



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

<b>Case Reference</b>	:	<b>LON/00AY/LBC/2014/0004</b>
<b>Property</b>	:	<b>Flat 2, 42 Montrell Road, London SW2 4QB</b>
<b>Applicant</b>	:	<b>Goldpoint Investments Limited</b>
<b>Representative</b>	:	<b>Mr M Jones, Counsel</b>
<b>Respondents</b>	:	<b>Mr P Lawrence (First Respondent), Mrs H Kahani (Second Respondent) and Fast Homes UK Limited (Third Respondent)</b>
<b>Representatives</b>	:	<b>Mr J Lewison, Counsel, for Third Respondent. First Respondent not represented. Mr B Kahani (husband) for Second Respondent</b>
<b>Type of Application</b>	:	<b>Application for determination under section 168(4) Commonhold and Leasehold Reform Act 2002 (breach of covenant in lease)</b>
<b>Tribunal Member</b>	:	<b>Judge P Korn</b>
<b>Also present</b>	:	<b>Mr O Akintola, of Applicant company, and Mrs Kahani</b>
<b>Date and venue of Hearing</b>	:	<b>12<sup>th</sup> March 2014 at 10 Alfred Place, London WC1E 7LR</b>
<b>Date of Decision</b>	:	<b>31<sup>st</sup> March 2014</b>

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**DECISION**

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## **Decision of the tribunal**

The tribunal determines that the alleged breach of covenant has not occurred. No cost order is made.

## **The application**

1. The Applicant seeks a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("**the 2002 Act**") that a breach of covenant has occurred under the lease of the Property.
2. The Applicant is the freehold owner of the Property and the Second Respondent is the current leasehold owner. The Second Respondent's lease ("**the Lease**") is dated 15<sup>th</sup> March 2006 and originally made between Kingstar Development Limited (1) and the First Respondent (2).
3. The Applicant alleges that in breach of the terms of the Lease the leasehold interest was transferred to the Third Respondent and then to the Second Respondent, in each case without notice being served on the landlord and without payment to the landlord of a registration fee.

## **Preliminary point**

4. The Applicant was represented by Mr J Lewison of Counsel. The First Respondent was not present and was not represented at the hearing. The Second Respondent was present and was represented by her husband. The Third Respondent was represented by Mr M Jones of Counsel.

## **Applicant's case**

5. Mr Lewison for the Applicant took the tribunal through the Applicant's written submissions. These included a chronology of events, the Applicant's evidence for the alleged breach, and an analysis of the relevant provisions of the Lease.
6. In July 2006 the freehold interest in the Property was transferred from Kingstar Development Limited ("**Kingstar**") to the Applicant, although the transfer was not registered until 8<sup>th</sup> May 2012. On 7<sup>th</sup> September 2009 the Lease was transferred by the First Respondent's mortgagee to the Third Respondent, and the mortgagee notified the Applicant of the transfer in writing that same day. On 30<sup>th</sup> November 2009 the Lease was transferred to the Second Respondent, but there is a dispute between the parties as to whether the Applicant was notified of this transfer.

7. In relation to the first transfer (to the Third Respondent), the Applicant accepted that it had received the notification from the First Respondent's mortgagee but did not accept that this notification complied with the terms of clause 2(xiv) of the Lease, the relevant parts of which read as follows:-

*“To produce for the purpose of registration to the Lessor’s Solicitor within one calendar month after any such document ... shall be executed or shall operate or take effect ... a verified copy of every assignment or transfer ... and for such registration to pay to such Solicitor a fee of Ten Pounds ... plus ... Value Added Tax (if applicable)”.*

8. Mr Lewison said that this clause required the production of a verified copy of the transfer plus payment of a registration fee. In relation to the notification from the First Respondent's mortgagee, he submitted that this notification did not comply with the requirements of clause 2(xiv) of the Lease. The letter merely notified the Applicant of the fact of the transfer and did not enclose a verified copy of the transfer or a registration fee.
9. In relation to the transfer to the Second Respondent, Mr Lewison noted that the Second Respondent's hearing bundle contained a copy letter dated 30<sup>th</sup> November 2009 from Harrow Law Practice to Kingstar purporting to enclose a Notice of Transfer and requesting details of the registration fee. Mr Lewison said that the Applicant denied ever having received this letter. In any event, in his submission the letter did not comply with the requirements of clause 2(xiv) of the Lease.
10. Regarding the argument that the Applicant had waived any breach by its subsequent actions, Mr Lewison did not accept that it had. The Applicant had had no notice of the breach and therefore it could not be said to have waived it. The Second Respondent had also at no stage been sent a formal demand for ground rent/service charges. Mr Lewison added that even if there had been a waiver this would still not be relevant to the specific question that the tribunal was being asked to determine, namely whether there had been a breach of covenant. In his submission, a breach of covenant that is subsequently waived is still a breach of covenant for the purpose of the tribunal's determination.
11. Mr Lewison added that even though it was accepted that the Applicant was not the registered freehold owner at the time, it was the registered owner now and yet the Respondents had still not complied with the registration requirements in the Lease. As regards the specific registration requirements, the Respondents and their solicitors should have read the Lease more carefully to ensure compliance.
12. As regards the provision of information to the Respondents, paragraph 5 of Mr Akintola's witness statement makes reference to some

