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

Case Reference : LON/00AY/LBC/2015/0001

Property : Flat 2, 53 Bonnington Square,
London SW8 1TF

Applicant : Vine Housing Co-operative

Representative : Devonshires Solicitors

Respondent : Mr Mark Smith

Representative : None

Type of Application : Application for determination
under section 168(4) Commonhold
and Leasehold Reform Act 2002
(breach of covenant in lease)

Tribunal Member : Judge P Korn

Date of Decision : 3rd March 2015

DECISION

Decision of the Tribunal

The Tribunal determines that, on the basis of the evidence provided, a breach of covenant under the Respondent's lease has not occurred.

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 Respondent's lease.
2. The Respondent is the leaseholder of the Property and the Applicant is his landlord. The Respondent's lease ("**the Lease**") is dated 12th May 2003 and made between the Applicant (1) and the Respondent (2). The Lease is expressed to be a Tenancy Agreement with provision for weekly rental payments, and it contains a clause (clause 6.2) stating that the tenancy will only be brought to an end in certain specific circumstances.
3. As stated in a previous tribunal decision dated 20th November 2013 in a case between the same parties (*Ref: LON/00AY/LBC/2013/0074*), by virtue of the Supreme Court decision in *Mexfield Housing Co-operative Ltd v Berrisford (2011) UKSC 52* a clause such as clause 6.2 of this Lease would if taken at face value render the term of the Lease uncertain. Therefore, for the reasons given by the Supreme Court, the Lease falls to be treated as a tenancy for a term of 90 years determinable on the leaseholder's death or in accordance with the terms of the tenancy. As such it is a long lease for the purposes of the 2002 Act, and before a forfeiture notice can be served under section 146 of the Law of Property Act 1925 the Applicant must first obtain a determination under section 168 of the 2002 Act that a breach of covenant has occurred.
4. The Applicant contends that the Respondent has committed a breach of clause 2.2 of the Lease, which reads as follows:-

"Membership and Policies – The Tenant shall be a member of the Co-operative throughout the tenancy and will comply with the Co-operative's policies and regulations and abide by the terms of the Co-operative's Membership Policy / Agreement. The Tenant will also comply with the Co-operative's Disputes Procedure in case of dispute with either another tenant or the Co-operative."
5. The Respondent has not responded to the application and has not submitted a statement of case.
6. No oral hearing has been requested and, as the Tribunal considers this to be a case which is suitable to be dealt with on the basis of the papers

alone, the Tribunal has made its decision on the basis of those papers without an oral hearing.

Applicant's case

7. The Applicant's case consists of the application, a copy of the Lease, a witness statement from Susan Berry (who is employed by the Applicant as an administrator) and the items referred to in Ms Berry's witness statement.
8. In support of the application, Ms Berry states in her witness statement that the Respondent was expelled as a member of the Co-operative on 5th September 2013 following a resolution by the members of the Co-operative in accordance with the Co-operative's Rules. She explains the criteria for expelling a member and gives evidence as to the process gone through. In particular, the Respondent was hand-delivered a letter advising him that he was believed to have engaged in certain antisocial behaviour and further advising him that a general meeting had been arranged at which it was proposed that he be expelled from the Co-operative. In that letter he was also invited to attend that meeting to answer the complaints against him.
9. At the meeting the Respondent's behaviour was discussed by those present. Although it is not clearly stated, it appears that the Respondent was not himself present at that meeting. The meeting voted to expel the Respondent from the Co-operative and a letter was sent to him on 21st September 2013 to advise him that he had been expelled.
10. Subsequently, there was a hearing at the First-Tier Tribunal on 20th November 2013 at which – in response to a **separate** application (made much earlier than the present one) – the First-Tier Tribunal determined that other specific breaches of covenant set out in that other application had occurred.

The statutory provisions

11. 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 tribunal for a determination that a breach of a covenant or condition in the lease has occurred."*

Tribunal's analysis

12. The sole alleged breach of covenant on which the Applicant relies in this application is the Respondent's ceasing to be a member of the Co-operative, which the Applicant asserts constitutes a breach of clause 2.2.
13. The cause of the Respondent ceasing to be a member of the Co-operative is stated to be his expulsion. This took place at the meeting of 5th September 2013 or possibly on his receipt of notification of the result of that meeting by a letter dated 21st September 2013. Either way, it took place several weeks before the hearing on 20th November 2013, which itself was to determine whether certain **other** specific breaches of covenant had occurred as set out in a previous application.
14. At that hearing (as recorded in the decision), Counsel for the Applicant stated that "*the Applicant no longer asserted that the Respondent was in breach of covenant by reason of being expelled from the Co-operative*". Yet this now forms the sole basis of the current application. No explanation has been offered as to why this further application, made over a year after the date of the previous determination, was considered necessary at all, although one could obviously speculate as to the reason. In addition, no explanation has been offered as to why the Applicant now considers that, directly contrary to the view of its own Counsel in the previous case, being expelled from the Co-operative constitutes a breach of the Lease.
15. In the Tribunal's view, being expelled from the Co-operative does not constitute a breach of clause 2.2 of the Lease. The relevant part of clause 2.2 states that "*The Tenant shall be a member of the Co-operative throughout the tenancy*", and yet he did not resign his membership nor cause it to lapse in any way. On the contrary, the evidence indicates that he took no steps whatsoever to relinquish his membership and that it was the Applicant who chose to take steps to expel him. It may be that the Applicant was justified in doing so, although little information has been provided as part of this application to enable the Tribunal to satisfy itself on this point. However, in the Tribunal's view, being stripped of membership of an organisation (possibly against one's will) does not by itself constitute a breach of a covenant to be a member of that organisation.

16. The Tribunal has serious concerns as to why this application was made at all. It relies on an event that was already known about when the previous determination took place, in circumstances where the Applicant's own Counsel at the time did not consider that the sole ground cited in the current application was a valid ground. Given the passage of time between the previous determination and the current application, it does also strongly suggest that the Applicant is not aware of any current breach of covenant.
17. The Tribunal therefore considers this application to constitute an abuse of its process and – subject to receiving any submissions which could explain the Applicant's conduct – the Tribunal might well have been minded to make a cost award against the Applicant if there had been any evidence before the Tribunal that the Respondent has himself incurred any costs.

Cost applications

18. No cost applications were made.

Name: Judge P Korn

Date: 3rd March 2015