorted out and *'it would ultimately need to involve a leaseholder company called Triplark for their agreement, but that would be a formality unless a person was not of good faith'*. The First Respondent then says that her solicitor had told her that the RTM or Canonbury could grant the licence.
113. She emails the Second Respondent on 17 June to tell him that her solicitors said they had not heard from his solicitors or received the licence to assign.
114. On 18 June the Second Respondent emails her a draft licence to assign and she forwards this to her solicitor.
115. On 19 June her solicitors email Canonbury asking for the licence to assign as soon as possible.
116. Canonbury replied on 19 June. It acknowledged the request for a licence assign and set out the process to obtain a licence. A licence to assign would be produced as soon as £600 was paid in advance to Canonbury, that licence would then need to be signed and sent back to Canonbury.
117. She speaks to the Second Respondent on 19 June and told him that she had sent the draft licence to her solicitor and mentioned that a licence was being sought from Canonbury. She then says; *'Mr Wismayer clearly interpreted me as saying that my solicitor had advised me that we needed a second Licence from Canonbury for the transaction with him.'*
118. The Second Respondent then sends an email the same day to her solicitors saying that Canonbury did not have the capacity to sign licences to assign and that the RTM would produce a licence to assign to assist with any sale.
119. Canonbury were then pressed to provide information for the sale to the first purchaser. They replied on 23 June repeating the information that would be required for the licence to be issued. It repeated that a fee of £600 was payable for the licence. The First Respondent then says;

As a result of the changes and the question mark placed over Canonbury's involvement with the licence to assign evidenced by Mr Wismayer, I believe that my solicitor did not pursue the Canonbury licence to assign process any further in order to obtain a licence from them.

Therefore, my solicitor removed from the contract any obligation on me to provide licence to assign to Mr Wismayer, because it was believed that this was fundamentally something that was already taken care of and substantially within Mr Wismayer's control. From a practical perspective, after I signed the Licence to Assign which Mr Wismayer had produced on

behalf of the RTM company and returned it to the company, I thought that I had done what I needed to do on that.

My solicitor sent the Licence to Assign signed by me to the RTM Company at its registered office, under cover of a letter dated 16 July 2015.

120. The contract for the sale to the Second Respondent was exchanged on 26 June with completion on 29 July 2015.
121. On the day of completion the First Respondent's solicitors received a communication from Canonbury, the relevant parts of that state;

Triplark, headlessor for the block has affirmed that a new process MUST be undertaken for the grant of a licence to assign and consequently, there will be a delay whilst we put in place that new process with them. During this time, you MUST NOT assign a property to a new owner. For the avoidance of doubt, any licences purported to have been granted by Mr Wismayer are not valid and if we have issued to you a licence to assign, this will not be suitable for use.

Under 2002 Act, the NWH RTM company must give 30 days notice to the Headlessor of the intention to grant the licence to assign before it may grant that licence and so there may be some delay whilst these matters are resolved.

122. After calls are made to Canonbury by her solicitors with no resolution to the situation and after having actually moved to her new property on the day set for completion, she decided to compete the transfer with the Second Respondent.
123. In oral evidence Ms Reiner said that people in the Block knew that she was selling and that she was in contact with the Second Respondent. She agreed that she never paid the fee for the grant of a licence. Her solicitors had believed that the licence from the Second Respondent was sufficient. She considered that she had done everything necessary to obtain the licence to assign.

The Second Respondent – Mr Wismayer

124. In his witness statement, Mr Wismayer says the following.
125. He was introduced to the former Directors of the RTM in December 2014 who were looking for help regarding the problems surrounding the heating project at the Block.
126. He was appointed as a Director on 13 March 2015. He took the view that Canonbury was not managing the Block properly.
127. Some time after March 2015, a group of 'pro-Canonbury' leaseholders emerge.
128. The Applicant used its 30 votes to oppose him at the general meetings of the RTM on 29 April and 24 July 2015.