information that was volunteered by the Applicant, and some information was provided on 18<sup>th</sup> June 2009.

### **Third Respondent's response**

13. Mr Jones for the Third Respondent noted that the Applicant only became registered as the freehold owner in 2012 and said that the Respondents had no reason for knowing that it had become entitled to be registered at a much earlier stage. The registered freehold owner during the relevant period was Kingstar.
14. In his written witness statement, Mr Bernard Ubiner, a solicitor with Bude Nathan Iwanier, stated that he acted for the Third Respondent in the purchase of the leasehold interest in the Property. He was advised by the First Respondent's mortgagee that Kingstar had not responded to any enquiries, and as a result he obtained an Absent or Unresponsive Landlord Indemnity Policy.
15. Mr Jones said that there was no indication that Kingstar had any solicitor, and therefore the Respondents were not in a position to comply with the requirement to register the transfer with Kingstar's solicitor (Kingstar being the registered owner at the relevant time). On 31<sup>st</sup> March 2009 the First Respondent's mortgagee wrote to Kingstar specifically asking it to confirm on whom notice should be served following completion but no response was received. At the hearing it was noted that the First Respondent's mortgagee did in fact receive a letter from the Applicant itself a few months later, on 8<sup>th</sup> June 2009, although in that letter the Applicant described itself as the managing agent for the Property and not as the owner of the Property.
16. Mr Jones drew the tribunal's attention to an email dated 29<sup>th</sup> November 2012 from the Applicant's solicitors to the Second Respondent's solicitors stating that the Second Respondent was in arrears of ground rent and service charge payments and also stating that the Applicant would instruct its solicitors to prepare a Deed of Rectification when the arrears were paid in full. In his submission, this was evidence that the breach of covenant – if any – had been waived by the Applicant because its solicitors were treating the Second Respondent as the leasehold owner with full knowledge of the alleged breach.
17. Mr Jones also submitted that the tribunal had discretion as to whether to treat a breach of covenant as a breach for the purposes of section 168 of the 2002 Act, especially if the breach was 'de minimis'.

## **Second Respondent's Response**

18. Mr Kahani referred to the chronology and to the witness statement from Hitesh Patel, a solicitor with Harrow Law Practice, stating that she sent a notice of transfer to Kingstar. The notice was sent by first class post and was not returned undelivered. Mr Kahani also referred the tribunal to a letter from him to Kingstar dated 5<sup>th</sup> January 2010 requesting an invoice for ground rent, to which he received no reply. In his submission, the Second Respondent did everything that she reasonably could to notify the freeholder that she was the new leasehold owner. In any event, she had nothing to gain by not notifying the freeholder.
19. Mr Kahani also referred the tribunal to more recent correspondence – in 2012 – in the context of his trying to sell his leasehold interest to a third party. By this stage the Second Respondent had the Applicant's solicitors' contact details but her own solicitors were having difficulties obtaining from the Applicant's solicitors information needed for the sale. Finally on 28<sup>th</sup> November 2012 the Second Respondent's solicitors received an email from the Applicant stating that the Applicant had not been notified of the change of leasehold ownership of the Property and threatening forfeiture proceedings.
20. Mr Kahani reiterated that the email dated 29<sup>th</sup> November 2012 from the Applicant's solicitors referred to in paragraph 16 above seemed to indicate an acceptance of the Second Respondent's status as the leasehold owner provided that the arrears were paid.
21. Mr Kahani also referred the tribunal to his letter of 25<sup>th</sup> January 2013 to the Applicant, copied to its solicitors, in which he set out his understanding of the events leading up to the Applicant's threat to forfeit the Lease and stating – amongst other things – that he and his solicitor had done everything required of them to inform the then freehold owner (Kingstar) of the change of leasehold ownership.
22. Mr Kahani also referred the tribunal to a copy letter from a Mukesh Patel detailing difficulties that he had encountered with the Applicant in connection with a different property at 27C Mowbray Road SE19 including difficulties in obtaining responses.

