



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

**Case reference** : **LON/00AP/LBC/2014/0030**

**Property** : **505 Lordship Lane Wood Green,  
London N22 5DL**

**Applicant** : **Mayor and Burgesses of the  
London Borough of Haringey  
Mr Richard Ricks - In house  
Counsel**

**Representative** : **Mr Paul Cox- Lease Compliance &  
Home Sales Manager Homes for  
Haringey**

**Respondent** : **Mr Sulman Rahman**

**Representative** : **Mr Myers, Churchills Solicitors**

**Type of application** : **Determination of an alleged breach  
of covenant**

**Tribunal member(s)** : **Judge: N Haria LLB(Hons)  
Professional member: H Geddes  
Lay member: L Hart**

**Date and venue of  
hearing** : **10 July 2014 at 10 Alfred Place,  
London WC1E 7LR**

**Date of decision** : **15 September 2014**

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**DECISION**

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## **Decisions of the Tribunal**

- (1) The Tribunal is satisfied that the Lease is a long lease within the meaning of Section 169(5) of the Commonhold and Leasehold Reform Act 2002 (“the Act”). The Lease contains covenants that are binding and may be enforced by the Applicant.
- (2) The Tribunal finds the Applicant’s acquiescence or delay in seeking a determination that a breach of a covenant has occurred amounts to a waiver on the Applicant’s part of a breach of the covenants under Clauses 2(13) and 2(15) of the Lease.

## **The application**

1. The Applicant seeks a determination pursuant to subsection 168(4) of the Act, that the Respondent is in breach of the covenants under Clauses 2(13) and 2(15) of the Lease.

## **Background**

2. The Applicant holds the freehold title to the Property registered at the H M Land Registry under Title Number MX334295.
3. The Respondent holds the leasehold title to the Property registered at the H M Land Registry under Title Number NGL454271 pursuant to a lease dated 18 April 1983 made between The Mayor and Burgesses of the London Borough of Haringey (1) and Solomon Layi Adebayo and Phebean Olufunke Adebayo (2) (“the Lease”).
4. The Property was originally a maisonette known as 505 Lordship Lane but it has since been converted into two self-contained flats known as 505A and 505B Lordship Lane.

## **Directions**

5. Directions were issued at a case management conference held on the 8 May 2014. The Applicant was represented by Mr Ricks of Counsel and Respondent appeared in person. The case was scheduled for hearing on the 10 July 2014

## **The Lease**

6. Paragraph 1 of the Lease defines the “the Flat” as “ALL THAT the flat numbered 505 in the building (hereinafter called “the Building”) known as 505/507 Lordship Lane Wood Green, N22 on the estate (hereinafter called “the Estate”) known as Noel Park Estate .....

7. The recitals of the Lease define “the Corporation” as “THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF HARINGEY of Civic Centre Wood Green London N22 4LE”

8. The Respondent as lessee covenants under Clause 2 of the Lease as follows:

“(13) Not at any time without the licence in writing of the Corporation first obtained not except in accordance with plans and specification previously submitted in triplicate to the Corporation and approved by the Corporation and to its satisfaction to make any alteration or addition whatsoever in or to the Flat either externally or internally or to make any alteration or aperture in the plan external construction height walls timbers elevations or architectural appearance thereof nor to cut or remove the main walls or timbers of the Flat unless for the purpose of repairing and making good any defect therein nor to do or suffer in or upon the Flat any wilful or voluntary waste or spoil.

.....

(15) To use and occupy the Flat solely and exclusively as a self – contained residential flat.”

### **The Statutory Provisions**

9. The relevant provisions are set out under the Commonhold and Leasehold Reform act 2002 (the 2002 Act). These provide as follows:

#### **Section 168: No forfeiture notice before determination of breach**

(1) A landlord under a long lease of a dwelling may not serve a notice under section 146(1) of the Law of Property Act 1925 (c. 20) (restriction on forfeiture) in respect of a breach by a tenant of a covenant or condition in the lease unless subsection (2) is satisfied.

(2) This subsection is satisfied if—

(a) it has been finally determined on an application under subsection (4) that the breach has occurred,

(b) the tenant has admitted the breach, or

(c) a court in any proceedings, or an arbitral Tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred.

(3) But a notice may not be served by virtue of subsection (2)(a) or (c) until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

(4) A landlord under a long lease of a dwelling may make an application to a leasehold valuation Tribunal for a determination that a breach of a covenant or condition in the lease has occurred.

