UPPER TRIBUNAL (LANDS CHAMBER)

Neutral citation number: [2022] UKUT 319 (LC)

UTLC No: LC-2022-301

Royal Courts of Justice, Strand,
London WC2A 2LL

29 November 2022

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – BREACH OF COVENANT– RIGHT TO MANAGE – FTT PROCEDURE – whether RTM company may apply for determination of breach of covenant under s.168(4), Commonhold and Leasehold Reform Act 2002 – appeal dismissed

AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

EASTPOINT BLOCK A RTM COMPANY LIMITED

Appellant

-and-

AKEHINDE OLUFUNLOLA OTUBAGA

Respondent

Re: Flat 15, Pointer Close,
Crossway,
North Thamesmead,
London SE22

Martin Rodger KC, Deputy Chamber President

Determination by written representations

The following cases are referred to in this decision:

Bedford v Paragon Asra Housing Association Ltd [2021] UKUT 266 (LC)

Kyriacou v Linden [2021] UKUT 288 (LC)

1. Can an RTM company which has acquired the right to manage under Chapter 1 of Part 2, Commonhold and Leasehold Reform Act 2002 (the 2002 Act) apply to the appropriate tribunal for a determination under section 168(4), 2002 Act that a breach of covenant or condition has occurred? That is the short point raised by this appeal.

2. As its name indicated, the appellant, Eastpoint Block A RTM Company Ltd, is an RTM company. It has acquired the right to manage Pointer Close, a block of flats in Thamesmead in south-east London. One of the flats in the block is occupied under a long lease by Akehinde Olufunlola Otubaga, (whom I will refer to as the respondent although he has not participated at any stage of these proceedings).

3. On 25 October 2021 the RTM company applied to the First-tier Tribunal (Property Chamber) for a determination under section 168(4) that the respondent was in breach of two of the covenants in the lease of his flat by using the premises to conduct a business and by permitting a subtenant to cause nuisance to other tenants and occupiers of the block.

4. By a decision issued on 28 March 2022 the FTT struck the application out on the grounds that it had no jurisdiction to consider it. The FTT granted permission to appeal and the RTM company now appeals to this Tribunal arguing that the FTT was wrong and that it does have jurisdiction to determine the application.

5. I directed that the appeal would be determined on the basis of the parties' written representations. Submissions in support of the appeal have been provided by Mr Greg Lazarev of Lazarev Cleaver LLP; the respondent has chosen not to participate.

6. Part 2 of the 2002 Act made significant reforms to residential leasehold law. Chapter 1 of Part 2 (comprising sections 71 to 113) provides for the acquisition and exercise of rights in relation to the management of blocks of flats by a new type of company, referred to as an RTM company, whose members are to be tenants holding long leases of flats in the block. Chapters 2, 3 and 4 amended the law on leasehold enfranchisement. Chapter 5 makes other provisions about leases, including by a group of sections headed "Forfeiture of leases of dwelling" (comprising section 167 to 171).

7. This appeal is mainly concerned with section 168 in Chapter 5, which is headed "No forfeiture before determination of breach". It provides, so far as relevant:

> "(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) …

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

(5) …

(6) For the purposes of subsection (4), "appropriate tribunal" means—

(a) in relation to a dwelling in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) in relation to a dwelling in Wales, a leasehold valuation tribunal."

8. Section 169 contains supplementary provisions relating to section 168, including sub-section (5) which provides that the expressions "landlord" and "tenant" have the same meaning in section 168 as in Chapter 1 of Part 2 of the 2002 Act. That definition is provided by section 112(2)-(3) which provide:

(2) In this Chapter "lease" and "tenancy" have the same meaning and both expressions include (where the context permits)—

(a) a sub-lease or sub-tenancy, and

(b) an agreement for a lease or tenancy (or for a sub-lease or sub-tenancy),

but do not include a tenancy at will or at sufferance.

(3) The expressions "landlord" and "tenant", and references to letting, to the grant of a lease or to covenants or the terms of a lease, shall be construed accordingly."