## **The statutory provisions**

23. The relevant parts of section 168 of the 2002 Act provide as follows:-

*“(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 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.*

*(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.”*

### **Tribunal’s analysis**

24. The tribunal notes that on the date of transfer of the Lease to the Third Respondent (7<sup>th</sup> September 2009) and on the date of transfer of the Lease to the Second Respondent (30<sup>th</sup> November 2009) the registered freehold owner was Kingstar. The Applicant was not registered as freehold owner until 8<sup>th</sup> May 2012.
25. On the basis of the oral and written evidence submitted the tribunal is satisfied that the Respondents believed Kingstar to be the freehold owner and therefore to be the landlord until some time in 2012 and that this belief was a wholly reasonable one. Whilst it is noted that the First Respondent’s mortgagee received a letter from the Applicant on 8<sup>th</sup> June 2009, the Applicant described itself in that letter as the managing agent for the Property and not as the owner of the Property, and the only rational conclusion to be drawn from this was that Kingstar remained the freehold owner (as would have been confirmed by a Land Registry search) and the Applicant was its managing agent.
26. The relevant clause in the Lease requires the tenant to register the transfer with the landlord’s solicitor. However, on the basis of the evidence submitted the tribunal is satisfied that the Respondents did not know who Kingstar’s solicitor was and that appropriate steps were taken to try to find out the necessary information to enable them to register the transfer to the Third Respondent and the transfer to the Second Respondent. The tribunal notes, for example, the difficulties encountered by the First Respondent’s mortgagee in obtaining a response from Kingstar and the fact that the Third Respondent’s solicitors took out an Absent or Unresponsive Landlord Indemnity Policy. No evidence has been provided to indicate that Kingstar did respond, and there is no credible basis for believing that the First Respondent’s mortgagee and the Third Respondent’s solicitors were merely pretending that Kingstar was being unresponsive.
27. As regards the attempts to register each transfer, these need to be examined in turn. First, there is the letter of notification from the First

Respondent's mortgagee. This letter was not sent to the landlord's solicitor, did not include a copy of the transfer and did not enclose the registration fee. Taken out of context, therefore, it would seem to constitute a clear failure to comply fully with clause 2(xiv) of the Lease. However, this letter follows on from an earlier letter dated 31<sup>st</sup> March 2009 from the First Respondent's mortgagee to Kingstar specifically asking it to confirm on whom notice should be served following completion and to which no response was received, and a general pattern of a lack of response from Kingstar.

28. When the First Respondent's mortgagee finally received the letter from the Applicant dated 8<sup>th</sup> June 2009 (referred to in paragraph 25 above) asking it to direct all enquiries to the Applicant as the owner's managing agent, the First Respondent's mortgagee responded two days later – on 10<sup>th</sup> June 2009 – requesting various items of information and specifically asking the Applicant to confirm on whom notice should be served following completion. On this occasion the First Respondent's mortgagee did receive a response – on 11<sup>th</sup> and 18<sup>th</sup> June 2009 – to the other questions raised by it, but it received no response at all to its very clear repeated request for information as to where the notice of transfer should be sent. The First Respondent's mortgagee did not know who Kingstar's solicitor was and had no way of finding this out otherwise than by writing first to Kingstar and then to the Applicant. In the absence of a response from Kingstar and a relevant response from the Applicant and in the context of the previous general lack of response from Kingstar, the tribunal does not consider it reasonable to expect the First Respondent's mortgagee to have taken further steps to try to find out this information.
29. In the end, in the absence of a relevant response to its enquiries, the First Respondent's mortgagee simply wrote to the Applicant on 7<sup>th</sup> September 2009 confirming completion of the transfer. Taking the sequence of events as a whole, the tribunal considers that the First Respondent's mortgagee's failure to be more proactive at this point does not constitute a breach of the Lease. First of all, the letter of 7<sup>th</sup> September 2009 clearly constituted a notification of the fact of the transfer. This is important, because in the tribunal's view the main purpose of registration of a transfer with a landlord is to ensure that the landlord is aware of the change of leasehold ownership. That does not mean that the detailed registration process does not need to be followed, but it is relevant to the context of the First Respondent's mortgagee's actions. Having written to both Kingstar and the Applicant specifically asking them to confirm on whom notice should be served following completion and having received no response, the tribunal considers that the inability of the First Respondent's mortgagee to register the transfer fully was a result of the landlord's own failings. It cannot, in the tribunal's view, constitute a breach of a tenant's covenant to attempt to comply with the covenant in question only to be thwarted by the action or inaction of the landlord itself (and, in this case, that of the landlord's 'agent' as well).