(5) But a landlord may not make an application under subsection (4) in respect of a matter which—

(a) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,

(b) has been the subject of determination by a court, or

(c) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement

### **Section 169: Section 168: supplementary**

.....

(5) In section 168

“long lease” has the meaning given by sections 76 and 77 of this Act, except that a shared ownership lease is a long lease whatever the tenant’s total share.

### **Section 76: Long leases**

(1) This section and section 77 specify what is a long lease for the purposes of this Chapter.

(2) Subject to section 77, a lease is a long lease if—

(a) it is granted for a term of years certain exceeding 21 years, whether or not it is (or may become) terminable before the end of that term by notice given by or to the tenant, by re-entry or forfeiture or otherwise”

### **The Hearing**

10. There was a delay in the start of the hearing as the Respondent's solicitor Mr Myers was delayed by transport problems. The Tribunal waited until 10:25 before proceeding with the hearing. Mr Myers arrived at 10:35 and the Tribunal permitted a short recess to allow the parties to discuss matters and the hearing resumed at 11:05.
11. **Matters Agreed:** It is agreed that the Property was originally a five bedroom mid terrace maisonette.
12. The underlying facts and chronology of events of the case are not in dispute. These can be summarised as follows:
  - (i) Mr & Mrs Adebayo the original leaseholders acquired a long lease of the Property from the Applicant under the Right to Buy.
  - (ii) Around 2003 – Mr & Mrs Adebayo sold the leasehold interest in the Property to Circleview Properties Limited (“Circleview”),
  - (iii) Around 2003 – Circleview split the maisonette into two self contained two bedroom flats and let out each separate flat now known as 505A Lordship Lane and 505B Lordship Lane to tenants,
  - (iv) 7 May 2003 – the two properties were listed as two separate dwellings for Council Tax purposes and charged accordingly,
  - (v) 3 December 2004 – Circleview let 505B to the Applicant under a five year lease (“the sub-lease”). The Applicant used the property to provide temporary housing accommodation and continued to rent the flat until September 2010,
  - (vi) 22 December 2010 – the Applicant sent the Respondent's solicitor a Resale pack in respect of 505 Lordship Lane (“the Resale pack”),
  - (vii) February 2011 – the Respondent acquired the leasehold title to the Property from Circleview,
  - (viii) 29 August 2012 - the Respondent telephoned and informed Mr Tal Shaki of the Home Ownership Team of Homes for Haringey that 505 Lordship Lane had been converted into two separate flats and

sought consent from the Applicant as freeholder for the use of the property as two flats,

- (ix) 7 September 2012 - Mr Shaki wrote to the Respondent and informed him that the conversion of the property into two flats without a licence in writing from the Applicant in accordance with the terms of the Lease was a material breach of the lease and insisted that the property be reinstated into one flat,
- (x) 10 October 2012 - the Respondent wrote to Mr Shaki in response to the letter of 7 September 2012 informing him that the flats had been registered as two separate properties for Council Tax purposes and the flats had been rented to the Applicant from December 2004 to September 2010.
- (xi) May 2013 - the Respondent applied to the Applicant's Planning Department for certificate of lawfulness of use of the whole Property as two separate two bedroom flats,

13. **The Applicant's Case:** It is the Applicant's case that the Respondent is in breach of the covenant under Clause 2(13), because prior to the commencement of the conversion Circleview did not

- (i) submit plans and specifications in triplicate to the Applicant, and
- (ii) obtain the approval of the plans and specifications from Applicant, and
- (iii) obtain a licence in writing from the Applicant.

14. The Applicant also contends that the Respondent is in breach of Clause 2(15) of the Lease as the Property has been converted into two separate self contained units and therefore it is no longer being used or occupied as a self contained flat.

15. The Applicant submits that although it is accepted that Circleview breached the covenants under clauses 2(13) and 2(15) of the Lease, the Respondent inherited these breaches when he acquired the leasehold interest in the Property as all the rights duties and obligations under the Lease passed to him. This included the liability for a breach of clauses 2(13) and 2(15) of the Lease. The Applicant submits that the breach still stands. The Applicant denies that there has been any

constructive notice of the breach or that there is an implied waiver of the breach.