9. Chapter 1 of Part 2, 2002 Act explains how an RTM company can acquire the right to manage premises to which the Chapter applies. It also contains provisions, at sections 95 to 103, dealing with what happens once the right to manage has been acquired. Section 96 is headed "Management functions under leases" and provides at sub-section (2) that:

"Management functions which a person who is landlord under a lease of the whole or any part of the premises has under the lease are instead functions of the RTM company."

By this provision responsibility for performing management functions is conferred on the RTM company. The extent of the RTM company's new role is explained in section 96(5) and (6):

> "(5) "Management functions" are functions with respect to services, repairs, maintenance, improvements, insurance and management. is then qualified by sub-section (6) which relevantly provides:
>
> (6) But this section does not apply in relation to—
>
> (a) …,
>
> (b) functions relating to re-entry or forfeiture."

10. The transfer of management functions from the landlord to the RTM company is then completed by section 97(2) which prohibits a landlord and certain other persons from doing anything which the RTM company is required or empowered to do by section 96.

11. Section 100 is concerned with the enforcement of tenant covenants other than those which relate to management functions. These are referred to as "untransferred tenant covenants" (section 100(4)). Sub-sections (2) and (3) provide that:

> "(2) Untransferred tenant covenants are enforceable by the RTM company, as well as by any other person by whom they are enforceable apart from this section, in the same manner as they are enforceable by any other such person.
>
> (3) But the RTM company may not exercise any function of re-entry or forfeiture."

12. Finally, it is relevant to mention section 101 which is concerned with failures to comply with tenant covenants; sub-section (2) requires an RTM company to monitor and report to the landlord whether tenant covenants are being complied with.

13. Two short points emerge from this review of the relevant provisions of the 2002 Act.

14. First, an application under section 168(4) may only be made by a "landlord", as is clear from its opening words: "A landlord under a long lease may make an application …". That is consistent with the purpose of the group of sections in which section 168 is found, which, as the cross heading also makes clear, are all concerned with "forfeiture of leases of dwellings". The specific purpose of section 168 is to restricts the circumstances in which a landlord may serve notice under section 146, Law of Property Act 1925, as a prelude to forfeiture. Only a landlord can serve such a notice and only a landlord can forfeit a lease: "no one can forfeit except the person then legally entitled to the reversion" (*Woodfall: Landlord and Tenant*, para. 17.080).

15. Secondly, when an RTM company acquires the right to manage, it does not become a landlord. Nothing in Chapter 1, 2002 Act has the effect of vesting the reversion to leases or any other property rights in the RTM company. The substance of the right to manage is the acquisition by the company of a limited set of responsibilities, or "functions", and the rights and obligations which go with them. In the same way as a manager appointed by a tribunal under Part II, Landlord and Tenant Act 1987 does not become the landlord of the property they are appointed to manage, so too, by acquiring the right to manage an RTM company does not become the landlord.

16. Those two points provide the answer to this appeal. The FTT approached the issue by asking itself whether bringing an application under section 168(4) of the 2002 Act amounted to enforcement of a covenant (which an RTM company was entitled to do under section 100(2)), or was part of the exercise of a function of re-entry or forfeiture (which it was prevented from doing by section 100(3)). The FTT concluded that the procedure under section 168(4) was not about enforcing a covenant but was a pre-condition of forfeiture. But, with respect to the FTT, I do not think it is necessary to approach the issue in that way. A simpler answer is available: only a landlord may make an application under section 168(4), and an RTM company is not a landlord.