30. In the alternative, if the tribunal is wrong on the above point and if there was in fact a breach of covenant, could the breach be said to be 'de minimis' such that it was not a breach for the purposes of section 168 of the 2002 Act? Whilst Counsel for the Third Respondent argued that it was 'de minimis' and Counsel for the Applicant argued that it was not, neither party brought any legal authority to support its position. In the tribunal's view, it is difficult to divorce the concept of what is 'de minimis' in this case from the circumstances of Kingstar's and the Applicant's lack of engagement. The tribunal does not accept that the difference between mere notification of change of ownership and full registration would be 'de minimis' even where the tenant had details of the landlord's solicitors and was on notice that full registration was required and yet failed without good reason to register the transfer fully. However, in this case the tribunal considers that the breach of covenant (if there is one) should be treated as 'de minimis'. Both Kingstar and the Applicant had been asked with whom the transfer should be registered but had not responded. Also, the Applicant (as Kingstar's 'agent') was notified of the fact of the transfer. In the circumstances it is hard to see what prejudice will have been suffered by Kingstar as a result of the failure fully to register the transfer, and therefore the breach (if any) should in the tribunal's view be regarded as 'de minimis' and therefore not treated as a breach for the purposes of section 168 of the 2002 Act.
31. As regards the purported registration of the transfer to the Second Respondent, the Applicant denies ever receiving the notice of transfer. However, there is a witness statement from the Second Respondent's solicitor stating that the notice was sent by first class post and was not returned. In the circumstances, even if the notice was not in fact received the tribunal considers that the notice should be deemed to have been properly served, as the solicitor took appropriate steps to serve it and had no reason to believe that it had not been received. Whilst it might be argued that the solicitor could have chased up a response to the notice, this has to be seen in the context of a pattern of lack of responses such that an absent or unresponsive landlord indemnity insurance policy was taken out.
32. Again the notice was sent to Kingstar rather than to its solicitor, but again the Second Respondent had no details of Kingstar's solicitor if any. The tribunal notes that the Second Respondent's solicitors included a notice of transfer but that it is unclear on the face of their covering letter whether they included a verified copy of the transfer itself. What is clear is that they did not include the registration fee as the letter asks for details of the fee. This is curious, as the Lease specifies the amount of the fee, and although it states that value added tax is payable "if applicable" they should have been able to work out for themselves whether it was payable. However, the Lease states that the registration fee is payable to the landlord's solicitor, not to the landlord itself, and therefore without knowing the identity of the landlord's



solicitor the Second Respondent was not in a position to send a registration fee to the landlord's solicitor.

33. On balance, the tribunal considers that the Second Respondent did not commit a breach of covenant. As a result of information received concerning previous attempts to communicate with Kingstar and the conclusion having been reached that an absent or unresponsive landlord indemnity insurance policy needed to be taken out, it was reasonable for the Second Respondent to conclude that Kingstar could not be contacted and that the Applicant as its 'agent' was either unable or uninterested in providing the information needed to enable her to register the transfer fully in accordance with the Lease. The notification to Kingstar needs to be seen in that context. It is true that a registration fee was not sent, but the Second Respondent did not have details of Kingstar's solicitors and a previous request for those details had been met with silence. It is unclear whether a verified copy of the transfer was enclosed with the notice, but in the absence of clearer evidence the tribunal considers that the Second Respondent should be given the benefit of the doubt on this point. However, in any event, the ongoing pattern of lack of response from Kingstar and the lack of relevant response from the Applicant leads the tribunal to the view that the Second Respondent's failure fully to comply with the registration requirements was primarily due to the landlord's own failings and/or failings on the part of the Applicant.
34. In the alternative, if the tribunal is wrong on the above point and if there was in fact a breach of covenant, again this needs to be seen in the context of the circumstances as a whole. The evidence indicates that the First Respondent's mortgagee and the solicitors acting for the Second Respondent and for the Third Respondent encountered serious difficulties in obtaining a response from Kingstar over a considerable period of time, and therefore it would have been understandable for the Second Respondent to have regarded the notice of transfer as a pointless formality. Again, Kingstar was notified of the fact of the transfer and it is hard to see what prejudice will have been suffered by Kingstar as a result of the failure fully to register the transfer. Therefore, the tribunal considers any breach to be 'de minimis' and therefore not a breach for the purposes of section 168 of the 2002 Act.
35. The tribunal does not accept the proposition advanced on behalf of the Applicant that the transfer to either the Second Respondent or the Third Respondent needed to be registered with the Applicant (as distinct from Kingstar) once the Applicant became registered as the freehold owner. The obligation to register arose at the relevant times in 2009 when Kingstar was the registered owner and was, in the tribunal's view, limited to taking reasonable steps to register with Kingstar.
36. If the tribunal is wrong in its analysis above, can the Applicant and/or Kingstar be said to have waived its right to forfeit or to have waived the