16. Mr Ricks pointed out that the Respondent was legally represented by Matthew Arnold & Baldwin Solicitors at the time of acquisition and alarm bells should have been raised when the Resale pack was received by his solicitor's.
17. The Applicant relied on the witness statements dated 27 May 2014 and 1 July 2014 of Paul Cox a Lease Compliance & Home Sales Manager employed by Homes for Haringey. Mr Cox explained that Homes for Haringey is an arms length management organisation, managing the leasehold homes for the Applicant. The offices of Homes for Haringey are located in the same building as the offices of the Applicant. Mr Cox confirmed that his witness statement and his evidence is based on his review of the relevant files as well as on the basis of enquires made of the Applicant's employees, servants or agents.
18. Upon being cross examined Mr Cox confirmed that he had been employed by the Applicant from March 2009 and was employed in his present role from March 2013. He confirmed that his instructions came from the Applicant. He explained that in his role as Lease compliance officer he would deal with all non-compliance issues and applications from leaseholders who wished to make alterations. He stated that they obtained information regarding breaches from a number of sources such as the leaseholders themselves, a caretaker, a tenancy management officer. The tenancy management officer would inspect the properties from time to time. He stated that he could not confirm whether anyone working for the Applicant had been informed of the breach but he can confirm that there was nothing on the records. Mr Cox stated that if the Property had been inspected, it would have been apparent that the Property had been subdivided and that there had been a breach of the Lease and the Lease Compliance Team would have been informed.
19. Mr Cox stated that Circleview carried out building works to split the Property into two flats and to ensure that each flat had its own front door, kitchen, bathroom and two bedrooms. The Applicant submitted that Circleview did not obtain consent from the Applicant as freeholder for these works, nor did they obtain planning permission from the Applicant's planning department for these works. It is submitted that the Applicant was unaware that Circleview intended to or had carried out these works until 29 August 2012 when the Respondent informed the Applicant of the matter.
20. It is admitted that in December 2004 the Applicant through its Private Sector Leasing department took a five year letting of 505B Lordship Lane ("the sub-lease") in order to use it to provide temporary housing accommodation. Mr Cox stated that the Private Sector Leasing

department would have been primarily concerned with the physical condition and layout of the property. They would have been interested to note that the property was free from disrepair and that all facilities including plumbing, drainage, ventilation, heating and lighting were in full working order. They would have sought proof that Circleview Properties Limited was the registered owner of the property. They were not aware that Circleview was in breach of any terms of its Lease. Mr Cox did not know who would have signed the sub-lease on behalf of the Applicant. Mr Ricks contends that the sub-lease was not a lease but a short term tenancy agreement even though the document purports to be a lease and is headed "THIS LEASE". Mr Ricks did not make any legal submissions in support of his view but stated that in his view it was a short term tenancy.

21. It is admitted that Circleview made arrangements to have both flats separately registered for Council Tax in May 2003. Mr Cox stated that the officials in the Applicant's Council Tax department would not have been aware of the fact that the Property was held under a 125 year lease under which the Applicant was the freeholder and landlord or that there had been a breach of any covenants of the Lease.
22. Mr Cox stated that although the Respondent purchased the two flats from Circleview as one lot, the Respondent should have been aware from the estate agent's particulars that both flats were held under one Lease as they described the Property as two leasehold self contained flats offered as one lot, and described the tenure as "...Leasehold. Both flats are held on one lease for a term of 125 yeas from 18 April 1983....".
23. The Applicant contends that it should have been clear to the Respondent and the Respondent's solicitor from the sales particulars and the Resale pack which included a copy of the Lease, that 505A and 505B were held under one lease and that there was no planning permission to create two separate units and no formal authority from the Applicant as freeholder. Mr Cox stated that the purpose of the Resale packs is to provide prospective purchasers with information in relation to matters such as service charges, or any planned works in the ensuing 12 months. He stated that if the Applicant had been aware of the breach of covenants it would have brought the breach to the attention of any prospective purchaser.
24. Mr Ricks referred to the Resale pack and highlighted the following extracts from the pack:

**"A. Landlord and Managing agent**

(1) .....

(2) Homes for Haringey is an Arms Length Management Organisation (ALMO) which manages the council's housing stock and carries out the council's responsibilities (as landlord) under the lease.....



**B Property, block, estate and lease details**

(1).....

(2) The block comprises: LORDSHIP LANE 505 & 507. There are 2 units in the block of which 1 are (sic) sold on long leases with similar conditions.....