129. During 2015 Mr Heimann and Mr Ormonde of Triplark, Mr Saunders and Mr McElroy *'became ever closer and more co-ordinated in their conduct of affairs'*.
130. He saw the purchase of the Flat as being an *'elegant solution'* to the First Respondent's problem. He felt that becoming a leaseholder would *'reinforce my commitment to the block and demonstrate that I was serious about sorting out its problems'*. He continued *'I am also not ashamed to say that I saw it as an additional method of holding Canonbury accountable...'*
131. He was *'aware that a licence to assign would be required'*. He continues that he familiarised himself with the way that Canonbury had managed the Block and says; *'This revealed to me the outline of the process Canonbury followed, including the way it contacted Triplark's agent OCK on questions of notice of assignment or consent...'* and continues; *'When I was first negotiating the sale with Ms Reiner in June therefore, I anticipated any dealing with Triplark would be a formality and would take less than 7 days.'*
132. He states that he became aware that Mr McElroy was no longer entitled to sign licences on behalf of the RTM and so he produced his own licence based on the one used by Canonbury.
133. On 23 July 2015 he is sent an email by Mr Ormonde in which it is asserted that Triplark was aware that leases were being assigned without notice to being given by the RTM and that it objected to any assignment without such notice. He was not aware of there being any other licences to assign around this time and concludes that this email was directed at him and his proposed purchase of the Flat.
134. He continues as follows;

As a director of the RTM Company, I had no grounds to object to the assignment with Ms Reiner, but of course I was the sole director of the company authorising a transaction to myself. I knew that I was not able to purport to grant consent myself as the RTM company and that a procedure with Triplark was officially required, and I had envisaged that could be dealt with in the same way as other transactions I had identified. I did not consider that Triplark had any reasonable grounds at all to withhold consent and I could not envisage any.

135. On 1 July, the Second Respondent sends an email from the RTM email address to Mr Kaufman, Mr Saunders and the new directors which includes the following;

The die is cast! I have already bought a flat. We complete the assignment on 28th July.

I shall not be moving in; the flat is just the first of a series of investments in Northwood Hall and will be sublet.

The intention is to establish a contractual route by which I can enforce the lease against the RTM company which, as you helpfully admit, is in breach of the repairing obligation. Should you and your group be appointed directors (your first task will be to admit me to membership of the RTM company), your careless admission of breach will save time either in Court in a claim for specific performance of the repairing obligation or at the First Tier tribunal in an application under S24 of the LTA 1987.

What I hope you will realise and appreciate now, before it is too late, is that I have made a commitment to Northwood Hall which involves but which is not limited to restoring the building to a state of repair. Whereas your group apparently cannot comprehend the process, which I necessarily infer from your astonishing love-fest with your incompetent Mr McElroy, I have been immersed in it for the last 30 odd years. So, if you get out of the way, you will get what you want without exposing yourself to risk of personal liability. What could be better than that?

136. In oral evidence, the Second Respondent explained that the agreement with the former Directors envisaged him being paid a consultancy fee of £250,000 per annum (in respect of which he said he would seek prior approval from the First-tier Tribunal). He had, he said, transformed the mansion block where he lived and was paid a fee in respect of his management tasks there of £100,000 per annum. He added that he was interested in the Block because of the difficulties and complexities – he *'dealt with the impossible'* – that's why he was invited to become involved in the Block by the former Directors.
137. As to the granting of the licence, he said that, as far as he was concerned, Canonbury were acting as a rogue managing agent and that he had to take action to sideline them.
138. He went on to state that he did not send the application to assign the Flat to the Applicant, their solicitors or their agents and that the situation regarding the granting of consent could not be clearer, it would not be granted. His analysis of the situation was that the First Respondent was *'non-competent'*; if he communicated with the Applicant and it objected to the licence to assign, there could be months of delay with devastating consequences for the First Respondent. It was *'the obligation of the strong to protect the weak'* and he was not prepared to expose the First Respondent to *'vindictive attack'*. He took full responsibility for his decision not to contact the Applicant regarding the assignment.
139. In a letter to the Applicant's solicitors sent by email dated 12 August 2015, the Second Respondent said;

So, as to avoid the costs and uncertainties inherent in your client's threatened litigation and in any related proceedings in which that step may provoke, an outcome that would be disproportionate to the issue of consent to the transfer by Ms Reiner, I suggest that as it has suffered no conceivable harm, Triplark should waive the breach or provide a retrospective consent.

The Second Respondent explained this statement in oral evidence by making the point that this was simply a commercial suggestion to avoid pointless proceedings. He did not consider that he was actually in breach of covenant – this was not an admission.

140. As to the physical occupation of the Flat, the Second Respondent stated that the Flat is empty as it is unfit for occupation. Since he purchased the flat no one has lived there, his staff visit from time to time to collect mail. At this point in the hearing an email was produced and shown to the Second Respondent. The email is dated 8 November 2015 and was sent by the Second Respondent to another occupant in the Block and concerned a complaint by that occupant as to the smell of smoke emanating from the Flat. The email states;

My tenant does not smoke heavily nor does she smoke in the corridor. As she is a vulnerable person, with Winter fast approaching, I am not going to impose what to her would be an onerous obligation.

