

613



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

Case reference : **LON/00BE/LBC/2014/0049**

Property : **Unit 4, 4 Archie Street, London SE1
3JT**

Applicant : **AHGR Limited**

Representative : **Mr Peters of Counsel instructed by
George Ide Solicitors**

Respondents : **Dean Andrew Snowden & Nicolette
Beeston**

Representative : **Ms Winston of Counsel instructed
by Wiseman Lee Solicitors**

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

Tribunal members : **Ms N Hawkes
Mr M Taylor FRICS
Mrs R Turner JP BA**

**Date and venue of
hearing** : **5.11.14 at 10 Alfred Place, London
WC1E 7LR**

Date of decision : **12.11.14**

DECISION

Decisions of the Tribunal

The Tribunal determines that the respondents are in breach of the covenant contained in clause 2.4 of the Lease because they are using the Property for residential purposes and not as a "live-work unit". The Tribunal determines that the respondents have been in breach of this covenant since they took an assignment of the Lease on 21st June 2005 and that the breach is continuing.

The hearing

1. The applicant was represented by Mr Peters of Counsel and the respondents were represented by Ms Winston of Counsel at the hearing. The Tribunal is grateful to both barristers for their helpful written and oral submissions.

The background

2. The Property is located on a site which was developed by the applicant's predecessor in title. On 7th June 2000, planning permission was granted for 14 flats and 8 live/work units to be built on the site. In June 2001, planning permission was granted which increased the number of live/work units which could be built on the site to 10.
3. A long lease of the Property was granted on 15th April 2003 for a term of 999 years from 25th December 2001 ("the Lease"). On 5th March 2004, the applicant purchased the reversion and, on 21st June 2005, the respondents took an assignment of the Lease.

The issue in dispute

4. The applicant seeks a determination pursuant to section 168(4) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") that the respondents are in breach of covenant.
5. The Tenant's covenants with the Landlord are set out in clause 2 of the Lease. By clause 2.4, the Tenant covenanted:

"Not to use or permit the use of the Demised Premises or any part thereof otherwise than as a live-work unit in accordance with the terms and conditions set forth in the Planning Permission dated 7th June 2000 issued by the London Borough of Southwark under reference no. TP1 165-163/DH nor to do or permit to be done anything which may cause the Landlord to be in breach of its obligations under any statutory enactment or regulation."

6. The June 2000 Planning Permission included the following conditions:

- (i) Condition 3: "The residential use within the live/work units hereby permitted is ancillary to the work use and shall not be occupied independently and should a unit cease to be used for live/work purposes the unit should be used for business purposes (Class B1)"; and
 - (ii) Condition 4: "In the event that a live work unit approved ceases to be used for live/work purposes the whole of the unit may be used for purposes falling within Class B1 (Business Purposes) of the Town and County Planning (Use Classes) Order 1987 provided (a) no part of the unit shall be used for any purpose other than Class B1, and (b) in the event that the use of a unit changes from live/work to wholly Class B1 use pursuant to this condition the unit may not return to use as a live/work unit without the prior written approval of the planning authority."
- 7. It is common ground that the respondents have at all material times used the Property for residential purposes only and not as a "live-work unit".
- 8. In 2010, Southwark Council served contravention notices on a number of tenants of the live/work units, including the respondents. The respondents and five other leaseholders consulted a planning agent and, in January 2011, they applied for a certificate of lawfulness on the grounds that there had been at least four years' residential use of the live/work units. On 23rd March 2011, Southwark Council issued a certificate of lawfulness.
- 9. The Tribunal has been informed and has no reason to doubt that the respondents were not personally aware that that the Property was to be used solely as a live/work unit until they were served with the contravention notice in 2010. From January 2009, the respondents have lived in Australia and have let the Property on assured shorthold tenancies.
- 10. The respondents accept that, until the certificate of lawfulness was obtained, they were in breach of covenant. The issue in dispute is whether or not that breach is a continuing breach. The respondents argue that the covenant should be construed, or a term implied, such that there is no breach when a use is permitted by the current planning status.