.....

(9) The leaseholder has service charge arrears and this constitutes a breach of the lease.....

**F Legal action**

No legal action is currently being taken by the council (as landlord) against the leaseholder(s)

**G Disclaimer**

The information provided in this resale pack has been provided to the best of our knowledge. We cannot be held responsible for any matters relating to the sale of the property nor the nature of the agreement entered into by the seller and the purchaser.”

- 25. Mr Ricks stated that the Respondent and or his solicitors should have had alarm bells raised upon comparing the description of the Property given in paragraph B2 of the Resale pack with that on the estate agents particulars. He stated that had the Applicant been aware of a breach of covenant it would not have stated in paragraph F of the pack that no legal action is being taken.
- 26. Mr Cox clarified on being cross examined that they do not inspect the properties before producing a Resale pack.
- 27. Mr Cox submitted that the first time the Home Ownership Team of Homes for Haringey became aware of the conversion of the Property into two flats was when the Respondent telephoned Mr Shaki of the Home ownership team on the 29 August 2012. Mr Shaki wrote to the Respondent on the 7 September 2012 and informed him that there had been a material breach of the Lease and that the Property must be reinstated into one flat, failing which legal action would be taken. Since then the Respondent has been written to on a number of occasions and informed that the Property must be reinstated into one flat. The Applicant produced copies of the correspondence from August 2012 onwards between the parties.
- 28. The Applicant accepted that on the 8 July 2013 the Respondent was granted a certificate of lawfulness for the use of the first and second floors as 2 x 2 bed self- contained flats, but Mr Cox submitted that there is a distinction between the Applicant as a planning authority and the Applicant as a freeholder. He submitted that obtaining planning approval does not confer permission from the Applicant as freeholder under the terms of the Lease. The fact that the Respondent has been

granted a certificate of lawfulness from the Applicant's planning department does not oblige the Applicant to agree to the breach of the covenants in the Lease.

29. Mr Cox stated that Homes for Haringey Limited was incorporated on 20 March 2006 and to the best of his knowledge the Home Ownership Team which prior to the incorporation of Homes for Haringey was part of the Applicant has always managed the Applicant's leasehold housing stock.
30. Mr Cox referred to the Applicant's current "alterations policy for leaseholders" which was ratified by Cabinet on the 12 June 2012. This policy was implemented after the conversion of the Property. He stated that the policy was implemented following an increasing number of unauthorised alterations, in order to prevent this continuing and to introduce clarity and a more systematic approach to such matters. He referred to the Policy document and highlighted that it confirms the Applicant's position on the matter which is that it will generally grant consent for proposed alterations to the inside of a property one of the provisos being that the subdivision of a property into two flats will usually not be allowed. Mr Cox also referred the Tribunal to the detailed conditions which applicants must meet both before the start of the works and after completion of the works in order to obtain landlord's consent for work set out in the Policy document. In response to questions from the Tribunal Mr Cox confirmed that although the Policy document is dated 2012, the same considerations would have applied at the time the subject Property was converted. Mr Cox further clarified that an alteration such as the one in this case would have required a Deed of variation of the Lease.
31. Mr Cox clarified that although there appeared to be a contradiction in the Resale Pack between the statement at paragraph B(9) which states that "...the leaseholder has service charge arrears and this constitutes a breach of the lease", and the statement at paragraph F that "No legal action is currently being taken by the council (as landlord) against the leaseholder(s)", in fact the Resale pack was accurate as internal recovery action in respect of the service charge may have been taken and a letter before action issued but legal action may not have been commenced.
32. In his closing submission Mr Ricks stated that a finding of constructive notice or implied waiver would be in direct conflict with the evidence of Mr Cox that the Applicant being a local authority there are different departments within it and Homes for Haringey was the appropriate department for communication between the leaseholder and the Applicant as freeholder. It is accepted that there was a breakdown in communication between the different departments of the Applicant but as soon as the Respondent brought the breach to the attention of the

appropriate department, Homes for Haringey, immediate action was taken.