The Second Respondent's explanation of this email was that the person in question is one of his employees, she is vulnerable and needs shelter occasionally away from her normal place of residence. He occasionally allowed her to spend the night or several nights together at the Flat. The Flat was not sublet to her, the Flat is unfurnished and she is not usually present there. He would not consider obtaining the agreement of Ms Reiner to let this person occupy the Flat because he regarded it as his property. He proposed to completely modernise the Flat but would not be seeking Ms Reiner's permission to carry out works as he had not considered whether that was necessary.

The parties' submissions – parting with possession

141. It was agreed between the parties that the result of the assignment of the Lease not being registered at the Land Registry was that first, there has been no full legal assignment of the Lease from the First to the Second Respondent and, accordingly the Lease remains vested in the First Respondent. Therefore so far as clause 8(1)(ii) of the Lease is concerned, there has not been an assignment, but according to the Applicant, there has been a parting with possession of the whole of the Flat.
142. Second, as matters stand, by virtue of section 6 of the Trusts of Land and Appointment of Trustees Act 1996 ('TOLATA') the leasehold legal interest in the Flat is held by the First Respondent on trust for the Second Respondent (he being the beneficiary under that trust).

143. We were referred to two authorities as follows:-

Lam Kee Ying SDN BHD v Lam Shes Tong trading as Lian Joo Co
[1975] AC 247

144. The lease in this case contained a covenant in the following terms;

Not to assign underlet or part with possession of the demised premises or any part thereof without the prior written consent of the lessors such consent not to be unreasonably withheld

144. The tenant of the premises in question, in partnership with others, was using the premises to carry out business as general merchants. The tenant and his partners then formed a limited company in order to take over the business formerly operated in partnership as a going concern.

145. It was alleged by the landlord that there had been a parting with possession of the demised premises from the tenant to the limited company. The Privy Council found that it could not be disputed that the tenant had permitted the company to occupy the premises.

146. Sir Harry Gibbs, giving the agreed judgment of the Privy Council, then records that the tenant and company had relied on number of cases in which it was held that a lessee who retains the legal possession does not commit a breach of a covenant against parting with possession by allowing other people to use the premises; the judgment then continues as follows

Accordingly, it has been said that a lessee who grants a licence to another to use the demised premises does not commit a breach of the covenant; "unless his agreement with his licensee wholly ousts him from the legal possession..... nothing short of a complete exclusion of the grantor or licensee or from the legal possession for all purposes amounts to a parting with possession"

The Judge continues as follows;

Their Lordships regard these decisions as settling the law and as proceeding upon correct principles. A covenant which forbids a parting with possession is not broken by a lessee who in law retains the possession even though he allows another to use and occupy the premises. It may be that the covenant, on this construction, will be of little value to a lessor in many cases and will admit of easy evasion by a lessee who is competently advised, but the words of the covenant must be strictly construed, since if the covenant is broken a forfeiture may result.

The Judge then deals with the case in hand as follows;

However, the question whether the first respondent has parted with possession must depend upon all the facts and circumstances of the present case that in their Lordships' opinion are distinguishable from those of the cases cited. Some of the evidence—as to the erection of a signboard, the transfer of the electricity, water supply and telephone and of the issue of receipts, bills and invoices in the name of the second respondent— is equivocal and is quite consistent with a conclusion that

although the second respondent occupied the premises the first respondent retained possession. However the fact that the second respondent tendered its own cheque in payment of the rent is some evidence that the second respondent regarded itself, and was regarded by the first respondent, as having possession of the premises. Even more significant in their Lordships' opinion is the fact that at no time before the trial or in evidence did the respondents give an unqualified denial that the first respondent had parted with possession to the second respondent. In their solicitors' letter of November 13, 1969, in their defence and in evidence the reply given by the respondents to the claim that they had broken the covenant was not that there had in fact been no parting with possession, but that there had been no parting with possession because the first respondent was a major shareholder in the second respondent..... in their Lordships' opinion the proper conclusion to be drawn from the whole of the evidence in the case, scanty as it may be, is that the first respondent did part with possession of the premises.