17. Mr Lazarev made a number of points in his written submissions in support of the appeal.

18. First, he accepted that the definition of "landlord" in section 112, 2002 Act, does not immediately suggest that it includes an RTM company, but he contended that the definition does not prohibit that interpretation. The expression "landlord" is to be construed in accordance with the definitions of "lease" and "tenancy", which include sub-lease or sub-tenancy and an agreement for a lease or tenancy. In other words, he submitted, the definition of "landlord" under section 112 is broad and encompasses landlord and tenant relationships where there is no privity of contract. I do not agree that the definition is wide enough to include RTM companies. Two types of relationship are identified as being included in the expression lease or tenancy, namely sub-leases or sub-tenancies and agreements for leases or tenancies. The first category does not expand the concept of landlord at all, but simply clarifies that it does not matter that the landlord may itself be a tenant of a superior landlord. I agree that the recognition of the parties to an agreement for lease as landlords and tenants is an expansion of the ordinary understanding of those expressions, but it does not go far enough to assist the appellant. In particular, section 112 does not provide that any person with responsibility for the discharge of management functions is to be treated as a landlord.

19. Mr Lazarev then answered a point made by the FTT about section 102 and Schedule 7 to the 2002 Act, which provide for the operation of earlier statutes with modifications making clear where references to "the landlord" are to be read as including an RTM company. For example, paragraph 4 of Schedule 7 provides that in sections 18 to 30, Landlord and Tenant Act 1985 concerning service charges, references to the landlord are to the RTM company. I agree with Mr Lazarev that there would be no reason to expect a reference to section 168, 2002 Act in Schedule 7 of the same Act, but it is clear that the drafter carefully considered in which statutory circumstances the RTM company was to have the same rights and obligations as a landlord. That makes it very difficult to believe that in the 2002 Act itself the drafter would have omitted to make it clear, had it been intended, that an RTM company was to be treated as a landlord for the purpose of section 168. Nor does Schedule 7 identify section 146, Law of Property Act 1925 as one of the statutory contexts in which lessor or landlord are to be understood as including RTM company.

20. Next, Mr Lazarev took issue with the FTT's characterisation of an application under section 168(4) as part of the exercise of a function of re-entry or forfeiture. He referred to two recent decisions of this Tribunal (*Kyriacou v Linden* [2021] UKUT 288 (LC) and *Bedford v Paragon Asra Housing Association Ltd* [2021] UKUT 266 (LC)) which emphasised that it was not the FTT's function to determine whether a lease could or could not be forfeited, and it was restricted to determining whether a breach had occurred. That is obviously correct,

but it does not expand the category of persons who may make an application under section 168(4). Only a landlord may apply, and it is not necessary to rely on the section 100(3) to deprive an RTM company of the right to do so.

21. Mr Lazarev argued that a determination under section 168(4) could be seen as a form of enforcement and therefore as one of the "functions of enforcement" which an RTM company was entitled to exercise by virtue of section 100(2). He pointed to the fact that a determination under section 168 could provide the basis for an application for an injunction or might simply encourage a tenant to comply in future. If the division between forfeiture functions and enforcement functions has any significance I would place an application under section 168(4) clearly on the forfeiture side of the line, but even if it was treated as an enforcement function, it is not one which is available to an RTM company because it is not a landlord (in contrast, an RTM company would be entitled to ask the court for an injunction, or a declaration that a tenant was in breach of covenant, but those would not be applications under section 168(4) which can only be made to the appropriate tribunal).

22. In this regard, I do not think the passages from the Law Commission's consultation paper on the right to manage (Consultation paper 243, January 2019) which Mr Lazarev relied on address the issue in this appeal.

23. Finally, Mr Lazarev referred to the suggested impracticality of an RTM company complying with its obligation under section 101, 2002 Act, to monitor and report on non-compliance with tenants' covenants if it was unable to seek a determination of breach under section 168(4). I do not think there is anything in this point, and indeed it emphasises the limits of the RTM company's role in relation to breaches of covenant. The premise of section 101 is that the landlord needs to be kept informed by the person managing the building (the RTM company) of any breaches of covenant, presumably so that it can consider whether to take steps to forfeit a lease or other enforcement action. There is no requirement that the RTM company take action of its own; any action it chose to take could not include an application under section 168.

24. For these reasons I am satisfied that the FTT was right to strike out the application as one which the appellant was not entitled to make and which the FTT had no jurisdiction to determine.

Martin Rodger KC

Deputy Chamber President

29 November 2022

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is

received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.