33. He stated that the issue in relation to planning permission is a red herring and it is nothing to do with the freehold rights. The Council Tax Department is another department of the Council and all attempts made by the Respondent to remedy or rectify the breach are irrelevant as the breach took place before he took over as leaseholder and the breach subsists. It is admitted that the Applicant accepted ground rent, but it did so in respect of a single unit 505 Lordship Lane and not the subdivided units. Mr Ricks confirmed that the Applicant has refused permission for the alteration.
34. Mr Ricks pointed out that the Respondent has made lots of assumptions but he did not read the Lease. The Respondent took legal advice at the time of purchase but this was remarkably lacking. Alarm bells should have started to ring to any professional reading the Resale pack and the estate agent's particulars. He stated that never has the expression Caveat emptor ("let the buyer beware") been more appropriate. By the Respondent's own admission he was prevented from obtaining a mortgage or granting a lease as he did not have title to 505A and 505B Lordship Lane. The Applicant did not know the Property had been subdivided until this was brought to their attention. It is transparent that there has been a breach and he is liable.
35. **The Respondent's case:** The Respondent contends that the Applicant by its actions has waived any breach of the covenants.
36. The Respondent relied on his witness statement. He stated that he purchased the Lease in February 2011 by arranging a loan against his personal residence.
37. He confirmed that the two flats were offered for sale as one lot. Circleview properties, the previous leaseholder had gone into receivership and so he thought the Resale pack may have contained limited or incomplete information.
38. He confirmed that the Resale pack was part of the auction pack and it seemed to indicate that everything was in order. He stated that the Resale pack contained two leases, one for 505 Lordship Lane and another for 505B Lordship Lane under which the Applicant was a tenant.
39. The Respondent clarified that Matthew Arnold Baldwin did not act for him in connection with the purchase but Askew's solicitors acted for him. He clarified that his solicitors did not tell him that there was a problem and his solicitors did not go through with him the clauses of the Lease. The Respondent confirmed that he read the Lease but not in

detail. He confirmed he saw the estate agent's particulars but he did not read clause 2(13) of the Lease. Upon being cross examined the Respondent stated that as Circleview had gone into liquidation he assumed that there must have been consent for the subdivision of the property, and he simply needed to get hold of the paperwork. He stated that he was under the impression that the Applicant as freeholder must have consented to the subdivision otherwise they would not have entered into the sub-lease.

40. The Respondent confirmed that he had paid ground rent to the Applicant for 505 Lordship Lane.
41. He stated that as the Applicant was the freeholder and had taken a sub-lease of the second floor flat 505B for a period of 7 years he did not think that they would have any reasonable objection to the continued use of the Property as a 2 x 2 bed flats.
42. He stated that in the early part of 2012 after refurbishing the Property he tried to remortgage the Property as two separate units but was refused by the mortgage broker. He stated that no one was prepared to lend money on the Property because the lenders said there was no proof of planning permission and no proof of the freeholder's consent for the use of the Property as two flats.
43. He stated that he also approached Housing Associations to try to lease the flats to them. No organisation was prepared to re-mortgage the Property as individual units and no organisation was prepared to sub-lease the individual units as he did not have planning permission or freeholder's consent.
44. He stated that he contacted the Home Ownership Team to seek freeholder's consent and was surprised to receive the letter of 7 September 2012 from Mr Shaki saying that he was in breach of the Lease. He stated that he could not understand how the Applicant having leased 505B Lordship Lane from the previous leaseholder for a period of over 7 years could now turn around and say that there was a breach of the Lease. He stated that he responded to Mr Shaki's letter without taking legal advice based on common sense. He wrote again after having taken advice.
45. It is the Respondent's view that the Applicant entered into the sub-lease of 505B Lordship Lane after due diligence by its legal department. The Respondent relies on a memorandum from Mekaheel Maknoon of the Applicant's legal department but this was not produced in the bundle. The Respondent believes the Applicant in its capacity as freeholder and in its capacity as the planning authority must have consented or at the very least acquiesced to the sub-lease of 505B from Circleview properties.