Akici v LR Butlin Ltd [2005] EWCA Civ 1296

147. This case concerned a covenant (4.18) in a commercial lease which included the following words;

not to charge assign....underlet or part with possession of a part of the demises premises....nor to share possession of the whole or any part of thepremises nor to part with possession of the whole of thepremises

148. In that case, Mr Akici carried on the business of preparing and selling take away pizzas at the premises. From shortly after the acquisition of the lease by Mr Akici, a company, Dekka Limited, whose only shareholder and sole director was a Mr Gultekin, started trading from the premises. Following a dispute over noise from an adjoining building, in correspondence with the landlord, Mr Akici's solicitors referred to the fact that they acted for Mr Akici and Dekka Limited. The landlord then served notice alleging a breach of the lease in that the lease had been assigned, or that there had been a subletting or that there had been a parting with possession without consent between Mr Akici and Dekka.
149. The trial judge found that there had been no assignment, subletting or parting with possession between Mr Akici and Dekka. Nothing short of a complete exclusion of Mr Akici from legal possession for all purposes amounted to a parting of possession. However, he found that Mr Akici had shared possession of the premises with Dekka, that sharing represented a breach of covenant against the sharing of possession. In the case of 'sharing possession', possession was not to be given the strict meaning that is applied in considering if there has been a parting with possession. The reason for this was that it would be impossible for there to be a sharing of possession in the strict legal sense. Mr Akici appealed.
150. The Court of Appeal, in allowing the appeal, found that there had been no breach of covenant. It considered that it was possible to share

'possession' (in its strictest sense) – this would be by means of converting the tenancy from a sole tenancy to a joint tenancy but that 'sharing' in its ordinary sense (i.e. without a transfer of a legal interest) would not breach the covenant.

151. Neuberger LJJ, as he then was, on the question of interpretation, said as follows;

The difference between possession and occupation is rather technical and, even to those experienced in property law, often rather elusive and hard to grasp. None the less, it is very well established and is particularly important, and indeed well known, in the field of landlord and tenant law, especially in relation to the question of whether an agreement creates a tenancy or a licence, and in relation to alienation covenants such as clause 4.18. [23]

While interpretation of a word or phrase in a document must ultimately depend upon the documentary and factual circumstances in which it was agreed, it is desirable that the courts are as consistent as they properly can be when construing standard phrases in standard contexts. In that connection a covenant against parting with possession is included in many, quite possibly most, modern commercial leases. Further the courts have consistently given the strict meaning to such covenants as was adopted in unreserved terms by the Privy Council in the *Lam Kee Ying* case.... [24]

Accordingly, while one cannot lay down any immutable rule as to how a particular word or expression is to be construed in every document or lease, I consider that any court must be very cautious before construing the word "possession" as extending to occupation which does not amount to possession, especially in a familiarly expressed covenant against parting with possession in a detailed professionally drafted commercial lease, such as that in the present case. [25]

In these circumstances I consider that it would require a very strong and clear case before a covenant against parting with possession should be construed in a way other than that adopted by the Privy Council in the *Lam Kee Ying* case, particularly in the light of the consistent approach taken in the earlier authorities cited therein. [26]

It may be said that this conclusion will result in a covenant against sharing possession having relatively little value. The answer to that point may be said to be the same as that given in the *Lam Kee Ying* case...., namely that "the words of the covenant must be strictly construed, since if the covenant is broken a forfeiture may result". That approach may well be a little less powerful that it was 30 years ago on the basis that such canons of construction are now given rather less weight. None the less, the modern approach, namely that such covenants should be given what is, in their documentary, factual and commercial context, their natural and commercially sensible meaning, indicate, in my judgment, the same result. Further, I do not think one should lean in favour of giving a wide meaning to an absolute covenant (i.e. one which is not subject to a proviso that consent cannot be unreasonably withheld)

Respondents' submissions

152. Mr Johnson QC for the Respondents reinforced the point that, as matters stand, the First Respondent holds the legal interest in the lease on trust for the Second Respondent. The Second Respondent is not the

tenant of the First Respondent nor is he her assignee. The legal title to the Flat remains vested in the First Respondent. Mr Johnson particularly drew out attention of the following provisions of TOLATA;

6.-

(1) For the purposes of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner.

.....

(5) In exercising the powers conferred by this section trustees shall have regard to the rights of the beneficiaries.

.....

(9) The duty of care under section 1 of the Trustee Act 2000 applies to trustees of land when exercising the powers conferred by this section.