Construction

The submissions

11. The respondents state that the use required by clause 2.4 of the Lease is framed by reference to planning permission and that if the intention was purely to limit the way in which the Property was used to a specific use, it would have been simpler and clearer to have set out a definition of "live-work" unit. Instead the parties incorporated a planning permission into the Lease. This makes it clear that the objective intention of the parties was that use of the Property should be in line with planning permission.
12. It was common ground that clause 2.4 must be read as a whole. The respondents argue that, when read as a whole, it is clear that the purpose of the clause is to protect the landlord from being in breach of its statutory and regulatory obligations. The type of use required is defined and then the clause goes on to prohibit use which puts the landlord in breach of statutory or regulatory obligations. The type of statutory or regulatory obligations are not defined, but the very fact that use is defined by reference to planning consent indicates that those obligations include planning obligations.
13. The respondents state that the purpose of clause 2.4 is to protect the landlord in this way and is not to merely bind the tenants to a particular type of user is borne out by the following surrounding circumstances:
 - (i) The land on which the property was built was in a designated employment area (this is stated in the 2000 planning permission).
 - (ii) The developer would not, therefore, have been able to obtain permission to build only residential units.
 - (iii) There were, in fact, some residential units on site. Accordingly, the developer was, clearly amenable to residential use on site.
 - (iv) The reason, therefore that the use of the property was restricted to live/work use was to avoid breach of the planning permission, not because the developer had any other interest in the use to which the units were put.
14. The respondents submit that clause 2.4 should in all the circumstances be read as prohibiting the Tenant from using the Property in a manner which would breach planning law or any other statutory or regulatory obligation.

15. Clause 3.5 of the Lease contains an express covenant by the Tenant not to do or permit anything which contravenes the provisions of the Town and Country Planning Acts. The respondents state that the seeming overlap with clause 2.4 does not prevent clause 2.4 from also including planning obligations within its ambit. Clause 2.4 is a covenant with the landlord only and so is in wider form. Clause 3.5 is a covenant with the landlord and with the other tenants so it is limited to planning only.
16. The respondents' case is not that clause 2.4 only requires them to comply with current planning permission but rather that the clause permits them to use the Property in any way permitted by planning law, provided, of course, that this does not put the applicant in breach of some other statutory or regulatory obligation. They state that as they have obtained a certificate of lawfulness in relation to the use of the Property, its use thereafter for residential purposes cannot put the applicant in breach. There is, therefore, no current breach of covenant.
17. The applicant argues that clause 2.4 simply does not say that all that is prohibited is something which would put the applicant in breach of a statutory or regulatory obligation. The user covenant in clause 2.4 does not duplicate clause 3.5. It serves a different purpose and, in particular, it enables the Landlord to control the use to which the Property is put. The applicant points out that, on the respondents' construction, the Landlord would have no control over any use of the Property for which the Tenant was able to obtain planning permission.
18. The clause expressly and in clear terms prohibits the Property from being used other than as a "live-work unit" and from being used other than in accordance with the terms and conditions set out in the 2000 Planning Permission as well as prohibiting the Tenant from doing anything which would put the Landlord in breach of its obligations under any statutory enactment or regulation.
19. The applicant states that the terms of clause 2.4 do not provide that the permitted use of the Property can or will vary from time to time. The first limb of clause 2.4 specifically prohibits the Property from being used other than as a "live-work unit" and the terms of that prohibition are fixed, not variable. Likewise the second limb of clause 2.4 specifically prohibits the Property from being used otherwise than in accordance with the 2000 Planning Permission. It does not permit any use which is compliant with whatever planning permission might from time to time be in force during the term of the Lease.
20. The applicant submits that the words "live-work unit" limit the use of the Property to a narrower use than that which would be provided for by the 2000 Planning Permission alone. The 2000 Planning Permission permits Class B1 use in certain circumstances. Further, the requirements of the 2000 Planning Permission qualify the manner in

which the live/work unit can be used. The residential use must be ancillary to the work use.

21. The applicant notes that, at the time of the grant of the Lease, the 2000 Planning Permission had been superseded and submits that the wording of the 2000 Planning Permission is potentially more favourable to the Landlord than that of the 2001 Planning Permission.