46. Mr Myers in his closing submission stated that this Application brought under Section 168(4) of the Act has been prompted by the possibility of a forfeiture of the Lease. He stated that the burden of proof is on the Applicant and the Tribunal needs to be satisfied that the Lease includes the covenants and that the acts constitute a breach of one or both covenants. The evidence in this case is the witness statements of Mr Cox and that of the Respondent as well as the bundle. He submitted that the statement of Mr Cox is redundant as he was only employed by the Applicant from 2009 and from 2013 by Homes for Haringey. He could not comment on the various documents as he has no knowledge of the matters. The Policy document dated 2012 shows that someone within the Applicant had an issue with subletting and it is an important document as it refers to "...now putting in place a formal document...". It is an important document as it is an all encompassing document. The Applicant being a local authority should have a document as to the Policy in 2004. In 2004 the Applicant was concerned with the provision of emergency housing and so turned a blind eye. There is no explanation as to the dichotomy between the various departments of the Applicant. There is no question as to the Respondent's credibility; he has been consistent throughout, the letter of the 25 November 2013 from Churchills solicitors to the Applicant's Head of Legal Services was sent on the instructions of the Respondent and it is consistent with his witness statement. It is the Respondent's position that the Applicant freeholder has been a party to the alleged breach (which is not accepted or admitted) for seven years when 505B was leased from the previous leaseholder. The Applicant continued to demand and accept Council Tax for two properties and has granted a certificate of lawfulness of use. The sub-lease of 505B Lordship Lane is a telling document, this shows that a government department using a standard local authority lease drafted by a local authority solicitor entered into a private sector leasing agreement. The document is a 5 year lease and not a tenancy as it includes very serious obligations either way. Mr Myers submitted that prior to entering into this sub-lease the solicitor acting for the Applicant would have looked at the title to the property by looking at office copy entries and must have undertaken due diligence. This puts the Applicant on constructive notice at the time and they turned a blind eye as they needed emergency housing. In his view nothing turns on the Resale pack. The certificate of lawfulness is a waiver of any right by the Applicant to say there is a breach.
47. In Mr Myer's opinion the two Council tax bands must have been registered after due diligence. He submitted that the best evidence is that of the Respondent and the letter of the 25 November 2013 from Churchills solicitors to the Applicant's Head of Legal Services, the sub-lease of 505B, the Council Tax registration, the Certificate of lawfulness of use and the acceptance of ground rent all put the Applicant on constructive notice.
48. He stated that the Applicant should have qualified the acceptance of ground rent and said that there is a breach of covenant.

49. Mr Myer argues that there is a Public Policy issue in that no entity, be it a local authority or a commercial organisation should be able to say that one department is not bound by the actions of another department. In this case three separate departments within the Applicant's organisation: the Council Tax Department, the Planning Department and the Private Sector Leasing Department were all on notice. The Applicant should have given evidence as to the alterations policy in 2004, and not the policy in 2012. Mr Myers submitted that the Applicant has not satisfied the burden of proof given the seriousness of the consequences of a finding of a breach of covenant.
50. Having heard evidence and submissions from the parties and considered all of the documents provided, the Tribunal has made determinations on the various issues as follows.

### **The Tribunal's decision**

51. A determination under Section 168(4) of the Act does not require the Tribunal to consider any issue relating to forfeiture other than the question of whether or not a breach has occurred. In determining whether a breach has or has not occurred the Tribunal has the jurisdiction to determine whether at the relevant date the covenant was or was not suspended by reason of a waiver or estoppel. The Tribunal does not have jurisdiction to consider the separate question as to whether the landlord has waived the right to forfeit the lease, this is a matter for the court to determine when considering an application for forfeiture.
52. The question of the Tribunal's jurisdiction and the issue of waiver or estoppel was considered in the case of Swanston Grange (Luton) Management Limited v Eileen Langley-Essen (LRX/12/2007) where His Honour Judge Huskinson concluded as follows:

" 16. I am conscious of the fact that the question of the jurisdiction of the LVT to consider whether a landlord has waived a covenant (in the sense of being estopped from relying upon its rights against the tenant under the covenant) is a matter of some potential importance. ....For the reasons set out below I agree with the LVT that it did have jurisdiction to consider this question of waiver of the covenant – using this expression in the sense mentioned above. Nothing I say is intended to indicate any jurisdiction in the LVT to consider the separate question of waiver which arises when it is necessary to decide whether a landlord has waived the right to forfeit a lease on the basis of a breach of covenant. The latter question is dealing with the remedies available to a landlord on the basis of a breach of covenant which has been determined to have occurred or has been admitted by the tenant. The question with which this case is concerned is the question of whether the landlord is estopped from asserting against the tenant that there has been a breach of covenant at all. This in my judgment is a

wholly different question and I do not accept Mr Clargo's argument that, if the LVT does not have jurisdiction to consider questions of waiver of the right to forfeit, it necessarily cannot have jurisdiction to consider questions of waiver in the sense of being estopped from relying upon a covenant at all.