It follows therefore, argued Mr Johnson, that the First Respondent had, and has, all the powers of an absolute owner of the Flat. By sub-section (5), she has to have 'regard' only to the rights of the beneficiaries, not be bound by them. By sub-section (9), the First Respondent is under a duty of care. It must follow therefore from the judgments and principles set out in *Lam Kee Ying* and *Akici* that there cannot have been any parting with possession of the Flat until the Second Respondent became the registered proprietor of the leasehold interest.

The Applicant's submissions

153. Mr Gallagher for the Applicant pointed out that the facts in *Akici* were somewhat different to the case in hand and that in *Lam Kee Ying* the Privy Council were at pains to stress that what amounts to a parting of possession is fact sensitive.
154. It would be odd, continued Mr Gallagher, if in this case, possession could only mean full and absolute legal possession - the effect of that would be that only an assignment or subletting could amount to a parting of possession. That would leave the words 'part with possession' in clause 3(8) of the Lease as redundant.
155. At the hearing, in a discussion between the tribunal and counsel, we struggled to envisage any scenario apart from a full legal assignment and/or a subletting of the whole that could amount to a complete parting with legal possession.
156. Mr Gallagher made the point that the Flat was sold, as per the terms of the contract, with vacant possession.
157. As to TOLATA, yes, Mr Gallagher agreed that it made reference to the trustee having the power of an absolute owner, however this is in relation to the trust and is subject to the rights of the beneficiary and in this case, the beneficiary has a right of occupation.

The parties' submissions – breach

Respondents' submissions

158. Mr Johnson argued that even if there had been a parting with possession within the proper meaning of the Lease covenant, the First Respondent was entitled to part with possession and accordingly there had been no breach of covenant.
159. The function of granting consent was, by virtue of the Act, vested in the RTM. The managing agents, Canonbury, by virtue of the fact that its associated company had resigned its directorship of the RTM had no authority to grant consent. Its procedures for the granting of consent were therefore irrelevant. The application by the First Respondent to assign to the Second Respondent was dealt with by the RTM. The RTM was able to unilaterally refuse consent, the corollary of that is that the RTM could unilaterally grant consent; granted, if it did act unilaterally, it would have problems so far as the Applicant was concerned because the RTM is obliged under the 2002 Act to give notice to the Applicant, however that does not affect the validity of given consent as between the RTM and the First Respondent.
160. Further, if the RTM can unilaterally grant consent, it must be that it is capable of unreasonably refusing consent. There are three circumstances in which it may so act. First, it could simply (and unreasonably) say no; second, it could delay the decision on consent for an unreasonable time; third, it could simply fail to pass the application for consent to the Applicant.
161. On the facts of this case, there are two alternative analyses;
(a) The RTM gave consent or conducted itself in such a way that it is impossible now to say that it did not give consent
(b) If consent was never obtained, the lack of consent is explained by the fact that the giving of it was unreasonably withheld. The RTM never gave a proper response to the application and never passed it to the Applicant.
162. Mr Johnson highlighted the following course of dealing;
- | | |
|----------|-------------------------------------------------------------------------------------------------------------------------------------------|
| 01.06.15 | Email: R1's solicitors to RTM encloses leasehold enquiries and asks for a response |
| 02.16.15 | Email: R1's solicitor clarify to R2 that the leasehold enquiries are in respect of the Flat. R2 states he will address the matter shortly |
| 05.06.15 | Email: R2 in capacity of director of RTM asks to speak to R1 regarding the replies to the leasehold enquiries |
| 16.06.15 | Email: R2 sends draft licence to assign 'which I shall copy to your solicitor shortly.' |

Mr Johnson submits that at this point, the application for licence is with the RTM

- 19.06.15 Email: RTM (by R2) to R1's solicitors; "Should it prove necessary, I confirm that the RTM company will provide an appropriately drawn Licence to facilitate a sale by your client to her alternative purchaser."
- 16.07.15 Letter: R1's solicitors send to the RTM the licence signed by R1

So, says Mr Johnson, either the RTM never responded to the application for a licence and did not send it to the Applicant – in which case there was an unreasonable withholding of consent, or the RTM gave consent to the assignment.

163. The First Respondent genuinely believed that she had done all she could and needed to do to obtain the licence.
164. The contract for the sale of the Flat specifically excluded the term that the seller was to obtain a licence to assign. The reason for this was that the Second Respondent was the Director of the RTM and took the decision not to notify the Applicant as he knew that the Applicant would refuse to grant the licence.
165. The 'cabal' consisting of Mr Saunders, the New Directors, the Applicant, Mr Ormonde and Canonbury, all knew what was going on and conspired together to try and frustrate the sale between the Respondents.
166. Finally, said Mr Johnson, the RTM got the letter from the First Respondent's solicitors (dated 16 July 2015 enclosing the licence signed by the First Respondent) on 20 July 2015. From that point, a reasonable time for dealing with that licence was a matter of days, certainly before the completion of the sale on 29 July. It was not dealt with in that time and was accordingly, unreasonably refused.