The Tribunal's determination on this issue

22. The Tribunal finds that clause 2.4, read as a whole, simply does not state that the respondents are permitted "to use the Property in any way permitted by planning law provided that this does not put the applicant in breach of some other statutory or regulatory obligation." Clause 2.4 includes express provision that the Property is not to be used other than as a "live-work unit". Accordingly, the Tribunal is unable to accept that the clause can be construed so as to permit the Property to be used other than as a "live-work unit".

Implied terms

The submissions

23. The Tribunal was referred to Attorney General of Belize v Belize Telecom Ltd. [2009] 1 WLR 1988, in particular, paragraphs 16-21 and paragraphs 26-27. There was no dispute between the parties as to the legal test to be applied.
24. The respondents submit, in the alternative, that terms should be implied to the effect that either:
 - (i) Once there is no longer a planning obligation for the Unit to be used as a "live/work" unit, use for another lawful purpose will not cause a breach of clause 2.4; or
 - (ii) If the lawful use set out in the planning permission dated 7 June 2000 is replaced by another lawful use, the words "live-work" in clause 2.4 should be replaced with the said new use.
25. The respondent states that the Lease does not expressly provide for what is to happen when there is a change in use permitted under planning law. The respondent submits, for the same reasons given in relation to construction, that the meaning consistent with the Lease as a whole and with the relevant background is that where there is a

change in the use permitted under planning law, that use should be accommodated under the user covenant.

26. What is permissible under planning law can change, regardless of the terms of a lease and the parties cannot have intended that the Tenant would be bound by a use which was not in line with current planning status.
27. The applicant states that a term can only be implied into a lease if the proposed implied term would spell out, in express words, what the existing terms of the lease would reasonably be understood to mean. Thus it must be necessary to imply the proposed term into the lease in order to give it business efficacy; the proposed implied term must be so obvious as to go without saying; and the proposed implied term must not contradict any of the express terms of the lease.
28. The applicant submits, firstly, that the premise of the respondents' argument is a false assumption that the purpose, and the sole purpose, of clause 2.4 is to ensure that the use to which the Property is put at any particular time is lawful in planning terms. However, that is not what clause 2.4 says. Clause 2.4 is a user clause. Its purpose is to enable the landlord to control the use to which the Property can be put and clause 2.4 provides in clear and express terms that the Property cannot be used other than as a "live-work unit". It is clause 3.5 of the Lease which provides that the Tenant may not do anything which puts the Landlord in breach of its planning obligations.
29. Secondly, it follows that the respondents' contended implied terms would contradict the express user restrictions in the first and second limbs of clause 2.4. The use of the Property for anything other than as a live/work unit is expressly prohibited by the terms of clause 2.4.
30. Thirdly, the respondents' argument that such terms should be implied into the Lease contradicts the fact that, in the second limb of clause 2.4, the parties to the Lease fixed the user restrictions specifically by reference to the conditions in the 2000 Planning Permission notwithstanding the fact that a further planning permission had been granted in 2001. The restrictions in the second limb of clause 2.4 were not ambient or changeable restrictions; they were fixed by reference to the terms of one specific planning permission only, namely the 2000 Planning Permission.
31. Fourthly, the block contains 14 residential flats and 10 live/work units, all let on long leases, as well as other commercial premises. When the long leases of those flats and live/work units were granted in 2003, the premiums paid for the live/work units were significantly lower (about 30% lower) than the premiums paid for the residential flats. That reflected the different user covenants and the fact that the live/work units could only be put to that use. If the respondents' contended terms

were implied into the Lease, the resulting lease would be a different lease from the one which the Tenant bargained and paid for and was granted.

The Tribunal's determination on this issue

32. It was common ground that a proposed implied term must not contradict any of the express terms of the Lease. Clause 2.4 includes express provision that the Property is not to be used other than as a "live-work unit". Accordingly, the Tribunal is unable to accept that a term can be implied which would permit the Property to be used other than as a "live-work unit".

Conclusion

33. Accordingly, the Tribunal determines that the respondents are in breach of the covenant contained in clause 2.4 of the Lease because they are using the Property for residential purposes and not as a "live-work unit".
34. The Tribunal determines that the respondents have been in breach of this covenant since they took an assignment of the Lease on 21st June 2005 and that the breach is continuing.

Judge N Hawkes

12th November 2014