17. The purpose of a determination under section 168(2)(a) is in my judgment to bring the parties to the same position as would be reached if section 168(2)(b) was engaged by reason that "the tenant has admitted the breach". This contemplates an admission by a tenant that it has committed an actionable breach of covenant. Paragraph (b) does not contemplate an admission by a tenant that it has done an act which, judged strictly, would be a breach of covenant but which the tenant asserts the landlord is not entitled to complain about for reasons of waiver/estoppel.

18. The nature of a promissory estoppel, if established, is helpfully summarised in Halsbury's Laws of England 4<sup>th</sup> Edition Re-issue Volume 9(1) at paragraph 1030:

"1030 **The *High Trees* doctrine.** Similar to waiver is the doctrine of promissory or equitable estoppel, whereby a party who has represented that he will not insist upon his strict rights under the contract will not be allowed to resile from that position, or will be allowed to do so only upon giving reasonable notice."

Also at paragraph 1035 there is this

1035 **Promissory estoppel generally has effect of suspending obligation.** Like waiver, a concession giving rise to the *High Trees* doctrine of promissory estoppel will generally only suspend the strict legal rights of the party granting it (B); and he may revert to these rights for the future upon giving reasonable notice of his intention to the other party (A).

19. These passages show that if a landlord has waived or become estopped in the foregoing sense from relying as against a tenant upon a covenant, then for so long as this waiver or estoppel operates the obligation is suspended. It is wrong to conclude that a tenant who performs acts which strictly would be a breach of the suspended covenant has breached this covenant. Accordingly in answering the question posed by section 168(2)(a) as to whether the breach has occurred the LVT needs to decide (and must consequently have jurisdiction to decide) whether at the relevant date the covenant was suspended by reason of a waiver or estoppel (in which case a breach

will not have occurred) or whether at the relevant date the covenant was not suspended (in which case a breach will have occurred if the facts show non-compliance with the terms of the covenant).”

53. Accordingly, the Tribunal limits this decision to the narrow issue of whether or not the Respondent is in breach of the covenants in the Lease and whether at the relevant date the covenant was or was not suspended by reason of a waiver or estoppel.
54. It is not uncommon for leases to include covenants requiring a leaseholder to seek the written consent of the landlord to any alteration of the demised premises. The Lease in this case under Clause 2(13) includes a qualified covenant permitting the repair and making good of any defect but expressly prohibiting any alteration or addition to the Flat without:
  - (i) first submitting plans and specifications in triplicate to the Applicant and obtaining the approval of the Applicant to the plans and specification, and
  - (ii) obtaining a licence in writing from the Applicant before commencing the works.
55. The covenant is subject to the implied terms under Section 19(2) of the Landlord and Tenant Act 1927 that such consent is not to be unreasonably withheld.
56. The implied term that such consent is not to be unreasonably withheld does not preclude the right to require, as a condition of such licence or consent, the payment of a reasonable sum of money in respect of any damage to, or diminution in, the value of the premises, or any neighbouring premises belonging to the landlord, or of any legal or other expenses properly incurred in connection with such licence or consent.
57. The Tribunal is of the view that if, Circleview, the Respondent or for that matter any reasonable person had checked the Lease or sought advice on the covenants in the Lease they would have appreciated the need to ensure that plans and specifications were submitted to the Applicant in triplicate for approval and that a licence in writing was obtained prior to the commencement of the conversion works. The Solicitors acting for the Respondent should have appreciated that although there were two units being sold as one lot there was only one Lease and it related to the whole undivided Property and not the individual units. The Solicitors should also have appreciated and advised the Respondent that the Lease included a covenant prohibiting the conversion of the property into two self contained two bedroom flats without seeking the prior approval from the Applicant. The



information in the Resale Pack compared to the information in the Estate Agent's particulars should as Mr Ricks said have raised alarm bells with the Respondent and his solicitor. The fact that the Respondent did not read the Lease in detail and was not well advised by his solicitors does not negate the breach.