The Applicant's submissions

167. The fact that the functions of granting a licence are the RTM's does not mean that the RTM can unilaterally grant consent. Section 98(4) of the 2002 Act provides that the RTM company *must not* grant an approval without giving 30 days notice to the landlord. The effect of this subsection is reinforced by Section 99(1) which provides that if the landlord objects in time, the RTM may only grant an approval either with the written consent of the person who objected or in accordance with a determination of the appropriate tribunal. Further, section 111 of the 2002 Act provides that any notice must be given in writing.
168. If the Respondents' submissions were correct, that would give an RTM company (and so leaseholders) free reign to, for example, give licences to carry out structural alterations against the interests of the landlord. Yes, the landlord could, in theory, take action in respect of such matters against the RTM, but that would be of little use given that an RTM company has no assets other than the receipt of Service Charges.

169. If the First Respondent's solicitor's letter of 16 July 2015 was the application for consent, the Second Respondent specifically admitted that he chose not to pass that on to the Applicant.
170. What is a reasonable amount of time for the consideration of a licence to assign? Mr Gallagher contended that it could not be less than 30 days given that this was the notice period provided for by the 2002 Act for the period of notice to be given to the landlord by the RTM of the request for consent. Therefore, if the application was made to the RTM on 20 July 2015, the 'reasonable period' for the consideration of that application could not have expired prior to the completion of the sale between the Respondents on 29 July 2015.
171. The sending of a draft licence by the Second Respondent to the First Respondent on 18 June 2015 could not be taken to be an application for consent made by the First Respondent. The email from the Second Respondent to the First Respondent dated 19 June 2016 refers to 'an alternative purchaser' and so is not in any event related to the question of consent to an assignment to the Second Respondent.
172. As to the state of knowledge of the 'cabal' or 'consortium' (Mr Saunders, the Applicant and others), one cannot assume that what was known to one was known to all. No one had identified, at the material times, the actual flat that was being sold. Even if there was knowledge on behalf of that group that the Flat was in the process of being sold, so what? That does not obviate the need for consent to be obtained.

Our findings and decisions

Parting with possession

173. There is no doubt in our mind that, for all practical purposes, upon completion of the sale of the Flat, there was a parting with possession of that Flat from the First to the Second Respondent. We conclude this for the following reasons;
- (a) The purpose of the sale was for the First Respondent to be able to buy (and move to) a larger home for her growing family
 - (b) The contract for sale, as one might expect, provided that vacant possession of the Flat was to be given by the First to the Second Respondent upon completion.
 - (c) There is no dispute that the Second Respondent took physical possession of the flat; the First Respondent referred in her evidence to having moved all her possessions to her new property on the day of completion.
 - (d) There is no evidence that the Respondents ever contemplated that the First Respondent would ever have any control over or say in the Flat after completion.
 - (e) There is no question that the purchase price was not fully paid for the Flat on completion.

- (f) There is evidence that the Second Respondent either sub-let the Flat after completion or gave a licence to occupy the flat to a third person.
 - (g) The question of obtaining consent from the First Respondent to his use of the Flat after the sale had never occurred to the Second Respondent.
174. The lack of registration of the Second Respondent's title to the leasehold interest in the Flat of course meant that, as a matter of law, there existed between the parties a Trust. The First Respondent continued to hold the legal title, the beneficiary of that Trust was the Second Respondent.
 175. The only conceivable purpose of that Trust was for the Second Respondent to have possession of the Flat with the intention that the legal interest would pass to him by his registration as Proprietor of the leasehold interest by the Land Registry.
 176. It seems to us therefore that the roles of trustee and beneficiary and their statutory rights have to be seen in that context. The power of an absolute owner vested in the First Respondent by s.6 of TOLATA is, in this case and in reality, no more than to transfer that interest to the Second Respondent. The 'rights' of the beneficiary to which by virtue of s.6(5) the First Respondent has to have regard, must be his right to occupy and to have conveyed to him the legal title of the Flat.
 177. We do not consider that the result of the decisions in *Lam Kee Ying* and *Akici* is that, in any conceivable case, a parting with possession in the meaning of a covenant such is contained in clause 3(8) of the Lease, can only be a full legal assignment of the lease with the assignee being registered as proprietor by the Land Registry.
 178. We agree with Mr Gallagher's submission that the Privy Council in *Lam Kee Ying* in recognising the general principle - that a covenant which forbids a parting with possession is not broken by a lessee who in law retains the possession even though he allows another to use and occupy the premises; is subject to the facts of each case. The facts in *Lam Kee Ying* were indeed such that justified a finding that the lessee in that case had parted with possession despite the lack of an assignment by the lessee to a third party.
 179. The Court in *Akici* was concerned with a slightly different question on the facts of that case. The trial Judge had considered that it was not possible to share possession in the strict legal sense hence his distinction between the sharing of possession and parting with possession. The appeal court disagreed with the distinction and found that 'possession' should retain its strict legal sense throughout the covenant.
 180. That brings us back to the strict meaning of possession. The Court in *Akici* affirmed what was said in *Lam Kee Ying* but of course the Privy