breaches of covenant themselves, if any? Again, Counsel for the Third Respondent argued that there has been a waiver and Counsel for the Applicant argued that there has not been, but again neither party brought any legal authority to support its position. The evidence relied on by the Second Respondent and the Third Respondent in support of the proposition that there was a waiver is principally the Applicant's solicitors' email dated 29<sup>th</sup> November 2012. The Second Respondent and the Third Respondent consider this to constitute a demand for payment of arrears and therefore a waiver of the breaches. Whilst this is a superficially attractive argument the tribunal first needs to distinguish between a waiver of the right to forfeit and a waiver of the breaches themselves. In the tribunal's view it is outside its jurisdiction to determine whether the **right to forfeit** has been waived.

37. However, the tribunal considers that in determining whether there has been a breach of covenant it does have jurisdiction to determine whether **the right to sue for breach of covenant** has been waived. In this regard the tribunal notes the contents not only of the email dated 29<sup>th</sup> November 2012 but also of the letter from the Applicant to the Third Respondent dated 11<sup>th</sup> September 2009. In the letter of 11<sup>th</sup> September 2009 the Applicant states that it has been informed by the Nationwide Building Society (the First Respondent's mortgagee) that the Third Respondent is the new (leasehold) owner and refers to the existence of ground rent and service charge arrears. The letter also states that forfeiture proceedings are afoot but only in relation to alleged unauthorised works. The letter concludes by inviting the Third Respondent to respond in order to find a suitable resolution to these issues, and there is no suggestion that the Applicant or Kingstar considers the First Respondent or the Third Respondent to be in breach of covenant by virtue of their having failed fully to comply with clause 2(xiv) of the Lease when registering the transfer.
38. As regards the email dated 29<sup>th</sup> November 2012, although it does not contain a formal invoice, nevertheless it does include a statement that there are arrears and it states what will happen to regularise the position once the arrears have been paid. It could perhaps be argued that this indicates an acceptance of the Second Respondent's status as the lawful leasehold owner.
39. However, in the tribunal's view neither the letter dated 11<sup>th</sup> September 2009 nor the email dated 29<sup>th</sup> November 2012 is sufficient to constitute a waiver of any right that the Applicant or Kingstar may have had to sue for breach of covenant, as they both fall short of constituting an unequivocal statement or representation that the Applicant or Kingstar do not intend to rely on its legal right to enforce the alleged breach. The tribunal therefore considers that the Applicant has not waived the alleged breach of covenant if in fact there has been a breach.

40. In conclusion, the tribunal determines that no breach of covenant occurred in relation to the registration of either transfer. If the tribunal is wrong on this point it considers each breach to be 'de minimis' and therefore not a breach for the purposes of section 168 of the 2002 Act. However, the tribunal does not accept that the facts support the Second Respondent's and Third Respondent's contention that – in the alternative – any breach has been waived.

### **Costs**

41. Both the Applicant and the Second Respondent made an application for costs pursuant to Rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. This provision allows the tribunal to make an order for costs "if a person has acted unreasonably in bringing, defending or conducting proceedings". As the Applicant has lost the case it would not be appropriate to award costs in its favour. As regards the Second Respondent, whilst she has won the case it has not been a straightforward one. Although it appears from the evidence that the Second Respondent regards the application as being cynically motivated, the tribunal considers that the Applicant had an arguable case and was therefore entitled to make the application. It would therefore not be appropriate to award penalty costs against the Applicant, and accordingly no cost order is made.

**Name:** Judge P Korn

**Date:** 31<sup>st</sup> March 2014