58. The grant of a certificate of lawfulness of use is not the same as the approval of plans and specifications and a licence in writing envisaged by the provisions of Clause 2(13). The certificate of lawfulness of use does not negate the need to comply with the provision of Clause 2(13) of the Lease.
59. The parties in this case admit that sometime around 2003 Circlevue split the Property which was a maisonette into two self contained two bedroom flats without seeking the prior approval of the conversion of the maisonette as required under the terms of the Lease. The Tribunal finds that this action amounted to a clear breach of the provisions of the covenant under clause 2(15) of the Lease. Furthermore the Tribunal finds that the subsequent use and occupation of the two self –contained flats amounted to a breach of the covenant under clause 2(15) of the Lease.
60. The issue for the Tribunal is whether the breach of these covenants was suspended by a waiver or estoppel due to the actions of the Applicant.
61. It is accepted by the parties that on the 3 December 2004 Circlevue let 505B Lordship Lane to the Applicant and the Applicant used it in order to provide emergency housing and it continued to use and occupy 505B for a period of over 6 years until shortly before February 2011 when the leasehold interest in 505 Lordship Lane was acquired by the Respondent.
62. The Tribunal was not persuaded by Mr Ricks submission that the letting was under a tenancy agreement as opposed to a sub- lease. The document has many of the hallmarks of a lease, for example it includes covenants by both parties. The Tribunal makes no determination on the point as in the Tribunal's opinion a determination as to whether the letting was under a lease or a tenancy is not necessary as it does not assist in the determination of the issue before the Tribunal, which is whether the letting of 505B to the Applicant and its use and occupation of 505B was such that it amounted to constructive notice of the breach.
63. The Applicant argues that the Private Sector Leasing Department who were instrumental in taking the letting would have been primarily concerned with the suitability of the accommodation for the provision of emergency housing and would not have investigated the title to the Property or undertaken any other checks and so it would not have been aware that there had been a breach of the covenants of the Lease. The Applicant relies on the evidence of Mr Cox in this regard. However Mr

Cox was not employed by the Applicant at the time in question; he was first employed by the Applicant from March 2009 and the evidence he gives is not from his personal knowledge of the matter. Mr Cox submits that if the Applicant had been aware of a breach of covenant he would have expected there would have been a record of it in the files. This is mere supposition on his part. The Tribunal accepted that Mr Cox had checked the relevant files as well as make enquires of the Applicant's employees, servants or agents and could find no record of the Applicant being aware of the breach prior to being informed of it by the Respondent on 29 August 2012. Mr Cox stated that he could not confirm whether anyone working for the Applicant had been informed of the breach but he can confirm that there was nothing on the records. The fact that there is no record of the breach does not necessarily mean that everyone working for the Applicant was unaware of the breach.

64. The sub-lease defines the tenant as "MAYOR AND BURGESSES OF THE LONDON BOROUGH OF HARINGEY of Civic Centre High Road Wood Green London N22 8LE and its successors in title acting under the hand of its Principal Lawyer its duly Authorised Officer". The sub-lease makes specific reference to the Lease as the Head Lease and also the covenants of the Lease. The Applicant covenants under Clause 3(9) of the sub-lease as follows:

"Subject to clause 9(b) where the Term hereby granted is derived out of the Head Lease the Tenant shall at all times during the Term observe and perform only the covenants restrictions provisions and stipulations on the part of the tenant in the Head Lease in so far as they are consistent with the terms of this Lease and do not fall within the ambit of the Landlord's obligations ....."

65. It is the Tribunal's view that just as the Respondent and his solicitor should have been aware of the terms of the Lease so should the Applicant. The Applicant by entering into the sub-lease must have had notice of the breach. The fact that the Applicant entered into the sub-lease acting under the hand of its Principal Lawyer its duly Authorised Officer must surely mean the Applicant's lawyers would have checked the title to the Property and just as the lenders and the Housing Associations approached by the Respondent realised that there was an issue with regard to title to the Property, the lack of landlord's permission and planning permission for the conversion, so should the Applicant's Principal Lawyer have been aware of the issue. The Tribunal finds that the Applicant by entering into the sub-lease acquiesced in the breach. The Applicant's acquiescence or delay in seeking relief amounts to a waiver on the Applicant's part and precludes the Applicant from obtaining relief, Knight v Simmonds [1896] 2 Ch. 294.
66. The Tribunal did not consider the reference to the 2012 Alterations Policy document to be helpful since it was not in existence at the time of

the conversion. The Tribunal did not consider it necessary to take account of public policy issues in determining whether there has been a breach of covenant or not.

**Name:** N Haria

**Date:** 15 September 2014