Council in that case admitted of the possibility of there being a parting with possession without a completed assignment.

181. In his judgment, Neuberger LJ talks of, (as he went on to do recently in *Arnold v Britton* [2015] UKSC 36) the modern approach to lease construction, namely that such covenants should be given their natural and commercially sensible meaning. He mentioned earlier in the judgment that he could consider it would require a very strong and clear case before a covenant against parting with possession should be construed in any other way other than adopted by the Privy Council (in *Lam Kee Ying*). It seems to us that the case in hand is such a strong and clear case. The natural and commercially sensible interpretation of possession on the facts of this case include a parting of possession that falls short of registration with the Land Registry, especially when bearing in mind that the Second Respondent attempted to register his title at the Land Registry.
182. In passing, we note that if we are right in this conclusion, it would prevent a situation whereby the words 'or part with possession' in clause 8 of the Lease were rendered completely redundant.
183. We conclude therefore that, in this case, there was a parting of possession of the Flat upon the completion of the sale of the lease between the Respondents on 29 July 2015.

Was there a breach of covenant?

184. The above conclusion then brings us on to consider whether, on the facts of this case, the parting of possession took place without the previous written consent of the landlord (or whether consent was granted or unreasonably refused).
185. There is no doubt that there was concern amongst various parties about the Second Respondent acquiring an interest in a flat at the Block. There is no doubt that there was some discussion of the matter between elements of the so-called 'cabal' or 'consortium' consisting of Mr Saunders and the other New Directors, Mr McElroy and the Applicant.
186. Whilst it is clear that a number of parties, for differing reasons, were alarmed at the prospect of having the Second Respondent as a leaseholder, we do not consider that there was, in any sense, a coherent and co-ordinated plan hatched between leaseholders, the Applicant and Canonbury to prevent that event.
187. We accept Mr Ormonde's evidence that he had a limited recollection of events given that the Block and the Applicant were just one of many buildings and landlords with which he dealt. We accept that as far as he was concerned on the Applicant's behalf, there was no application for a licence to assign and that he did not become fully aware of the matter until after completion of the sale of the Flat.

188. As for Mr McElroy, clearly he had very good reason for not wanting the involvement of the Second Defendant in the Block to continue. He and his company Canonbury had been the subject of considerable criticism by the Second Defendant regarding his involvement in the Block and the running of the Block. However, he had been involved originally in the setting up of the protocol between the RTM and the Applicant regarding the granting of licences. Following the ending of his involvement of the granting of licence procedure in 2014, there is no evidence that the protocol agreement did not continue to be the arrangement between the RTM and the Applicant. We accept that the procedure by which the Applicant granted licences was the payment of a fee split between Canonbury and the RTM, the provision of information about the proposed assignee to the Applicant and then, the consideration of the question of consent by the Applicant. Mr McElroy clearly made the point that the Applicant was one of the only or few landlords that he dealt with that required so much information before considering the grant of a licence.
189. As for Mr Saunders, again he did not want the Second Defendant to be a leaseholder, he was opposed to his plans for the Block. We do not consider his role in events to be relevant to the question of whether or not there was a breach of covenant as alleged in the application before us.
190. In general, we do not consider that, to whatever extent there may have been attempt to stop the Second Defendant becoming a leaseholder, that this is relevant to the question of whether or not there was a breach of covenant.
191. Our view of the evidence presented to us is that there was a general concern to stop the Second Respondent taking over at the Block. This concern led to discussions about how to stop the Second Defendant taking control of the Block's finances by removing funds from Canonbury's control to an account controlled by him. The discussions involved removing the Second Defendant as a Director. There were clearly concerns that the Second Defendant would try and bypass the need to get consent to assign from the Applicant (which is exactly what he did in our view). What there was not, was any discussion or plan to prevent the Second Respondent from seeking consent to assign. There was clearly a recognition that such consent had to be obtained if the Flat were to be validly assigned. There was a view that should consent be sought to assign the Lease, it would be refused - that was however in the expectation that such consent would be sought. There was no evidence of any plan to frustrate the giving of consent by delay on the part of the RTM or the Applicant.
192. The Second Respondent knew full well that the Applicant's written consent to an assignment was required. He was aware that the Applicant would in all probability refuse consent. The Second Respondent took the decision, in his eagerness to obtain an interest in

the Block and in light of full knowledge of the need to obtain consent, to arrange matters so that consent was not sought from the Applicant.

193. To his credit, the Second Respondent has taken full responsibility for his actions to date so far as the First Respondent is concerned. The First Respondent was throughout this matter something of a pawn in the game between the Second Respondent and his opponents at the Block (the Second Respondent referring to her as 'non-competent'). The Second Respondent's actions in issuing the draft licence and changing the registered office of the RTM and in his statements to the First Respondent confused the situation for the First Respondent and her solicitors. That does not change the facts that the First Respondent and her solicitors; (a) were, or should have been, aware of the need for proper written consent to assign; (b) were clearly and consistently informed of the process to obtain consent; (c) did not respond to the information requested of them in order to obtain consent; (d) took the decision to complete in full knowledge that the necessary consent had not been obtained.
194. The only licence ever produced was a draft licence.
195. We do not accept that the RTM can unilaterally grant a licence in the face of a statutory requirement to give notice of the application to the landlord. Section 98(4) could not be in plainer terms when it provides that the RTM company *must not* grant an approval without having given notice to the landlord.
196. There is nothing in the evidence before us that leads us to the conclusion in any event that the RTM gave consent or represented that such would be given in the context of this transaction. The nearest the evidence comes to this is when the Second Respondent writes to the First Respondent's solicitors on 19 June 2015 promising to provide an 'appropriately drawn' Licence to facilitate a sale to the First Respondent's alternative purchaser. We do not consider that the Second Respondent himself considered that he, on behalf of the RTM, had ever actually given consent.
197. We do not consider that there was any unreasonable withholding of consent. The first time that there is any response to the sending out of the draft licence to the First Respondent is with the sending of the licence, signed by the First Respondent, to the RTM by letter dated 16 July 2015. The full information requested by Canonbury had not been provided by that stage nor had the fee demanded been paid. The licence itself contains a paragraph making it clear that the RTM can only grant the licence if it has first given the landlord 30 days notice.
198. The request for a licence is of course not sent to the Applicant prior to the completion of the sale.

199. We cannot see in the light of these facts how it can be said that either the RTM or the Applicant had either unreasonably delayed or refused consent.
200. For the avoidance of doubt, even if there was a proper request made for a licence to assign by way of the letter of 16 July 2015, we do not consider, bearing in mind the statutory period of 30 days, that the failure to pass this on to the Applicant or to deal with it by 29 July 2015 could be classified as unreasonable delay.
201. We conclude therefore that the First Respondent is in breach of clause 8 of the Lease in that she has parted with possession of the Flat to the Second Respondent without obtaining the written consent of the Applicant.

Costs

202. The Respondent sought an order pursuant to Section 20C Landlord and Tenant Act that the costs incurred, or to be incurred, by the Applicant in connection with these proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Respondents.
203. Whilst we have found against the Respondents on this application, Counsel for the Respondents emphasised throughout the hearing that, in the Respondents' view, this application was entirely pointless. His view was that, should the Applicant seek to forfeit the Lease based on this determination, given the nature of the breach and the fact that (in the Respondents' view) the Applicant ultimately could not argue that it had any reasonable grounds to object to the assignment, there would be no question that relief from forfeiture would be obtained.
204. It appears to us therefore that (subject to any appeal of this decision) before making any decision on the application under Section 20C, we should await the outcome of any application for relief and further submissions on the question of section 20C thereafter.
205. If any party objects to the postponement of the Section 20C decision, they should write to the tribunal Case Officer setting out their reasons by no later than 28 days from the date of this decision.

Mark Martynski, Tribunal Judge
23 February 2016

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.